

217.
MODERN ENTRIES,
IN
ENGLISH: 48y3
BEING A
CHOICE COLLECTION
OF
PLEADINGS

IN THE COURTS OF
KING'S BENCH, COMMON PLEAS,
AND EXCHEQUER,

In the several ACTIONS of
Covenant, Debt, Detinue, and Prohibition.

FROM
THE MOST AUTHENTICK BOOKS,
BUT CHIEFLY FROM
Lutwich's, Saunders's, Ventris's, Salkeld's, and
the Modern Reports;

AND
From other Cases lately tried and adjudged, and wherein Writs
of Error have been brought, and Judgments affirmed:

TOGETHER WITH
READINGS AND OBSERVATIONS
On the several Cases in the Reports,

As well relating to the PRECEDENTS herein, as to all other Cases incident
to each particular TITLE; and the same abridged and disposed of in a
methodical Order.

And under the Head of JUDGMENTS IN DEBT is set forth
The Practice in Proceedings ON WRITS OF ERROR.

TO WHICH ARE ADDED,
References to all the other Entries in the Books.

WITH THREE DISTINCT TABLES.
One of the PRECEDENTS, the Second of the CASES abridged;
and the Third of the NAMES of the CASES.

By JOHN MALLORY, Esq;

VOL. II.

THE FOURTH EDITION WITH ADDITIONS.

D U B L I N :

Printed by HENRY WATTS, (LAW-BOOKSELLER,) No. 3, CHRIST-
CHURCH-LANE, adjoining the Four-Courts. 1791.

★ Of whom may be had, a well-chosen Collection of LAW BOOKS, in all
their various Branches, New and Second-hand.

S
UK
a7.91
MAL

ix
M 255M
ed 4

NOV 25 1910

THE
BOOKSELLER
TO THE
READER.

PREFACES being generally designed rather to promote the Sale of Books than the Benefit of the Readers, it has been usual to stuff them with fulsome and strained Expressions of Recommendation.— This Method, out of Modesty and good Manners to the Public, we have avoided; for if the Book be thought worthy of Esteem, it wants no other Recommendation; and if not, it deserves none. But for the Sake of Justice, and the Satisfaction of those who have been so kind as to favour us with their Subscriptions, 'tis necessary to say something of this Volume, in Excuse for its not containing so many Titles as were proposed and intended: It must be owned that in the Subscribers Receipts, 'tis mentioned to contain the several Titles, *Covenant, Debt, Detinue, Prohibition, and Quare Impedit*: But the last of these being copious in itself, and requiring other Titles in *Rolle's Abridgment*, viz. *Parson, Patron and Ordinary, and Presentations*, to render it compleat, would have swelled this Volume to a Size too large; therefore, 'tis hoped, the Publick will excuse that Omission.

The

To the R E A D E R.

The Title of *Quare Impedit* is now fitting for the Press, in which will be comprised the several other Titles above-mentioned in *Rolle's Abridgment*, with the Cases subsequent in Time added to each Head, and other Heads inserted concerning the Pleadings in that Action omitted by *Rolle*. But as our Author is determined not to trust it to the Censure of the Profession, without the utmost Care, we can't promise the Publication of it at present. The Reason why he did not frame the other Titles of *Covenant*, *Debt*, and *Detinue*, in the same Manner as that of *Prohibition* is, that they have been already judiciously done by Mr. *Danvers*: But *Prohibition* not having been touched upon by that *Learned Gentleman*, it was thought proper to follow his Method in that and the remaining Titles, by translating *Rolle*, and continuing down the Cases to this present Time, with an Addition of some new Heads relating to the *Pleadings* in that Action.

The favourable Reception the First Volume met with, and the Apprehension our Author was under (since his Advancement to the Bar) that his Character would greatly suffer if any Thing should pass incorrect, engaged him to another serious Perusal and Correction, which greatly protracted the Publication. Under the Title of *Judgments in Debt*, he hath set forth the practice of the several Courts in proceeding on *Writs of Error*, much wanted, and not before attempted; wherein he hath not trusted to his own Judgment alone, but submitted it to the Perusal and Correction of some able and judicious Persons of the Profession, that the whole might be as useful, correct and perfect as possible. It cannot be expected but that some Mistakes may have escaped the Observation of both Author and Printer, which 'tis not doubted but the candid Reader will readily excuse.

T H E

A

T A B L E

O F T H E

NAMES of the CASES.

A.		
A Dams and Sir John Vavafor		Allen v. Wedgwick. P. 117, 126
v. Huberton. Page 455		—v. Givers 111
Abram v. Cunningham 396		—v. Salisbury [364] b.
Abbotts v. Johnson 340 a.		—v. Babbington 144
Acton v. Hide 318 a.		Alford v. Lee 316
Adams v. Adams 266		Alington v. Gearkner 150
—v. Dixon [386] b.		Allington v. Yearkner 318 b.
—v. Adams 462		Allington v. Bale 119, 342 a.
—v. Oakes 380		Allison v. Reeves 435
—v. Staley 266		Ambassador Spanish v. Pontes.
Adred v. Mathew [359] b.		400
Adderley v. Wife 152		Ambler v. Metcalfe 440
Adwards v. Graves 407		Amend v. Fotherbie 433
Alden v. Blague 141		Ameer v. Chambers 432
Aldrich v. Ray 448		Andrews v. Kirk [361] a.
Aldersley v. Duparry. [363] b.		Androse v. Eden 317 a.
Aldworth v. Hutchinson 9, 136		Andrews v. Cope [384] b. [385] a.
Alden's Case [390] a.		Andrew's Case 156, 117
Aldresh v. Ray 483		Andrews v. Wood 342 a.
Alexander v. Dyer 293, 297		—v. Harper [389] b.
Alexander v. Lamb 340 a. 341 a.		Anfeild v. Feverell 443
Alexander v. Gresham 282		Anger v. Brown 490
Allefon v. Marsh 471		Anger v. Brewer Ibid.
Allen's Case 479		Annesley v. Stokes [364] a.
Allen & Ux. v. Grey 335 a. 351 b.		Annison v. Perkins [383] a.
—v. Andrews 313		Anslow v. Anslow 313
—v. Holden [380] b.		Aprise v. Packhurst [367] a.
		Appleton v. Bailly 293, 296
		Archbishop of York v. Taylor 487
		Archdeacon of Richmond's Case.
		460
		Archbishop

A TABLE of the Names of the Cases.

<i>Archbishop v. Duke of Newcastle.</i>	Ayre v. Ader	Page [394] b.
Page 480	Aynsworth v. Chamberlain	152
Arlington Lord v. Merrick		339
Armin v. Bews		150
Arnot v. Breame		266
Arran v. Crispe		343 a.
Arscot v. Heale	[361] b.	
Arnold v. Bidgood		297
Arlow v. Wright	317 a.	
Ascock v. Eel	350 a.	
Ascue v. Batts		99
Aske v. Hollingworth		252
Ashbrook v. Snape	334 b.	
Ashton's Case		470
Asten v. Mazien		134
Ashhurst v. Mingay		109
Ashton v. Martin		140
Churchwardens of Ashton v. The Inhabitants of Castle-Bromage.		416
Askew v. Hollingbrook	[365] b.	
Ashburnham v. Braham	[367] a.	
Athill v. Athill		463
Atkinson v. Chatworth		133
Athoe v. Heming	97, 100, 107, 110, 111, 116	
The Attorney General v. Sparrow & al'		39 b.
The Attorney General v. Andrew.		[397] b.
Atwood v. Burt	[382] b.	
Audley v. Berry		150
Austin v. Lucas.	432, 479, 480	
Austen v. Pigot		486
—— v. Burfcoe	[362] a.	
—— v. Moyle		121
—— v. Millet		323 b.
Austin & al' v. Clifton		489
Aubery v. The Lord Bridgewater.		324 b. 325 b. 326 b.
Aubin v. Cox		468
Auberie's Case		480
Awbery v. Harvey		294
Auston & al' v. Clifton & al'		489
Ayliffe v. Archdale		333 a.
—— v. Scrimshaw		335 a.
—— v. Brown		474
Aylesworth v. Chadwell.	[367] a.	
	B.	
	Babington v. Allen	149
	—— v. Mathews	297
	—— v. Wood	252
	—— v. Babington	321 a.
	Bacon v. Bayne	294
	Badow's Case	254
	Bagnall v. Stokes.	439, 449, 485
	—— v. Tucker	104
	Bagshaw v. Plaine	296
	Bagshaw v. Shrewsbury	335 a.
	Baily v. Hughes	111
	Bailiffs of Ipswich v. Martin	289
	Bailiffs of Ipswich v. Longcastle & al'	286
	Baines v. Bigersdale	[283] a.
	Baker v. Chew	[367] a.
	—— v. Benford	140
	—— v. Brinsford	22, 92
	—— v. Berisford	111, 258
	—— v. Brook	272
	—— v. Payne	342 a.
	—— v. Bulstrode	258
	—— v. Dickenson	469
	Ball v. Blackmore	470
	Baldry v. Paliard	444
	Ballard v. Oddey	320 a.
	Baldwin v. Geary	465
	Barcroft v. Doughty	329 b.
	Banbury v. Newland	150
	Bann v. Richardson	363 b.
	Banks v. Smith	144, 149
	Bardsey v. Clyston	266
	Banister's Case	272, 284
	Banister v. Kenedy	[377] b.
	Banning v. Fryer	445
	Bamfield v. Bamfield	258
	Banks v. Wharton	466
	Barber v. Pomeroy	270
	Barwick v. Gibbson	135, 140
	Bartholomew Administrator, &c. v. Savage	318 b.
	Barnes v. Smith	329 a.
	Barker	

A TABLE of the Names of the Cases.

Barker v. Fletwell	Page 149	Beal v. Beal	Page 342
—v. Piggot	347 b.	Beaumont v. Long	[387] b.
Barnard v. Mitchell	290	Bearblock v. Read	282
Barkley v. Morrice	470	Bease v. Draiton	329 b.
Barker v. Bourn	390 b.	Beaver v. Lane	104
Barneshurst v. Yelverton	[386] b.	Beaumont v. The Hospital of	
Barnes v. Evans	319 a.	Wigston	468
Barnwell v. Pelfie	483	Beaumont v. Westley	409
Barrington's Case	486	Beavy v. Turner	119
Barton v. Habins	97	Berkett v. Manning	[364] b.
Barefoot v. Picard	94	Bedell's Case	149
Barker v. Thurold	63, 140	Bedingsfield v. Freak	455, 481
Barnard v. Godfdale	113	Beckwith's Case	111
Bardy v. Glyston	342 a.	Beckett v. Taylor	342 a.
Barker v. Dormer	[353] a.	Beecher's Case	[375] b.
Barret v. Fletcher	340 a. 340 b.	Beecher v. Shirly	[383] a.
	[383] a.	Beely v. Barry	111
Barnes v. Hill	[385] b.	Beele v. Moyle	461
Baron & al ^r v. Barkley	276	Bellamy v. Ruffel	140
Barry v. Perin	266	Bellamy's Case	456
Barnwell v. Tracy	437, 440, 448	Bellchamber v. Savage	318 b.
Barnes v. Greenwell	266	Belford v. Hale	129
Barfoot v. Frefwell	136	Bellows v. Handfore	[388] b.
Barnes's Case	488	Bellows v. Handford	[397] a.
Barker v. Holder	160	Bencroft's Case	462
Barefelt v. Luter	292	Benlofs v. Philips	251
Barton's Case	434	Bennet v. Shortwright	439, 490
Basket v. Basket	256	Bennet's Case	434
Basset v. Morgan	340 a. 351 b.	Bennet v. Clerk	427
Baspoole v. Freeman	265 a. 366	Bennet v. Bennet	347 b.
Basset v. Kerne	379 a	Bennet v. The Hundred of Hart-	
Basset v. Sproule	321 a.	ford	[360] a.
Bates's Case	403, 410	Bennet v. Belfield	319 a.
Bathurst v. Clinkard	[390] a.	Benfe v. Lee	455
—v. Coxe	294	Bentworth v. Bentworth	454
Baugh v. Philips	344 a. 348 b.	Bentiffe v. Pepple	429
Bawdry v. Bushel	479	Benkin v. Crispe	419
Bawker v. Isted	[367] .	Benfome v. Crook	258
Bayly v. Offord	111, 297	Dr. Bentley's Case	475
Baylie v. Hughes	324 b.	Benton v. Eyres	[364] b.
Bayly v. Taylor	339, 340 b.	Berry's Case	443, 475
	341 a.	Bernie v. Miles	442
Baynton v. Bobbet	141	Berkinhead v. Nuthall	[364] a.
Baynes v. Bitton	294	Berning v. Follat	331 b.
Bealy v. Sampson	[393] a	Berry v. Perry	266, 318
Beal v. Taylor	149	Berwick v. Andrews	281
Beal v. Webb	399, 475	Berwick v. Foster	293
Beal & Un ^r v. Simpson	319 a.	Berwick Mayor and Commonalty.	

A TABLE of the Names of the Cases.

Besome v. Crooke	P. [383] a.	Body v. Tafal	Page 320 a.
Betsworth v. Betsworth	439, 463	Board v. Cudmore	272, 292
Beten v. Trym	149	Body v. Hargrave	296
Bevyne v. Clapham	340 b.	Bolton v. Cannon	289
Beverham v. Osborne	313	Bolton v. Bolton	460
Beverly v. Beverly	[386] b.	Bolton v. Lee	135
Biggs v. J. S. Parson of D.	475	Bole's Cafe	428
Biggins v. Tytherton	[364] a.	Bond v. Smith	468
Birch v. —	[367] a.	Bond v. Windford	272
Birkenden's Cafe	444	Bond v. Moyle	253
Bickerstaffe v. Perdeu	296	Bond v. Richardson	335 a. [363] b.
Bitley v. Wright	449	Bonner v. Stukely	[396] b.
Bisnor v. Robinson	299	Dr. Bonham's Cafe	337
Birhall & al' v. Harris	[373] a.	Bond v. Green	322 b.
Biddulph v. Dashwood	284	Bond v. Smith	468
Billingham v. Vavalour	[383] a.	Born v. Jackson	411
Billinghurst v. Spearman	323 a.	Bord v. Cudmore	129
Bilford v. Flint	318 a.	Borne v. Sheers	329 b.
Birch v. Weaver	285	Boscawen & al' v. Cook	140
Birton v. Mandell	350 a.	Bostock v. Snell	[365] a.
Bishop of Salisbury's Cafe		Bosvill, &c. Executors of	Gibbs
Bishop of Carlisle's Cafe	403	v. Coats and Pickford	341 b.
Bishop's Cafe	[376] b.	Botwright v. Harvey	318 a.
Bishop of Exeter v. Starr	254	Boucher v. Coffer	140
Bishop v. Redman	116	Boulney v. Curteys	Ibid
Bithorne & al' v. Churchwardens		Bourn v. Carrington	341 b.
of Bow	410	Bowles v. Clark	463, 464
Bishop of Lincoln v. Cowper.		Bower v. Rewet	[380] b.
	454, 478	Bowder v. Share	333 a.
Bishop of Carlisle's Cafe	441	Bowfe v. Vernon	340 b.
Bishop v. Corbet	468	Boyer Sir William's Cafe	423
Bishop v. Bedman	100	Boyle v. Boyle	443, 395
Blackdon's Cafe	434	Boyer v. Garland	281
Blacket v. Cryfop	252	Boyer's Cafe	408
Blackmore's Cafe	459	Boyer v. Jennings	[383] a.
Blackwell's Cafe	409, 451	Boomer v. Payte	279
Blackshaw v. Stevens	429	Boreton v. Nicholls	[379] a.
Blackwell v. Ashton	291	Boyton v. Andrews	347 a.
Blanchflower v. Fry	324 b.	Bolton v. Lee	116
Blandford v. Andrews	330 a.	Bolton v. Cannon	323 a.
Blankard v. Galdry	319 b.	Booth v. Franklyn	482
Blewet v. Applebee	291, 294,	Boulter v. Ford	117
	319	Bowles v. Hewet	319 b.
Blincoe v. Barkfdale	456	Boothby v. Day	412
Block v. Palgrave	340 b.	Bosvill, Executors, &c. v. Coats	333 a.
Blunden's Cafe	285	Bracebridge v. Vaughan	319
Blunden v. Wood	335 a. [383] a.	Bracebridge v. Baskerville	324 b.
Blunt v. Symphon	344 a.		381 a.

A TABLE of the Names of the Cases.

Brabin v. Tredenham	P. 412, 413	Brookes v. Cooke	Page 289
Bradbury v. Bradbury	324 b.	Brooks & al' v. Trefham	324 b.
Bradshaw v. Salmer	140	Brook v. Fullerhurst	31
Bradston's Case	445	Brooks v. Dean	330 a.
Bradshaw v. Swanton	447	Brook v. Wingfield	473
Bragg v. Wiseman	100	Brook v. Wheeler	315
Bragg v. Nightingale	102, 133	Brook v. Brook	317 b. 347 a.
Brailsford v. Parsons	149	Brook v. Sharp	[364] b.
Branche's Case	481	Brook v. Jevett	18
Brandling v. Milbank	[381] a.	Brook v. Smith	254, 283
Brazer v. Dean	101	Brook v. King	258
Bray v. Bafon	318 b.	Brooks v. Lake	344 a.
Bree v. Carr	116	Brook's Case	456
Brereton v. Tatam	[357] b.	Brown v. Holland	349 b. 391
Brereton v. Evans	328	Brown v. Brown	97, 98, 141,
Brereton v. Monnington	[383] a.		150
Bressley v. Humfreys	140	Brown v. Palfry	416
Bret v. Andar	318 a. 150	Brown v. Poyns	441
Bret v. Nectar	465	Brown v. Haywood	480
Bret v. Averder	347 a.	Brownlow's Case	99
Bret v. Cumberland,	93, 104,	Brown v. Wentworth	437
	111, 116	Brownworth v. French	294
Brett Nectar v. Stephen Brett.		Brown v. Purchase	323 a.
	464	Brown's Case	117
Brettin v. Vaux	140	Brown v. Sir Edward Lake	490
Brett v. Pratt	340 b.	Brown v. Tanner	430
Brewster v. Kitchell	131	Brown v. Crawshaw	409, 487
Bridges v. Bedingfield	266	Brown v. Show	441
Brice v. Carr & al'	128	Browning v. Strelley	[337] a.
Bridgham v. Frowle	319 a.	Brown v. Evering	ibid. a.
Bridges v. Enion	316	Brown v. Fulshy	321 a.
Bright v. Cooper	119	Brownworth v. French	297 a.
Brightwell v. Dowty	149	Brown v. Adams	319 b.
Brigham v. Robson	474	Buckler v. Millard	321 a.
Bright v. Metcalf	294	Buckley v. The Bishop of Chester.	
Briggs v. Mond	318 b.		482
Brightman v. Keightly	[363] a.	Buckhurst v. Newnton	477
Brittain v. Charnock	282	Buckley v. Williamson	[362] b.
Bristow v. Bristow	108, 109	Buckley v. Williams	140
Briscoe v. King	331 a.	Buckner v. Cottle	136
Briscoe v. Knight	257	Buckner v. Rolestone & al'	131
Bristow v. King	342 a.	Buckwell v. Wood	140
Brocas's Case	102	Bulbrooke v. Buggs	409
Bread v. Pyser	465, 473	Bulbrook v. Bridges	437
Bromage v. Genning	400, 456	Bull v. Fraukester	103, 136
Bronker v. Rogers	281	Bullen v. Jervaise	[353] b.
Bronker v. Mompeffon	136	Bultivant v. Holman	136
Broughton v. Charney	317 a.	Burdet v. Pix	322 b.
		Burford	

A TABLE of the Names of the Cases.

Burford v. Fox	Page 322 a	Capenhurst v. Capenhurst	P. 252
Burgeffe v. Standish	293	Cardinal v. Hescott	340 a.
Burges v. Bradshaw	[362] a.	Carleton v. Mortagh	[376] b.
Burman v. Alton	138		[383] a.
Burnell v. Bowes	[364] b.	Carpenter v. Collins	293
Bunaton v. Morris	[389] a.	Carr v. Copping	396 b.
Burton v. Low	252	Carter v. Booth	119
Busb v. Collins	113	—v. Furmen	408
Busb v. Buckingham	321 a.	—v. Freeman	329 b.
Bushe's Case	319 a. 354	—v. Statute	266
Bushel v. Pasmore	341 b.	Carthage v. Manley	120
Buskin v. Edmunds	347, 284	Cartwright v. Doleworth	319 a.
Bust v. Wadsworth	[364] b.	—v. Pinkney	328 b.
Bustard v. Hockwell	406	Cary v. Rooby	[382] b.
—v. Stukeley	453, 458	Castillon v. Smith	140
Butcher v. Vane	257	Cave v. Polewheel	[365] a.
Butter v. Downham	321 a	—v. Brookby	114, 127
Butterfield v. Marshall	332 b.	Cavenhurst v. Cavenhurst	285
Butler v. Mannings	97	Cavendish Lord v. Earl of Shrewsbury	[367] a.
—v. Bartlett	427, 465	Caule v. Cook & al'	471
—v. Debt	274	Cecil v. Harris	[363] a.
Butcher v. Reeve	323 b.	Chadron v. Harris	434, 436,
Button v. Long	456		439
—v. Downham	321	Chamber's Case	419
Butts v. Jennings	[382] b.	Chambers v. Hunter	150
Buxton v. Nelson	347 b	Chamberlin v. Ewer	124, 132
—v. Horne	319 a. 335 a.	—v. Goldsmith	252
—v. Sir Richard Buller	455	—v. Stanton	253, 350 b.
Buzzard's Case	413, 433		[365] b.
Byrle v. Manning	99, 252	Chamberlain v. Thorpe	294,
Byrd v. Wilford	285		[382] b.
		Champernoon v. Hill	285, 297
		Chandflower v. Priestly	132, 138
		—v. Waterhouse	140
		Chapman v. Winer	313
		—v. Moyle	251
		—v. Gage	[364] b.
		—v. Cantrell	149
		—v. Peccod	318 b.
		—v. Chapman.	119, 342
		—v. Hurst	a. 347 b.
		Charleton v. Finney	341 a.
		Charney v. Corey	323 b. 340 a.
		Chaworth v. Phillips	108
		Cheekly v. Cheekley	334 b.
		Cherney v. Langley.	114, 116,
			121
			Cheney's

C

Cade v. Windham	442
Cage v. Paclin	100
Cale v. Joffin	289
Calthorpe's Case	292
Caldicott v. Smith	441
Calvin's Case	[372] b.
Cam v. Taylor	321
Campier v. Hill	297
Candict v. Plumer	409
Cane v. Bell	297
Canten v. Smallwood	[393] b.
Cantnor v. Muntnell	
Caps v. Lancafter	347 b.
Capell v. Allen	266

A TABLE of the Names of the Cafes.

Cheney's Cafe	Page [366] a.	Codner v. Dalber	P. 150, 318 b.
Cherborne v. Rye	328 b.	Coger v. Child	292
Chester Lady's Cafe	441	Coghill v. Freelove	280, 289
Chetley v. Wood	292	Cogner v. Came	292
Chicken v. Dickson	472	Cook v. Morgan	344 a.
Child v. Gardner	315	—v. Arundell	159
Cholmondly v. Brown	335 a.	—v. Allen	[367] a
Chorus v. —	342 a.	—v. Remmington.	142, 308,
Churchwardens of the Church of			330
Uffington's Cafe in Com. Berks.	410	—v. Forends	143
Churchwardens of Simpson's	421	Cooker v. Goale	449
Cafe	421	Colebrook v. Foster	313
Churchwardens of Denford's Cafe.	417	Cole v. Searle	347 b.
Churley v. Wood	406	—v. Shallet	102
Cicil v. Scot	480	—v. Pordage	295
Clanrickard Earl v. Denton.	481,	The College of Physicians v. Buth.	
	490	Coleman v. Gilbert	464
Clapham v. Moyle	95, 285	—v. Sherwyn	143
Clarke v. Gurnel	101, 102	Collet v. Padwell	342 a. 347 a.
—v. Cork	487	Colley v. Hellier	325 a.
—v. Daniel	440	Colgate v. Batchelor	258
Clarke's Cafe	[398] b.	Collins v. Goldsmith	292
Clark v. Peppin	142, 150	—v. Stilley	101
Clavell v. Galler	149	—v. Saunders	150
Claydon Churchwardens v. Dun-		—v. Cale	352 b. 409, 437
comb	411	—v. Sutton	353 b.
Cleavly v. Adams	435	—v. Harding	336
Clempson v. Bate	291	Colt v. Hore	134, 139
Clerk v. Hoskins	341 a.	—v. Ughtred	102
—v. Withers	[395] a.	Columbel v. Columbel	[318] b.
—v. Scrogs	155	Combe v. Combe	396
—v. Yewdall. [354] b. [368] a.		Combers v. Watton	287
Cliffe v. Dudney	454	Compost v. —	[359] b.
Clifford v. Huntley	446	Conan v. Kemise	114
Clifton v. Oates	423	Congham v. King	114, 136
—v. Webb	319 b.	Coniers v. Smith	140
Clotworthy v. Clotworthy. [380]		Coney v. Beveridge	313
b.		Constable v. Clobberry	119, 133
Coachman v. Halley	353 a.		140
Coates and Suckerman v. War-		Conwall v. Lisset	289
ner.	468	Cooper v. Price	[374] a.
Cockeram v. Welby	319 [394] a.	—v. Gardner	469
Cockerill v. Aphorpe	294	Coortnoll's Cafe	434
Cockson v. Cook	112	The Corporation of Coopers v. Al-	
Cocks v. Barnsley	[390] a.	len.	294
Cockayne & al' v. Hawkins	371	Corbert's Cafe	324 b.
a.		Core's Cafe	119, [392] b.
		Cornish v. Cawsey	289, [364] a.
		Cornwallis	

A TABLE of the Names of the Cases.

Cornwallis v. Spurling	[383] b.	Crumpton v. Smith	P. [383] a.
Corfet v. Hufely	470, 485	Crymen v. Tythen	319 b.
Corven v. Pym	414	Cullier v. Cullier	445
Cory v. Wood	431	Culpepper v. Austin	329 b.
—v. Pepper	451	Cunningham v. Hare	[367] a.
Cospey v. Turner	298	Cundey v. Edgecombe	[365] b.
Cotes v. Wade	295	Cutts v. Bennet	296
Cotton v. Westcott	[365] b.	Cutler v. Brewster	331 b.
—v. Wall	319 b.	Cutler & al' v. Southern & al'	143, 343 b.
Cottinghall v. Griffith & al'	[367] a.	Cumber v. Walton	289
Courtney v. Greenville	[383] a	Cumer v. Milton Parish	441
Cowley v. Lydiat	[396] a.	Curtis v. Davenant	418
—v. Lockton	275		
Cowlin v. Cook	321 b.		
—v. Drury	149		
Cowler v. Ginger	[373] b.		
Cox v. Warwick	285	Dagge & al' v. Penkeven.	297,
Crable v. Tooker	140		[383] a.
Crawley v. Ferme	297, 374	Dalston v. Thorpe	[383] a.
Cremer v. Humberston	116	Dandy v. Curren	136
Cresswell v. Trott	430	Darby v. Heming	350 a.
Creswick v. Saunders	129	Darcy Lord v. Sharpe	254
—v. Hyman	467	—v. North	473
Cressy's Cafe	435	Lady Davies v. Hazell	285
Crible v. Orchard.	[367] a.	Davies v. Davies	323 a.
	[368] a.	—v. Clark	[383] a.
Crisp's Cafe	150	Daughty v. Neale	316
Crisp and Jackson v.		Davis v. King	523 a.
Crobeck v. White	100	Davy v. Mathews	108
Crockhay v. Woodward	136	Davenant v. The Bishop of Sarum.	113
Crompton v. Waterford	429,		
	490	Dawbeny v. Banister	290, 291
Cromwell v. Grunsdell	254	Dowson v. Lee	369 a.
Crooke v. Littlepage	352 b.	—v. Fowle	411
Crook v. Sampson	414	Dawney v. Vesley	279
—v. Brainforth	335 a.	Day v. Austin	328 b.
Cropwell v. Peachy	258	—v. Pitts	356
Cros v. Powel	Ibid.	—v. Potts	487
Crossman v. Read	275, 280	Dean and Chapter of Bristol v.	
Cros v. Young	342 a.	Guise	27
Cross's Cafe	412	Dean v. Eason	344 a.
Croucher v. Collins	367, 481	Dean and Chapter of Windsor v.	
Crouch v. Falstoffs	311	Gover	328 b.
—v. Fryer	481	Degery v. Roe	258
Crowle v. Dawson	341 b. 342 a.	Deighton v. Clarke	318 b.
Croxwell v. Peachy	331 a.	Delawell v. Clare	321 b.
Crumwell v. Grundall	[363] b.	Denton v. Goddard	324 b.
		Denton	

A TABLE of the Names of the Cases.

Elliot v. Blake	Page 136	Foliot v. Ridge	Page 489
—v. Golding	[364] b.	Ford & Ux' v. Hollingbrooke.	489
—v. Chamberlain	429	Fordley's Cafe	329 a.
Elred v. Wafs	[382] b.	Force v. Whitcock	96
Ely v. Roberts	119, 347 b.	Forger v. Sales.	291, 294, [364] b.
Elve v. Sabe	250, 317 a.	Forth v. Harrison	[367] a.
Emery v. Emery	254	Fosse v. Parker	478, 480
Emett v. Cole	331 a.	Forestone v. Bregrave	141
Ent v. Withers	288	Foster v. Peacock & al'	476
Errington v. Hurft	341	—v. Hide	421
Etherington v. The Archbishop of York	412	—v. Jackson	389 b.
Evans v. Thomas	96, 97	—v. Wilfon	126
—v. Parr	470	—& al' v. Mapes	101
—v. King	438	—v. Jackson	386 b.
—v. Roberts	[383] a.	Fotherbie's Cafe	441
Ewre v. Strickland	113	Fountain v. Grymes	120, 320 a.
Exeter City against Clure	329 a.	Fowler v. Cook	322 a.
Exon Bishop v. Starr	252	Fown v. Mofely	142

F.

Falstow v. Thorney	[365] b.	Fox v. Wright	347 b. [360] a.
Farmer's Cafe	474	—v. Ley	150
Farmer qui tam v. Brown	446	Foxhall v. Corderoy	283
Farnham v. Atkins	109	Frances v. Ley	119
Farrar v. Swelling	136	Frances's Cafe	Ibid.
Fasbie v. Gilbert	464	Frank v. Tooley	[380] b.
Faulkner v. Andrews	481	—v. Foster	140
Feild v. Wood	149	—v. Stukeley	[373] b.
Feledown v. Beale	420	Fraughter v. Bugger	467
Fenner's Cafe	118	Freeman v. Sheen	126, 150
Fetherstone v. Hutchinson	258	French v. Pierce	339 b. 342 a.
Field v. Tovey	294, 291	Frizewell v. —	478
—v. Hunt	294	Fronde v. Balls	318 a.
—v. Winlove	[364] b.	Fruin & Ux' Administrators, &c.	
Fines v. Dell	330 b.	v. Paynter	289
Firrell's Cafe	423	Fryer v. Goldridge	271
Firth's Cafe	316	Fulcher v. Griffin	96
Fish v. Wiseman	388 b.	Fuller's Cafe	313, 335 a.
Fisher v. Chamberlain	421, 426, 463	Fuller v. Spackman	340 b.
—v. Anneers	116	Further v. Further	324
Fitton v. Richardson	469	Furrell v. Sham	321 a.
Fitzhugh v. Dennington	347 b.	Fynmore v. —	[365] b.
Fitzpatrick v. Robinson	350 b.		
Fletcher v. Baker	426		
Flower v. Vawer	443		

G.

Gadley v. Whichcot	[383] a.
Gage v. Gilbert	324 b.
Gainsford v. Griffith	99, 149
Gale v. Till	250, 291
Gallies v. Budbury	119, 331 a.
	347 b.

A TABLE of the Names of the Cases.

Gammon's Case	Page 446	Gobbett's Case	Page 430
Gardiner v. Dudgate	253	God v. Winch	126
Gardner v. Booth	473	Goddin v. Wainwright	404
Garnon's Case	369 b.	Goddard's Case	347 b.
Garrerd v. Bennet	[364] b.	Godfrey v. Llewellyn	441, 485
Garret v. Harrifon	324 b.	— v. Woodward	324 b.
— v. Daudy	459	— v. Godfry	266
— v. Weeden	318 b.	— v. Everiden	416
Gastrile v. Jones	462	Goffe v. Elkin	153, 335
Gates v. Smith	340 a.	Gold v. Death	341 b.
Gatton <i>Parish and</i> Milwick	409	Goldney v. Curtis	126
Gawdy v. Popham	451	Goldswith v. Sidnor	323 b.
Gawter v. Davies	285	Godolphin v. Tudor	342 a.
Gayle v. Betts	342 a.	Goldfborow v. Andrews	140
Geanings v. Markham	266	Goodwin v. Beakbean	[389] b.
Gearing's Case	282	— v. Harlow	[355] a.
Geary v. Reafon	96	— v. Newton	287
Gee v. Mansfield	345 a.	— v. Smith	476
Geiles v. Rigeway	319 a.	— v. West	294
Gelde v. Death	258	Goodman v. Turberville	[357]
Genner v. Lucking	136	— v. Knight	132 b.
Gennings v. Bromage	467	Gooche's Case	[356] a.
George v. Butcher	55	Goodeyeare v. Juce	[386] a.
Gerrard's Case	425		[384] b.
Gervis v. Halliwell	472	Goodson v. Duffield	[383] a.
Gerrard v. Sherrard & al	458	Goslin v. Harding	405, 406, 425,
Gewen v. Roll & <i>Ux'</i> Executor,			438, 447, 450, 481
&c.	340	Gore v. Starke	419
Gibbon v. Kent	297	Goswell v. Kinglemarth	319 b.
Gibbon's Case	473	Googe v. Bond	481
Gibbon v. Dove	[374] a.	Gowen v. Rell & <i>Ux'</i> Executor,	
Gibson v. Brook	345 a.	&c.	324 b.
Gilbert & <i>Ux'</i> v. Martin.	140,	Granger v. Hemborow	144, 343,
	152, 153, 352 b.		b. 148
— v. Hart	269	Grantham v. Hawley	98
Gilby v. Williams	417	Grafier v. Wheeler	150
Giles v. Hart	312	Graves v. Adwards	47
— v. Crofs	[381] b.	Gravesend's Case	204
Gilpin v. —	258, 282	Gray's Case	102
Gilmer v. —	321 a.	Gray v. Munford	430
Girling v. Aldas	399	— v. Constable	151
Glascock v. Morgan	285, [362]	Greaterchy v. Beardfley	413
	b. [384] b.	Green v. Wilcox	324 b. 339 v.
— v. Glasse	339	— v. Colduck & al	470
Glas v. Gill	153	— v. Proud	[359] a.
Glemster v. Powell	149	— v. Eden	345 a.
Glinifter v. Audley	150, 338	— v. Hun	480, 481
Glover v. Creed	347 b.	— v. Pendleton	455
— v. Wendham	415	Green	

A TABLE of the Names of the Cases.

Green v. Rofs	Page 352 a.	Hampton v. Bartholomew	324 b.
— v. Cubit	133	Hampton v. Courtney	[383] a.
Green's Cafe	435	— v. Boyer	281
Greenway v. Barker	470	Hammington v. Rider	126, 254
Grendon's Cafe	325 b.	Hancock v. Proud	341 b.
Grills v. Ridgeway	318 b.	Hankinson v. Sandilands	283
Grice v. Chambers	[383] a.	Hane and Pleder	348 b.
Griffin v. Harrison	122	Hamner v. Clive	[364] b.
— v. Bulfuft	448	Hanfall v. Nurfe	341 a.
— v. Spencer	335, 341	Hardman <i>Executor</i> v. Hardman,	
Griffith v. Goodhand	100	Hargell v. Cremer	362 b.
Griffith's Cafe	330 a.	Hargrave's Cafe	288
Grococke v. White	317 a.	Hargrave v. Rogers	254, 292
Grove v. Gordon	322	Hargthorpe v. Milforth & al'	
Grubham v. Thornborow	347 b.		381 a.
Gryfam v. Lewes	480	Harman v. Harman	282
Gurney & Ux' v. Sir Edward		Harris v. Pett	318 a.
Clere	362 b. [367] a. [382] b.	— v. Scot	473
Guybon v. Whitetoft	319	— v. Hicks	395, 451
Gybson v. Harbottle	[380] a.	— v. Sherley	[364] b.
Gyll v. Glafs	340 b.	Hare v. Savill	145
		Harrington v. Wife	96, 97, 254
		Harrison v. Fulsford	[365] a.
		— v. Knight	[362] b.
		— v. Hayward	119, 150,
			347 b.
		— & Ux' v. Mitchell	
		— v. Austin	409
		— v. Huxley & al' (378) b.	
		— <i>Executors</i> , &c. v. Fal-	
		stowe	(383) a.
Hadley v. Stiles	[362] a.	Harrold v. Clotworthy	313
Hagh v. Chadwick	340 a.	Harper v. Burgh	142, 146
Haines's Cafe	430	Harth v. Blackham	342 a.
Haines v. Scott	451	Harfelt v. Butcher	136
— v. Pescod	395	Hartop v. Holt	(371) b.
— v. Jescot	451	Hatelwood v. Mansfield	295
Hales v. Moore	[367] a.	Hatley v. Cape	446
Hale v. Clare	[376] a.	Harvey v. Holland	(383) a.
— v. Bonythen	[360] b.	Harwick v. Foster	297
Hall v. Ellis	486	Haulsey v. Carpenter	150, 329 b.
— v. Morton	318 a.	Hawes v. Leader	324 b. 250 a.
— v. Kirby	150	Hawley v. Simpson	313
— v. Wingfield	284	Hawkland v. Gatchell	258, 299
— v. Truffell	335 a.	Hawkin v. Ardin	(386) b.
Hall's Cafe	389	Hawkins v. Cook	474
Halling v. Comand,	136, 342,	— v. Laws	(357) b.
	347		Hawkin's
Halfey v. Carpenter	150		
Halfed's Cafe	119, 347 b.		
Hakesly v. Hurrifon	316		
Hammond v. Taylor	[359] b.		
— v. Dod	340 b. 341 b.		
— v. Getherell	297		

H.

A TABLE of the Names of the Cases.

Hawkin's Case	Page 428, 431	Hinton v. Glover	Page 402
Haydon's Case	390 a.	Hobart v. Borafton	297
Hayes v. Hayes	266	Hobert v. Barrow	396
Hayford v. Andrews	335 a.	Hobson v. Haywood	[383] a
Hayman v. Gerrard	341 a. b.	Hodgskins v. Thornbury	328 b.
	342 a.	Hodges v. Nicholls	70
Haynes v. Poynter	430	— v. Jane	281
Hayton v. Wolfe	344 a.	— v. Smith	258
Hayworth v. David	382 a.	— v. Cox	321 b.
Hedges v. Tempter	[369] b.	Hodgson v. Brown	429
Heighen v. Flower	291	— v. Ingram	338
Helden v. Taylor	134	Hodlesden v. Harrige	319 b.
Hellier v. Cafebrook	289	Holdy v. Otway	149
Henley v. Jones	349 b.	Holden v. Taylor	136
Hemmingway v. Lad	140	Holland v. Kerton	416
Hen v. Hanfon	150, 316	— v. Keale	433, 481
Henshaw v. Warren	316 a.	— v. Blest	140
Herbert Sir William's case	[384] a.	Hole v. Bradford	280
— v. Merit	429	Holford v. Andrews	329 a.
Herne v. Hudson	341 b.	Hollingshed v. Hicks	429
— v. Brown	446	Hollingshed's case	428
Herrick v. Sanderfon	149	Holman v. Dodd	349 b.
Hewson v. Webb	280	— v. Chute	287
Hewet v. Painter	254	Holmes v. Buckley	160
Hepwood v. Foster	490	— v. Goodwin	438
Hicks v. Woodfon	356, 477	— v. Twist	[375] b.
— v. Goate	136, 154	Hollynes v. Churchwardens of Cotterington	415
— v. Fleetwood	140	Holt's case	424
Hide v. Ellis	479	Honour v. Bradshaw	451
Higgins's case	325 a.	Honey v. Daniel	281
Higgon v. Coppinger	431	Honeycomb v. Sweet	483
Highgate v. Diggs	155	Hooker v. Robinson	[378] b.
Hilliard v. Rednor	[364] b.	Hookes v. Swaine	117
Hill v. Miles & al'	396, 441	Hooper v. Gammerhall & Ux'	324 b.
— v. Whitlack	[372] b.	Hope v. Holman	321 b.
— v. Bedoe	410	Hopkins v. Wrigglesworth	[371] a.
— v. Vaux	480	Horne v. Chandler	116
— v. Thornton	396	— v. May	318 b.
— v. Harris	[363] a.	— v. Barber	331 a.
— v. Pinfold	446	Hornick v. Sanderfon	340 b.
— v. Barne	402	The Company of Horners of Lon- don's case	467
Hills v. Cooper	254	Horseman v. Obbins	150
Hind v. Lyon	278, [355] a.	Horton v. Wilson	465
— v. The Bishop of Chester,	477	Hotchkis v. Corbet	429
Hinton v. Roffey	320 a. 321 a.	Houblon v. Milner	353
— v. Crane	340 b.		

A TABLE of the Names of the Cases.

Houfe v. <i>The Bishop of Ely</i>	251	Jefferies v. Pue	Page 431
— v. Lauder	344 a.	Jenks v. —	291, 294
Howard v. Wickliffe	338	Jenkins v. Armitage	149
— v. Freme		Jenkin v. Smith	352 b.
Howse v. Webster	281	Jennings v. Hankey	(353) a.
Howell v. Thomas	377 b.	— v. Pitman	116, 149
Hudson v. Fisher (375)	b. 463	— v. Hanking	152
— v. Banks	(367) a.	— v. Andley	472
— v. Matin	319 b.	— v. Vandport	266
Huddy v. Fisher	(363) b.	— v. Hawkley	364 b.
Hughes's case	487	Jenkinson v. Potter	(383) a.
Hughes v. Bennet	99	Jenour v. Alexander	463
Hulme v. Sonders	292	Jenner's case	445
Humble v. Fisher	463	Jenor's case	462
Humfry v. Barnes	321 b.	Jenter v. Saunders	(381) b.
Humlock v. Blacklow	102	Jesop v. Payne	480
Hungate v. Mease & al'	266	Jevense v. Harridge	150
Hunson v. Cockett	297, (363) a.	Jevans v. Harwick & Ux'	149
Hunt Doctor's case	445	Jevens v. Harridge & Ux'	330 b.
— v. Allen	121	Impe v. Pit	281
— v. Danvers	137	Incedon v. Crips	(364) b.
Hunter v. Benison	266	Inger v. <i>Executors of</i> Hide	116
Hutcombe v. Standing	335 a.	Ingolby v. Johnson	480
Huffey v. Caffock	416	<i>The Inhabitants of the Parish of</i>	
Hutchinson Doctor's case	444	Stafford v. <i>The Inhabitants of</i>	
— v. Lewson	329 b. 318 a.	Luddington	418
Hutton v. <i>Bishop of</i> Chester,	402, 412, 425, 466, 469	Jocelin v. Jocelin	308
Hutfeild v. Somerset	241 b.	Johnson v. Popinger	466
Hyat's case	437	— v. Muller	347 b.
Hyde v. Cooth	264	— v. Lee	362, 465
Hye v. Wells	431	— v. Clarke	349 b. (354) b.
		— v. Bridges	(347) b.
		— v. Palgrave	99, 149
		— v. Oxenden	465
		— v. Pye	351 b.
		— v. Awbery	480
		Johns v. Strafford	319 b.
		Johnes v. Carne	319 b.
		John v. Adams	381 b.
		Joice & al' v. Haines	266
		— v. Parker	476, 480
		Jones v. Whitlock	428
		— v. Boyer	460
		— v. Pope	319 b.
		— v. Crofs	(383) a.
		— v. Stanley	(382) b.
		Joy v. Rent	321 a.
		Joyner v. Viner	258, 278
			Joyner

I.

Jackson v. Coming	340 b.
Jackson v. Neale	468
James's case	462, 471
James v. Trollop	479
— v. James	142
Jacow v. Dalow	414
Jbson v. Beale	294
Jeffery v. Guy	339 b. 340, 341
	a.
Jeffery's case	415
Jefferies Mayor of London v.	
Watkins	361 a.

A TABLE of the Names of the Cases.

Joyner v. Ognell Isham's <i>case</i> Isles v. Corbet Isted v. Clarke — v. Stanley Ive v. Awbery Ives v. Wright Justin v. Ballam Juxon v. Byron	Page 351 <i>b.</i> (388) <i>a.</i> 430 (383) <i>a.</i> 116 (382) <i>b.</i> 458 359 422, 455	Kitchen & al' v. Knight — v. Buckley Kitley's <i>case</i> Kneverton v. Layton Knight v. Pitt — v. Savage — v. Buckley — v. Cole & Us' <i>Executor</i>, &c. v. Harvey — v. Green — v. Dauler — v. Burton Knight's <i>case</i> Knott & al' v. Barlow	Page 112 111 282 316 325 <i>a.</i> (383) <i>a.</i> 328 <i>b.</i> 315, 324, 349 <i>b.</i> 32 325 <i>a.</i> 266 (367) <i>a.</i> 315
K.			
Kale v. Jocelyne Keating v. Irish Kebble v. Pampillion Keffin's <i>case</i> Keighley v. Keighley Kellow v. Rowden Kelly v. Walker Kenlam v. Redding Keniston v. Jones Kercherer v. Wood Kettley's <i>case</i> Kettle v. Rebson Kerton v. Avery Keyley v. Manning Kiffe v. Bridgman Killigrew v. Sawyer King v. Bird — v. Hilton & Us' — v. Pallard — v. Atkins <i>Administrator</i>, &c. — v. Cattle — v. Welbie — v. Vendman — v. Lake — v. Atkins — v. Dean and Bird & al' v. Bird — v. Standish King and Queen v. Kingdon v. Jones — v. Viscount Ranelagh Kingsmill v. Knapman Kinnorsley v. Smart	289, 324 <i>b.</i> 332 <i>b.</i> 329 <i>a.</i> 461 282 289 449 100 266 (367) <i>a.</i> 329 <i>a.</i> 455 (377) <i>a.</i> 149 408 141, 457 (394) <i>a.</i> 282 (354) <i>b.</i> (347) <i>b.</i> 291 (394) <i>a.</i> 316 446 149 (394) <i>a.</i> 328 (370) <i>b.</i> 111, 137 99 318 352 <i>a.</i> (363) <i>a. b.</i>	Lacy v. Cheshire — v. Levington — v. Lacy Lacy's <i>case</i> Ladd v. Garron Lad v. Wright Lambert v. Lane Lamplugh v. Shiers Lampton v. Collingwood Lamb v. Brownwent Lampleigh v. Brathwayt Lancaster v. Keileigh — v. Loe Lancashire v. Killingworth Lander v. Elliot Landydale v. Cheney Lanning v. Lovering Lane v. Trefham — v. Pledall — v. Hodges — v. Goldman Langly v. Wilcord Langford's <i>case</i> Large v. Alton — v. Cheshire Lark v. Lark Lash v. Webb Lasscells v. Chatterton Lathwell v. Fisher Laugh	102 101, 104, 154 461 <i>Ibid.</i> 341 <i>b.</i> (382) <i>a.</i> 136 20, 136 (375) 330 <i>a.</i> 150 (371) <i>a.</i> (376) <i>a.</i> (353) <i>a.</i> 127 140 140 349 <i>b.</i> 363 342 <i>a.</i> 340 <i>b.</i> 266 450 490 130, 136, 141 464 483 317 <i>a.</i> 318 <i>b.</i> 150 Laugh

A TABLE of the Names of the Cases.

Laugh v. Huffey	Page 412	Lewis v. Bill	Page 150
Laughwell v. Palmer	144	----- v. Hellier	144, 149
Launton's case	251	Lewin v. Forth	127
Lawrence v. Johns	252, 347	Ley v. Anderton	275
----- v. Altham	316	----- v. Lutterell	143, 145, 148
----- v. Beverleigh	282	Leyfeild v. Tisdale	405
Lawry v. Aldred & al'	322 a.	Lightfoot v. Brightman	153
Lawson v. Widdrington	254	Limner v. Evero	258, (366) a.
----- v. Haddock	253	Lincoln Earl v. Topcliffe	285
----- v. Croft	323	----- Bishop v. Smith	390
Lawton v. Gardiner	340 a.	----- v. Fisher	294, 270
Lazall v. Dyer	(354) a.	Lindsey v. Aftey	340 b.
Leans v. Cox Administrator of		Lion v. Carne	127
Cole	341 b.	Lisle v. Martin	114
Lee v. Collins	480	Lister v. Bromley	269, (395) a.
Lee & al' v. Scurrey	98	Littleton v. Pern	97, 331 a.
----- v. Scurveton	291, (383) a.	----- v. Cromwell	256
----- Administrator, &c. v. Garret		Long v. Topcliffe	383 a.
& Ux'	312, 334 b.	----- v. Nethercoote	292, (382) b.
----- v. Pain	266	London v. Craven	123
----- v. Fidgies	347 a.	Lougher v. Williams	103
----- v. Russell	258, (366) a.	Longford's case	(390) a.
----- v. Maddox	136	Lory v. Reynes	485
----- v. Johnson	140	Lothbury v. Ridges	345 a.
----- v. Corbutt & al'	374	Love v. Naplesden	406
----- v. Colehill	319 b.	----- v. Wootten	331 a.
Lee's case	416	Lovelace v. Joniper	(365) a.
Leech v. Morris	342 a.	Lowthby v. Humphry	322 a.
Leigh v. Wood	409, 451	Lowndes v. Herbert	429
----- v. Hanmer	109, 119	Lloyd v. Petty	100
----- v. Ward	340 a.	----- v. Langford	280
Leighton v. Garnus	(383) a.	----- v. Evelin	327 a.
----- v. Green & al'	469	Lucas v. Warren	149
Llemale v. Cara	136	----- v. Fulwood	294
Legard v. Binley	(357) a.	Lucke v. Lucke	136
Lenkin's case	460	Lucy v. Levingstone	140
Letten v. Wynne	297	Lud v. Lewen	294
Leve v. Chelwitell	342 a.	Ludleham v. Stacy	313
Levell v. Hall	334, (383) a.	Luddington v. Amner	(395) a.
Levett v. Lewkner	278	Lutterell v. —	325, b. (365) b.
Lewin v. Alcock	341 a.	Lymbery v. Hemmurfe	(383) a.
Llewelling's case	317 b.	Lynch v. Porter	459
Lewknor v. Huntley	321 a.	Lynox v. Drury	292
Lewings v. Marth	136	Lyonel Copley's case	435
Lewes v. Whitley	428, 444	Lyfs v. Watts	475
----- v. Collinson	140		
Lewis v. Weeks	293, (361) a.		
----- v. Preston	333 a. 338		

M. Maby

A TABLE of the Names of the Cases.

M.

Maby v. Shepard	Page 254	Martin v. Green	Page 470
Machin v. Maultin	419, 375	<i>The Mariners Case</i>	471
Macro's Case	252	Martham v. Jenox	266
Mackley v. Mayzey	492	Marwood v. Turpin	279
Machell v. Dunton	108	Martin v. Hendley	289
Mackerel v. Bachelder	294	—— v. Holmes	406, 407
Maddock v. Young	319 a.	Marriot v. Kinsman	349 b. [383]
—— v. The Chancellor of Pe-			a.
terborough	395	Mary James's Case	406
Maddox v. Chivall	424	Marke v. Gilbert	412
Maidwell v. Andrews	149	St. Mary Magdalen Bermondsey	
Major v. Talbott	129, 136	in Southwark's Case	418
—— Administrator, &c. v.		Mafon v. Watkins	253, 258
Peck	15	—— v. Hanson	296
Mallack <i>Qui tam</i> , &c. v. Spar-		Mafeull's Case	110
ing	319 a.	Sir William Juxon v. Byron	450
Malins v. Dams Hawkins	348 b.	Mafon v. Nicholls	250
Mallory v. Marriot	439, 485	Mafon's Case	100
—— v. Jennings	[376] b.	Mather v. Mills	150
Mallory's Case	107	Mathew & al' v. Vaughan	[364]
Manwood v. Harris	143		a.
Manning v. Bucknell	299	Mathews v. Cross	304, 307,
Mannings v. Townsend	315, 341		328 a.
	b.	—— v. Roe	297
Mansfield's Case	445	Mathew's Case	[367] a.
Mantel v. Gibbons	324 b.	Mathewson v. Lydiott	101, 253
Mantell v. Gibbs	332 b.	Mathin v. Westoray	108
Manfer's Case	119, 150	Matures v. Westwood	111
Manner v. Veffey	149	Mawle v. Cacyfer	322 b.
Man v. Rainborough	<i>Ibid.</i> 329	Maynay v. Collins	364 b.
	a.	May v. Gibbon	412
—— v. Somerton	297	—— v. Gilbert	412
Manknoll's Case	425	—— v. Middleton	321 a.
Manchester v. Draper	317 a.	Mayor of Guilford v. Clarke,	
Manley v. Genings	347 b.		294
March v. Brace	272, 274	Mayor of Exon v. Starr	295
Marrow v. Twyden	272	Mayor and Commonalty of Ber-	
Marsh v. Cutler	284, 291	wick	152
—— v. Brace	272, 274, 329 a.	Mayne v. Scott	331 a.
—— v. Edmonds	318 b.	Mayhew v. Busnet	[376] a.
—— v. Brook	409	Mayo v. Combe	[358] b.
Marsh's Case	[373] a.	Meerton v. Orib	352 b.
Marshall v. Ashley	418	Meletine v. Hall	291
—— v. Leesham	[363] a.	Mellet v. Harbert & Ux'	427
—— v. Jolley	[383] a.	Mendyke v. Stint	468
	b.	Mechin v. Wilder	347
		Mekins v. Minshaw	468
		Melhuish v. Carneston	[366] b.
		Merchant v. Royston	[364] b.
			Merrell

A TABLE of the Names of the Cases.

Merrill v. Ecclesfield	P. 344 a.	Motam v. Motam	P. 433, 438
Meriel & Ux' v. Kendall	432	Motteram v. Motteram	438
— — Tresham	337	— v. Jolly	149
Meredith v. Davis	[376] b.	Mounfon v. Bourn	282
— v. Allen	305	Moyle v. Aultin	119
Merker v. Crofs	253	— v. Emot	319 a.
Messenger v. Freeman	342	Mumparson v. Merne	454
Mildmay v. Cafe	104, 252	Murrey v. Sir Henry Wallop.	458
Middlemore v. Goodale	110	Munday v. Frogatt	319 b.
Michael v. Cockwith	350 a.	Muscott v. Bullett	137, 140
Middleton v. Trott	[392] b.	— v. Morton	314
Midleton v. Weeks	266	N.	
Mills v. Atell	134, 137, 140	Napper's Cafe	99
Mildmay's Cafe	319 b. 383 a.	Napper v. Steward	410
Mints v. Bethel	150	Nash v. Afhton	119, 122, 347
Mingay v. Earle	317 a. 329 a.	— v. Molins	454
	331 a.	Neale v. Sheffield	335 a.
Mills v. Shirfield	324 b.	Nelson v. Thompson	340 a.
Mitchell v. Dunton	96	— v. Sharpe	455
Milton v. Percie	[367] a.	Nervin & al' Executors, &c. of	
Molyns v. Dawes	477	Finnery	99
Molineux v. Molineux	[365] a.	Netter v. Brett	396, 463
Molineux's Cafe	345 b.	Needler v. Gueft	135, 140, 154,
Montague v. Clarke	403, 440		155
Monings v. Worely	329 b.	Nevil v. South & al'	[371] a.
Monday v. Portock	488	— v. Cooks	149
Moore v. Bullock	486	Nevison v. Whitby	321 a.
— v. Reynell	396 b.	Newcombe v. Higgs	409
— v. Fawcett	372	New's Cafe	[383] a.
Moore & al' v. Morecomb	255,	Newen's Cafe	[382] b.
	329 b.	Newman v. Kingerly	431
— Roswell	342 a.	Newport v. Godfrey	280, 284
Morgan v. Williams	296	Newton v. Goddard	[387] a.
— v. Sock	365 b.	— v. Barnardine	328 b.
— v. Man	341 a.	— & Ux' v. Weeks & Ux'	142
— v. Thomas	318 b.	Nicholls v. Pullen	149, 150,
— v. Green	285		342 a.
Moreton v. Hopkins	279	— v. Pawlett	341 b.
Morris v. Lutherell	318 b.	— v. Haskett	323 b.
— v. Smith	427	— v. Rainbred	102
— Wilford	149, 150	Nicholl's Cafe	444
— v. Greech	258	Nightingale v. Leigh	347 b.
Mosdale's Cafe	[356] a.	Nokes's Cafe	98
Mosse v. Archer	130	Nokes v. James	342 a.
Moreley v. Laythan	[367] a.	Noel	
Morly v. Polhill	109		
Mordant v. Watts	127		
Morton v. Refdon	422		

A TABLE of the Names of the Cases.

Noel v. Nelson	[381] a. [392] b.	Oldham v. Pepper	Page 381
Nooth v. Ward	275	Oldbury v. Gregory	252
Norfolke's Case	252, 253	O'dfield v. Wilmer	340 b.
Normanvill v. Pope	347 a. 350 a. [367] a.	Oliver v. Collins	297, [367] a.
Norgate v. Snape	[387] b.	----- v. Hufley	425
Norman v. Foster	99, 342 a.	Orde v. Moreton	352 a, b.
Norton v. Simms	140, 252	Ordway v. Parrot	325 b.
----- v. Harvey	323 a.	Orphans of London's Case	406
----- v. Fence	432	Orphan's Case	461
----- v. Jenner	476	Osbaston v. Stanhope	340 a. 341 a.
----- v. Goldsmith	252	Osborn v. Kirton	364 b.
----- v. Sharpe	[396] b.	----- v. Beversham	311
North v. Wingate	[382] b.	Osbourn v. Hofier	350 b.
Northcott v. Underhill	110	Osbourne's Case	263
Norris Lord v. Barret	270	Osborne v. Crossland	333 a.
Norris & al' v. Creach	332	Overton v. Sydall	279, 289
Norwich Bishop v. Cornwallis.	318 a.	Ousley v. Fisk	140
Norwich v. Norwich	258	Outran v. Rolsten	149
Norwood's Case	445	Oveat v. Vyner	[387] a.
Nose v. Bacon	254	Owfield v. Shierft	294
Nuby v. Sabb	266	Owen v. -----	464
Nuns v. Gee	120	----- v. Lewis	321 b.
Nutt & al' v. Hodgson	1	----- v. Holt	468
		Oxford v. Rivet	[361] a.

O.

Oakley v. Clapham	421
Oates v. Bromwell	266
Oats v. Thornhill	329 b.
Oades v. Woodward	[379] b.
Obrian v. Ram	[388] b.
Odrinfield v. England	[342] a.
Offley & Ux' v. Best	402
----- v. Hicks	144
----- v. Pardine	297
Offly v. Warde	270
Offey v. Best	426
Oglethorpe v. Hide	149, 150, 331 a. 330 b.
Ogle v. Quintin	332 b.
Ognell v. Paston	319 a. [363] b.
----- v. The Sheriffs of London.	269
Ognell's Case	251
Okes v. Ange	426

P.

Packer v. Moore	430
Padget v. Crompton	415
Page v. Denton	322 b.
Paine v. Sketon	335 a.
----- v. Minshall	276
Pain v. Foster	148
----- v. Nicholls	254, [363] a.
Palfry v. Plees	140
Palmer v. Smith	426
----- v. Warner	444
----- v. Alicock	441
----- v. Knolles	[385] a.
----- v. Taylor	321 a.
----- v. Byfield	[389] a.
Palmer's Case	434
Pannell v. Smith	428
Panton v. Hall	[389] a.
----- v. Chowles	350 a.
Pandrid v. Chambers	[383] a.
b 2	Pardaine

A TABLE of the Names of the Cases.

Pardaine v. Jane	Page 329 a.	Penny v. Core	Page 313
Parishioners of Relvenden in Kent	410	Percivall v. Crispe	441
Parke & al' v. Evans	[393] a.	Percher v. Wheble	439, 449
Parker v. Amit	323 a.	Percher v. Vaughan	253
— v. Kemp	423	Percy v. Bardolf	258
— v. Harrold	331 a.	Perkins v. Perkins	[356] b.
— v. Clerke	472	Perkins v. Underwood	285
— v. Taylor [361] a.	[383] a.	Perkinson v. Guilford & al'.	269
— v. Williams	435	Perry v. Whitley	339 b.
Parkins v. Woolaston	344 a.	Perry v. Whitledge	151
Parmount v. Griffin	331 a.	Perry v. Hubbard	438
Parry v. Chamfey	480	Perry v. Allen	97 [363] a.
Paromore v. During	346 b.	Perry v. Bawfrey	475
Parsons v. Cotterell	314	Perry v. Dale	291
Partamore v. Paine	321 a.	Permy's Case	282
Partridge's Case	463	Person v. Cartwright	460
Paston v. Lusher	[365] a.	Peter v. Carter	119
Pascall v. Sparing	[383] a.	Peterborough v. John Lord Mor-	
Paterfon v. Dyer	[370] b.	dant	[358] b.
Patman v. Stanard	314	Petler v. Yalerman	401
Pavic v. Hall	331 a.	Pett v. Balden	406, 455
Pawlet v. Savage	332 b.	Pettit v. Conway	140
Pawley v. Ludlow	336, 329 b.	Peter v. Opill	102
Payne v. Wooland	322 a.	Petty's Case	424
Paynell v. Woolford	438	Phillips v. Berry	[374] b.
Pay v. Pacted	383 a.	Phillips v. Slacke	421
Peache v. Foster	[383] b.	Phillips v. Kettle	297
Peach v. Layfield	400	Phillips v. Echard	258, 314, 324
Peacock v. Pell & al'	[383] a.	Phillips v. Clever	405, 423
— v. Bole	462	Phillips v. Berry	[368] b.
Pearce v. Calcott	321 b.	Phillips v. Stone	258, 319 b.
— v. Stileman	279	Phillips v. Hinckson	437
— v. Winter & al'	408	Phillips v. Hayter	402
Peep's Case	439	Pickerin v. Barkly	100
Peeter v. Carter	347 b.	Pidgeon v. Pitts	272
Peirson v. Jones	140	Pigot v. Hearne	481
Peirpont v. Thumbleby	347 b.	Pigot v. Gascoyne	296
Peirse v. Hunse	258	Pierfon v. Selby	462
Pell v. Pell	321 a.	Pierfon v. Ponuteis	297
Pelham v. Henning	[383] a.	Pie v. Thrill	351 a.
Pembrook Earl v. Sir Henry		Pierce v. Parks	281
Beckley	95	Pierpoint v. Thumbly	119
Pemberton v. Shelton	290	Pike v. Cottington	258
Penn's Case	449	Pilkinton v. Dalton	276
Penfon v. Hodges	291	Pinckcomb v. Rudge	106
Penneland v. Taye	418	Pine v. Woolland	322 b.
Penning v. Plat	137, 140	Pinder v. Goose	401
		Pinfold	

A TABLE of the Names of the Cases.

Pinfold v Kide	Page 254	Prince v. Crompton	Page 296
Pinson's Cafe	427	Proctor v. Johnson	126
Piper v. Barnaby	421	— v. Burdet	129, 149
Pitman v. Biddlecombe	335,	— v. Barley	432
	347 a.	— v. Newton	136, 140,
			142 a.
Pitt v. Russell	131	— v. Johnson	342 a.
Pimm's Cafe		Pudsey v. Richardson	471
Plaine v. Bathaw	[363] b.	— v. Newsham	119, 341 b.
Player v. Pettit	294	— v. Newson	347 a.
Plome v. Plaisted	130	Purcase v. Jegon	[361] a.
Plymouth (Countess) v. Thog-		Purfey v. Grimes	97
morton	270	Purfey's Cafe	108
Plympton's Cafe	332 b.	Pye v. Brereton	293
Pocklington v. Hutton	[354] b.	Pyke v. Pullyn	149
Pocklington (Dr.) v. St. John.		Pyott v. Lord St. John	129
	449		
Pollard v. Coley	321 a.		
Poke v. Hawkins	429		
Pool v. Archer	125		
Pomfret v. Rycroft	99, 126		
— v. Brownfall	284		
Popham v. Hunt	109		
Pope v. Homan	[393] b.		
Pordage v. Cole	93, 102, 127		
Porrie and Thomas v. —	422		
Porter v. Harris	155		
— v. Rochester	462		
Fortland (Countess) v. Andrews.			
	133		
Portington v. Beaumont	468		
Potter v. Thompson	316		
Potkin's Cafe	321 a.		
Powley v. Sier	324 b.		
Powell v. Harris	433		
— v. Shift	294		
Powers v. Clarke	322 a.		
Powey v. Ales	469		
Pratt v. Difton	[383] a.		
Preston v. Dawson	341 b.		
Prew's Cafe	407		
Prescott v. Compleston	403		
— v. Pemberton	139		
Prescott's Cafe	[353] b.		
Price's Cafe	[371] a.		
Price v. Williams	258, 272		
Prisland v. Cooper	150		
Prideaux's Cafe	296		
Priddle v. Knapper	476		
Priest v. Coe	350 a.		

A TABLE of the Names of the Cases.

Reynold's Case	Page 453	Roper v. Martingly	Page 407
Reynell v. Langcastle	286, 289	Rolls v. Hollyman	454
— v. Newbery	406, 407	Rookett v. Gomersfall	489
— v. Hayes	448	Roror v. Escourt	[376] b.
Rich v. Rich	140, 148	Roffe v. Roffe	407
— v. Franke	289	Rotheram v. Crawly	258
Richards v. Collins	289	Ronsby v. Manning	340 b, 342 a.
Richardson v. Desborow	439	Royston <i>Executors, &c.</i>	Beefston.
— v. Fawconbridge	480		335 a.
— v. Dewell	282	Ruddock's Case.	[373] a.
Rident v. Took	149	Rudge v. Pincombe	114
Ridgways's Case	[385] b.	Ruffell v. Ruffell	145
Ridlesden v. Wogan	340	— v. Lea	321 b. 340 b,
Riesky v. Wentworth	423	— v. Gullwell	342
Rimes v. Baker	349 b.	Ryder v. Ablett	140
Ridden v. Jugle, 258, 266, 313, a.			
Rifam v. Goodwin.	[383] b.		
Roberts v. Pain	411		S.
— v. Stroker	141		
Robert's Case.	435, 440, 457	Saccars's Case	433
— v. Reeve	378	Sallows v. Girling	266
— v. Harnage	290	Sallows v. Golding	342 a.
— v. Brown	248	Salmon v. Smith	328 b.
— v. Picking	[389] a.	— v. Bradshaw	137
— v. Tremoile	320 b.	— v. Wilworth	467
Robinson v. Corbet	324 b.	Saltash's Case	461
— v. Robinson	323 a	Saltmarhe's Case	[393] a.
— v. Walker	111 a	Samborn v. Samborn	404
— v. Amp	125, 150	Samms v. Merfer	323 b.
— v. Taylor	431	Samon v. Norton	322 a.
— v. Warwick	285	Sampson v. Waters	428
— v. Wooley	462	Sameways v. Elmsby	102
— v. Bifs	264, 466	Sanderfon v. Martin	341 b.
— v. May	321 a	Sandback v. Turvey	[360] b.
— v. Stoker	141		[361] a.
Robins v. Sambele	383 a.	Sands v. Maleverer	150
Robottom's Case.	408	— v. Trevillian	295
Robotham v. Trevor	457	Sanders v. Marke	274
Robson's Case	447	Sarison v. Bathoe	423
Robson v. Cutler	352 b.	Saunders v. Meryton	140
Rocheffer v. Long	[376] b.	Savory v. Tey	[383] a.
Rockilly v. Godolphin	280, 322	Savil v. Roads	[363] b.
	b.	Sawyer v. Killegrew	34
Rodford v. Hopkins	[385] b.	— v. Crompton	293
Rodley v. Cook	156	Saxey v. Whempson	[383] a.
Rogers v. Jackson.	340 a.	Say v. Harwood	411
— v. Bird	[364] b.	Say and Seal v. Stevens	[371] b.
— v. West	488	Scarle's Case	408
			Scavage

A TABLE of the Names of the Cases.

Scavage v. Hawkins	Page. 297	Sherrington v. Fleetwood	P. 480
Scarling v. Sharpwell	[364] b.	Sherle v. Harris	365
Scawen v. Arundell	348 a.	Sherman v. Lilly	329 b.
Scory v. Baber	480	Sherrard v. Kirkman	295
Scott v. Maynie	127	Shipley's Cafe	[381] a. [391] b.
----- v. Knapton	[371] b.		[392] b.
----- v. Wall	405, 455, 450.	Shipwith v. Sheed	346 b.
----- v. Wilfon and Playter	457	Shipley v. Chappel	256, 329 b.
----- v. Herbert	296	Shirly v. Brown	410
----- v. Scott	[357] b.	----- v. Shakville	291
Scroggs v. Spencer	[367] a.	Shibden v. Redman	435
Seaman v. Edwards	322 a.	Shipley v. Craister	316
----- v. Browning	317, 342 a.	Shotter v. Friend	436
Seabright v. Beall	136	Shower v. Cudmore	102, 142, 146
Seymour's Cafe	437	Shuttleworth v. Garnet	270
Seaman v. Lucey	[353] b.	Shakeley v. Porter	[372] b.
Seaton v. Gilbert	321 b.	Shedborough v. Raunt	382 b.
Selby v. Walker	119, 347	Sheirs v. Britton	129, 140
Self v. Kennicott	321 b.	Sheyney v. Hermy	440
Semayne v. Gresham	[393] a.	Shelley's Cafe	[356] b. [357] b.
Serle v. Williams	444	----- v. Sheelock	140
Serles v. Stransham	116	Shoreditch v. Falder	136
Severne v. Clarke	254	Sherwood v. Nonns	149
Sewell v. Young	[362] b.	Simon v. Glanville	312
Sheeton v. Cufhee	119	Sims v. Smith	119, 347
Sheckfor v. Woolverfton	253	Simpson v. Ellis	290, [307] a.
Shambrook v. Fettiplace	414	Singleton v. Wade	406, 422
Sharplefs v. Hankinson	254,	Sibley v. Crawley	398
	335 a.	Sibel v. Hill	[360] b.
Shan v. Belby	110	Skinner's Cafe	487
Shandos Lady v. Simpson	294	Skymner v. Kilby	143, [361] a.
Sharpley v. Richardson	266	Skinner v. Mingey	
Shackerly v. Marvin	480	Skidmore v. Winston	296, [367]
Sharply v. Hurrall	321 a.		a.
Shaxton v. Shaxton	150	Slader v. Smallbrooke	403
Shaw v. Cutteris	324 b.	Slater v. Stone	102, 138
----- v. Thompson	[365] a.	----- v. May	296
----- v. Cutters	[385] b. [387] a.	Slaughter v. Layfield & al'	460
----- v. Sherwood	254	Slade v. Drake	486
Sheeton v. Cufhe	347 b.	Slyfield v. Sybil	349 b.
Shenter v. Couzens	323 a.	Slowman v. Church-wardens of	
Shepard v. Kerne	335 a.	Longueville	420
----- v. Penrose	481	Smallpace v. Smallpace	[324] b.
Sherrington v. Fleetwood	480	Smallwood v. Berthouse	407
The Sheriffs of Bristol's Cafe.	269	Smallcomb v. Buckingham	[391]
Shepherd v. Bailly	[373] b.		a. 393
Sherwood v. Winthcombe	481	Smallbrook v. Slaughter	408
		Smith v. Yeomans	149
		Smith	

A TABLE of the Names of the Cases.

Smith v. Coniers	Page 140	Spendlow v. Smith	Page.
— v. Cudworth	143	Sir John Spencer's Case [347]	b.
— v. Pannel	410	Specot v. Sheirs	344 a.
— v. The Executors of Pondriel	472	Spencer v. Durant	110
— v. Stoneard	[377] a.	Sprat v. Nicholson	409
— v. Bennet	410	Squire v. Fullerton	150
— v. Drayton	455	Star v. Buckhold	430
— v. Smith	294, 296	Stafford's Case	257
— v. Bernard	313	Stamp v. Hutchins	280
— v. Garbutt	119	— v. Kinsey	[386] b.
— v. Stafford	119	Stamere v. Amoney	[390] a.
— v. Wood	429	Stanton v. Burton	[367] a.
— v. Bartlett	341 b.	Starrie's Case	440
— v. Pease	342 a.	Stant v. Hutchins	[363] a.
— v. Warren	342 a.	Staples v. Allen	329 b.
— v. Kirfoot	258, 266	St. John v. St. John	
— v. Norfolk	289	St. John (Lord) v. Bandring.	
— v. Septon	[393] a.		281
— v. Shelberry	102	St. John v. Piot	151
— v. Newtham & Ux'	293	Stagg v. Bishop of Landaff	476
— v. Newton	293	Stamper v. Kinloy	[379] b.
— v. Batten	156	Stamford v. Cooke	341 b.
— v. Garbutt	347 b.	— v. Cooper	[379] o.
— v. Shelden	102	Stanyon v. Davis	[358] b.
Smith's Case	346 b.	Star v. Cuckow	430
Smithson v. Dodson	480	Starkey v. Church-wardens of Watlington	411
Snow v. Franklyn	24, 149	Stead v. Moone	[355] a.
Snell v. Bishop	429	Stevenson v. Case	415
Snelgrave v. Boswill	[380] b.	Stephens v. Tott	438
Snelling v. Smith	323 b.	Stephens v. Crips	425
Sneake v. Richards	316 [367] a.	Stephenson's Case	134
Somes v. Squibb	119, 347 b.	Stephenson v. Stephenson	131, 132, 136
Somerfet v. Markham	472	Staughton v. Newcombe	[383] a.
Sopram v. Skarry	121	Stevens v. Powell	124
Southcot v. Southcot	297	Stevenage Churchwardens v. Green	450
Sower v. Bradfield	285, 295, 296	Steward v. Allen	347 b. 328 a.
Somers v. Buckley	470	Steward's Case	405, 425
The Corporation of Southampton v. Richards	289	Stepney v. Lloyd	319 b.
Southerell v. Brown	132, 133	Stibbs v. Smith	148
Sparrow v. Norfolk	403	Stiles v. Stearing	Ibid.
— v. Draper	[363] b.	Stock v. Sycks	425
Spark v. Spark	278, 289	Stokes v. Stokes	249, 349
— v. Stafford	469	Stone v. Goddard	294
Sparks v. Martyn	470	----- v. Radish	330 a.
Spencer's Case	119	Stone	

A TABLE of the Names of the Cases.

Stone v. Bliffe	Page 329 b.	Taylor v. Hardman	Page [365]
Stonehouse v. Read	442	— v. Beckett	152
Stoughton v. Day	341 b.	— v. Rebera	336
Storke v. Cullen	295	— v. Emes	441
Stranishall v. Cullington	421	Taylor v. Moore	[383] a. [399]
Stranham v. Medcalf	458, 474	— v. Debar	159
Stratford v. Neale	488, 489	— Beal	[360] b.
Streeting v. Hinde	136, 140	— v. Smith	340 b.
Stroud v. Willis	347 a.	Teat's Case	258
— v. Hoskins	475	Tedcastle v. Halliwell	329 b.
Stubbs v. Wrightwise	[385] b.	—	331 a.
— v. Manklyn	[383] a.	Telly v. Pierce	335 a.
— v. Flower	[383] a.	Temple v. Forrest	289
Studhelme v. Morrison	125	— v. Temple	279
Studholme v. Mundell	342	Tench v. Cletheroe	155
Sturges v. Deane	285	Terry v. Baxter	266
— v. —	345 a.	Thackston v. Humlock	341 b.
Stutfield v. Somerset	317 a.	Thetford v. Thetford	[363] b.
Suckram & al' v. Warner	489	Thirlby v. Helbot	266
Suckliffe v. Reynill	269	Thomas v. Giffard	485
Suffolk (Lord) v. Battifon	331 a.	— v. Ward	96, 99
Sufter v. Cowell	310	Thompson v. Harvey	254, 258
Sutton v. Dowse	477, 485	— v. Clerke	[393] a.
Swallow v. Emberfon	324 a.	Thomson v. Butcher	253
Swann's Case	155	— v. Feild	295
Swan v. Carles	113	— v. Teisdale	488
Sweatham v. Archer	408	— v. Devenport	379
Swift v. Eyres	[363] a.	Thomlinson v. Freeman	473
Swinborne v. Gray	403	Thornton v. Pickering	489
Swinerton v. Man	476	— v. Teisdale	488
Sword-blade Company v. Dempsey	[372] a.	Thurkettle v. Tye	324 b.
Symms v. Smith	140	— v. Reeve & al'	324
Symons v. Smith	Ibid.	Thornhill & al' v. Knight	257 b.
Symms v. Purchase	289	Thursby v. Helbut	266
		— v. Plant	108
		— v. Hale	129
		Thurston v. Vincent	[383] a.
		Thursden v. Ward	347 b.
		Thwaytes & Ux' v. —	[366] a.
		Thynn v. Cholmley	251, 297
		Tillie v. Woodie	155
		Tindall's Case	97
		Tindall & al' v. Harrington,	[352] b.
		Tippett v. Hawkey	111
		Tipping v. Swan	297
		— v. Grove	278
		Tisdale	

T.

Talbot v. Lacen	126
— v. Levison	93
Tallory v. Jackson	319
Tapper v. Davenant	320 b.
Targett v. Lloyd	46
Taverner v. Quaterman	339 b.
Tawyer v. Whistler	407

A TABLE of the Names of the Cases.

Tidale v. Effex	Page 100, 126,	Twig v. Roberts	Page 372 b.
	140, [335] a.	Twisleton v. Dunkin	319 b.
Toddard v. Tyler	475, 477	Tyler's Case	340 a.
Tole v. Dawson	346	Tynan v. Bridges	316
Tomkins v. Jordan	[383] a.	Tyndall v. Hutchinson	143
Tompson v. Miles	118		
—— v. Noel	148		
Tomson's Case	458	V.	
Tongue v. Pitcher	143		
Took's Case	440		
Tooke v. Hastings	159	Vanacre v. Spleen	473
Tookey v. Squirrel	97	Vandicut's Case	289
Topsham v. Pannel	334 b.	Vane v. Minnhull	276
Topfal v. Ferrers	44	Vanvivee v. Vanvivee	342
Toler & Ux' v. Davis	430	Vast v. Gawdy	
Tourfon v. Tourfon	472	Vaughan v. Chambers	320 a.
Townsend's Case	[363] a.	—— v. Evans	467
Townsend v. Clerk	295	—— v. Daultsey	432
Toy v. Cox	460	Vawdery v. Pannel	469
Tracy v. Cheshire	330 a.	Veale v. Gatesden	324 b.
—— v. Bloom	293	Venners v. Allen	431
Trahearne v. Clenbrooke	284	Vere v. Smith	344 a.
Transam's Case	471	Vicar v. Litchfield v. Eyres & al'	[365]
Trap's Case	[362] a.	Vicar of Pancras v. Bushy	453,
Travis v. Scott	[377 a.]		454, 455
Tresham v. Roberts	335 a.	Vicar of Saltasbe's Case	461
Tregonwell Executors, &c. v. Sherwin	293	Vicar of the Chapel of Boston in Com' Cornub's Case	421
Tremorlin v. Sands	472	Vicar of Alderburne's Case	Ibid.
Trenchard v. Hoskins	99, 100	Villers & Ux' v. Hastings	319 b.
Trenchard, Sir George's Case	98	Vincent v. Alpy	429
Trevifa's Case	292	Violet v. Blague	470
Trevor v. Nurfe	140	Vita v. Vita	[364] b.
Triggarn v. Fletcher	376 b.	Vivian v. Shippings	102
Trippet v. Eyres	266	Vivian v. Wilde	253
Trot's Case	403	Underhill v. Brooks & al.	324 b.
Trott v. Bedingsfield	257	Vosque v. Daniel	342 a.
Truffel v. Mading	140		
Trygarn v. Fletcher	325 b.		
—— v. Ashton	319 b.		
Tucke's Case	281	W.	
Tuckerman v. Tuckerman	136		
Tull v. Osberfton	460	Wadefworth v. Andrews	403
Turnain v. Thorne	427	—— v. Amy	140
Turner v. Barnaby	[354] a.	Wade v. Benbere	129
Turvie's Case	[356] b.		
Twiford v. Barnard	298		

A TABLE of the Names of the Cases.

Wade & <i>Ux'</i> v. Smith	P. 382	Watnough v. Holgate	Page 140
Wainwright v. Griffith	269	Watkins's Case	466
Wainsford <i>Administrators</i> , &c. v.		Watson's Case	323 b. 434
Warner	322 b.	Watson v. Watson	266
Walcot v. Powell	289	Watt's Case	444
Walkden, &c. v. —	437	Watt's, <i>Sir John's</i> Case	469
Walker v. Hull	112	— v. Jordan	[383] a.
— v. Alder	[385] b. [392] b.	— & <i>Ux'</i> v. Conisby	439
— v. Hancock	[383] a.	— & <i>al'</i> v. Ognell	297
Walker v. Sacklore	[364] b.	Watton v. Weddington	150
— v. Harris	273, 274	Way v. Yally	Page [353] a.
— v. <i>The Dean of</i> Norwich.	117	Weal v. Goulfton	350 a.
Waller v. Croot	329 b.	Weaver v. Clifford	269, 294
— v. Creet	150	— v. Fetter	[376] a.
— Campion	297	<i>Weaver's Company</i> v. Scape	366 a.
— v. Crook	317 a.	Web v. Cooke	429, 442, 449
Wallis v. Proctor	429	Welby v. Herbet	410
Walpoole v. Coldwell	409	— v. Philips	293
Walsingham v. Stone	458, 482	Welcomb v. Lake	411
— v. Combe	142, 149, 151	Wells v. Wright	253
Walton v. Johnson	149	— Denney	[365] b.
Walter v. Waterhouse	39, 149, 150	Wentworth v. Crispe	275
— v. Pigot	[364] a.	— v. Wentworth	254
Walthal v. Aldrich		Westby v. Skinner & <i>al'</i>	269
Walwin v. Smith	[365] a.	Westby v. King	343 a.
— v. Herbert	[389] b.	Westley v. Allen	396
Warren's Case	[364] a.	Wheatly v. Lane	289
Ward v. Kedsgrave	289	Wheeler v. Haydon	297, 369 a.
— v. Coggin	[382] b.	— v. Honour	269, 274 a.
— v. Untorn	266	— v. Thomas	[373] a. [380] b.
Ware v. Chappel	101	Whelpdale's Case	298
Warley v. Pulley	292, 297	White v. England	295
Warner v. Hailer	457	Whistler v. Singleton	424
Warwick v. Skinner	430	White's Case	[359] a. 412
Warren v. <i>Alters</i>	95	White v. Helford	266
— Warren v. <i>Confett</i>	301	— v. Bodinam	145
Washington v. Murden	342 a.	Whitway v. Pensent	120
Waterhouse & <i>Ux'</i> v. Saltmarsh.	393 a.	Whormwood v. Shaw	283
— v. Copely	[377] a.	Whyddon's Case	299
Waterman v. Adams	334 b.	Wickenden v. Thomas	281
Waterfield v. <i>Bishop of</i> Chichester	446	Wicket & <i>al'</i> v. Creamer	[375]
Waters v. Montague	125, 128	Wigmore v. Wells	253
— v. <i>The Dean of</i> Norwich.	129	Wilcocks v. Watson	282
		Wilbraham v. Snow	[393] a.
		Wilcocks v. Green	345 a.
		— v. Hewson	[365] b.
		Wild v. Vinor	340 a.
		Willshaldye v. Davidge	[383] a.
		Williams's	

A TABLE of the Names of the Cases.

Williams's Case	Page 424	Wood v. Branford	Page (376) a.
Williams v. Cary	[383] a.	— v. Harbourn	(386) a.
— v. Curtis	[386] b. [387] a.	— v. Avery	331 a.
— v. Green	299, 333 a.	— v. Bates	253
— v. Sheadmean	343 b.	— v. Clememe	266
Williamson v. Henley	[364] a.	— v. Churley	401
	[365] b.	— v. Ash	100, 126
— v. Barnesly	252	— v. Kirkham	149
— v. Hunt	140	— v. Butts	352 a.
Wilkinson v. Richardson	481	Wood v. Hill	403
Wilkinson v. Floyd	112	Woody v. —	[382] b.
Wilks v. Wright	[382] b.	Woodward's Case	419
Wilmer v. Oldfield	142, 150	Woodward v. Pary	294
Willoughby v. Brook	347 a.	— v. Baggs	399
Wilson's Case	328 a. 402	— v. Darcy	322 b.
Wilson v. Wilson	436	— v. Nelson	482
Wilson v. Armorer	277, 331 a.	Woodard v. Bugg	456, 482
— v. Jeffery	131	Woodyard v. Dannock & al'	342
— v. Drake	441		a. (367) a.
— v. Weltch	142	Woodeyre v. Gresham	(388) b.
Willot v. Spencer	297	Workley v. Harpingham	350 a.
Willoughby v. Egerton	[367] a.	Woolhy v. Purnby	292
Wilford's Case	284	Worthy v. Watkinson	451
Wimbleton v. Holdrip	143, 150	Wortes v. Clifton	423, 447, 457
— v. —	330 a.	Worthmeal v. Gill	487
Winchcomb v. Pidget	253	Worth v. Elsey	318 b.
Winchester's Case	463	Worthy v. Saunders	455
Wingfield v. Secford	329 a.	Wooton v. Cooke	102, 119,
	[355] a.		347 b.
— v. Sherwood	134, 155	Wright's Case	481
Wingate v. Finch	440	Wright Margaret's Case	(389)
Winter v. Pierce	457		b.
Winterburn v. Bull	156	Wright v. Augur	285
Wintell v. Child	480	— v. Martin	(367) a.
Wife v. Greek	417, 418	Written v. Bye	316
Wiseman v. Wallinger	270	Wrothmeal v. Gill	452
— v. Denham	480	Wyat v. Harbye	(383) a.
Withers v. Owen	403	Wye v. Throgmorton	342 a.
Withers v. Drew	342 a.	Wynne v. Fellows	295
Withers v. Henley	[396] a.		
Witis v. Rollhampton	[335] a.		
Witchcot v. & al' v. Nine	342 a.		
Woodell v. Hungate	324 b.		
Wolf v. Davison	[386] a.		
Woolfe v. Meggs	(365) b.		
Wolfe v. Davison	269		
Woodcock v. Morgan	290		
Wood v. Shepard	(370) a.		

Y;

Yate v. Garth	(387) b.
Yates v. Glover	429
— v. Rolls	111
Yelverton v. Cornwallis	127
Young	

A TABLE of the Names of the Cases.

Young v. Taylor	Page 258	Yolle v. Powell	Page 434
— v. Melton	342 a.	York v. Allen	(383) b.
— v. <i>The Inhabitants of Tot-</i>	(361) b.	— York (Archbishop) v.	
nam		Taylor	488
— v. Gosling	149		
— v. Ashburnham	269		
— v. Pennington	294		
— v. Gape	(364) b.		
— v. White	339 b.	Zouch v. Clay	534 b.

A T A B L E

A TABLE OF THE NAMES OF THE

1	2	3	4	5	6	7	8	9	10
1	2	3	4	5	6	7	8	9	10
1	2	3	4	5	6	7	8	9	10
1	2	3	4	5	6	7	8	9	10
1	2	3	4	5	6	7	8	9	10
1	2	3	4	5	6	7	8	9	10
1	2	3	4	5	6	7	8	9	10
1	2	3	4	5	6	7	8	9	10
1	2	3	4	5	6	7	8	9	10
1	2	3	4	5	6	7	8	9	10

TABLE

A
T A B L E

O F T H E

Declarations and Pleadings

Contained in this VOLUME.

Covenant.

A Declaration for breach of Covenants in an *Indenture* of *Charter-party* in not paying for *Demurrage*, *Primage*, the *Dover-Duty*, and for freight, *Page* 1.

—The *Charter-party* set forth. Averment of performance by the plaintiff, 3. That the ship set sail such a day, *ibid.* Arrived at *Oporto*, *ibid.* And was there ready to take her loading on board, *ibid.* Notice given, *ibid.* That they did not load her pursuant to the *Charter-party*, *ibid.* That the ship was obliged to stay there from such a time to such a time, *ibid.* That they had not paid for the same, 4.—That the ship set sail from *Hamburgh* to *Oporto*, *ibid.*—Loaded with bay berries, &c. *ib.* Arrived at *London*, and perfected her voyage, *ibid.* What was due for the freight, *ibid.* The amount of the *Primage* and *Dover-Duty*, *ibid.* And the breach in non-payment, &c. 5.

—*Plea* as to the *Demurrage*, that they loaded her when she was ready to take in her loading; but that they could not load her sooner, for that the river *Elbe* was frozen up. As to the Freight, *Primage* and *Dover-Duty* that it was paid, *Page* 6. And issue thereupon, *ibid.* To the other part of the plea, a *Replication* that the river was thawed at the time the defendants plead it was frozen, and might have set sail sooner had she been loaded, *ibid.*

A Declaration in Covenant for not saving the plaintiff harmless, &c. 6. Setting forth the *Indenture*, *ibid.* Recital that *T. L.* died Intestate, leaving an estate to the value of 705 *l.* 7s. 6d. 7. That a moiety belonged to *M. L.* relict of *T. L.* and another moiety to the defendants and *P. S.* and that the Defendants having received of the plaintiff 307 *l.* 13s. 9d. in full payment of the said moiety, and of their shares, *ibid.* That *E. C.*

A T A B L E of the Declarations and Pleadings

E. C. sister to the Intestate of the father's side, sued the plaintiff in the Prerogative Court for her moiety, *Page 8.* And that thereupon such proceedings were had, that there was a Decree against the plaintiff for 43*l.* 1*s.* 6*d.* notice, breach, *ibid.*

A Declaration in Covenant for not saving the plaintiff harmless according to a Covenant in an Indenture, 9. Setting forth that the twenty-third of *June*, 2 *Jac.* 2. a special outlawry issued against *J. A.* The delivery of the writ to be executed; and that at the time of the delivery thereof, the plaintiff had in her hands 100*l.* of the monies of *J. A.* 10. That after the inquisition, and before the return of the writ, the plaintiff paid to *H.* at the request of the defendant 64*l.* Part of the 100*l.* and that the defendant covenanted to save the plaintiff harmless from paying the money, if a suit should be commenced for so much, so that the suit be brought before the end of *Michaelmas*-Term then next, *ibid.* An averment that the defendant hath not paid the 64*l.* That a Transcript of the record of the outlawry was delivered into the Court of Exchequer. — That a *Scire facias* thereupon issued out of the said Court of Exchequer against the plaintiff, 11. — That the Sheriff before the return summon'd the plaintiff thereupon, *ibid.* The return of the Sheriff, *ibid.* That the plaintiff let judgment go by default, *ibid.* A breach that the de-

fendant, tho' often required, hath not saved the plaintiff harmless, *ibid.* A Plea in Bar, with a *Protestation*, that the plaintiff was not damnified before the end of *Michaelmas*-term; for Plea, that the writ of *Scire facias* issued such a day, with a traverse of its being sued out as the plaintiff doth suppose, 12. A *Replication* setting forth the date of the *Scire facias* that it was sued out before *Michaelmas*-Term, with a traverse of its being sued out at the time in the defendant's plea, *ibid.*

A Declaration by an attorney upon articles to permit the defendant to receive tithes accruing to *T. P.* as Vicar, 13. Setting forth an agreement that a grant should be made for life, *ibid.* And to surrender the Vicarage for the defendant to present. *ibid.* — A Covenant to pay the plaintiff 150*l.* in lieu of tithes, 13. An averment of performance on the part of the plaintiff. A Breach that the defendant hath not paid the 150*l.* 14. — A Plea that *T. P.* dy'd at *Southo*, *ibid.* — The case, *ib.* That the death ought to have been alledged at the place in the declaration.

A Declaration by an Administrator of an Administrator during the minority of an infant, against a man and his wife executrix, for rent, 15. Setting forth an Indenture of demise from the plaintiff's intestate to the defendant's testator, and to one *Benjamin Wood*, on the twenty-first of *December*, 34

Car. 2.

Car. 2. of a house in *Pater-noster Row*, (except the use of the house for the first two years of the term) P. 15, 16.—For twenty-one years from *Christmas* then next, at the rent of 70*l.* per Ann. 16.—The lessees covenant jointly and severally that they, or one of them, would pay the rent, *ibid.* That the lessor on the twentieth of *December*, 25 Car. 2. made his will, and the said *Deborah* executrix, *ibid.* That the tenth of *March* 1684, he died possessed of the reversion, 17. That she proved the will, *ibid.* That the lessee *Rich. Wood*, Jan. 15. made his will, and the defendant *Ursula* executrix, and that she proved the will, *ibid.* That *D.* the lessor's executrix died intestate, and administration *de bonis non* was granted to the plaintiff, during the minority of *Richard Wood*, *ibid.* The marriage of the defendant, *ibid.* The rent in arrear, *ibid.* A protest of the letters of administration, *ibid.* An averment of the life of *R. Wood*, *ibid.* An imparlance, *ibid.*—A Plea after the last continuance that *Rebecca Wood* was of age, 18. The case whether this were a good plea.

In Covenant for non-payment of rent, and for want of repairs, 18. Breach, that 31*l.* 10*s.* was in arrear for rent due at *Martinmas*, 19. And that at *Lady-day*, and for a year before, the premises were out of repair, *ibid.* Bar, as to the rent alledging by protestation that 31*l.* 10*s.* were not in arrear; for Plea, that be-

VOL. II.

fore the day of suing out the original, he paid the plaintiff 5*l.* 5*s.* in full satisfaction, Page 19. And as to the want of repairs, that from the time when the premises were out of repair, he repaired them in a convenient time, *ibid.*—And a *Traverse* that the messuages were out of repair, 20. Replication, as to the rent non-payment, *ibid.* And as to the repairs, the plaintiff maintains his declaration, *ibid.*

A Declaration for not repairing one of fifteen messuages that was burnt down by fire, *ibid.*—Setting forth, that May 12. 3 W. & M. T. A. was seised in fee of lands, *ibid.* A demise to G. 21. A Covenant that G. should build fifteen houses before *Lady-day* then next, and to pay such a rent, *ibid.* And likewise a covenant for repairs, *ibid.* That fifteen houses were built, *ibid.* That T. A. granted the reversion to Sir P. M. and others, by lease and release, 22.—The lease, *ibid.* The release, *ibid.* That Sir P. M. and others, by a bargain and sale granted the reversion to the plaintiff, *ibid.* That May 21. 4 W. & M. the term for years granted to G. came by mesne assignments to the defendant, 23.—Breach, that 550*l.* were in arrear, *ibid.* That after the fifteen houses were built, one of them was destroyed by fire, and not rebuilt, 23.

A Declaration in covenant upon an indenture for non-payment of rent by a third person, 24. Setting forth, that the defendant covenanted, that in consideration

A T A B L E of the *Declarations and Pleadings*

sideration the plaintiff would permit S. P. to have and enjoy a farm for a year and half, at the rent of 72*l. per Annum*, that the defendant would pay to the plaintiff 200*l.* which was due to the plaintiff from the said P. and also the said rent of 72*l.* and would do and perform all things to be done and performed by S. P. with an averment that the plaintiff had permitted S. P. &c. Page 24. A *Breach* for non-payment of the rent, 25. A *Bar* by *Concord* in satisfaction of Covenants before any breach, *ibid.*

A *Declaration* in Covenant in an indenture for not sufficiently repairing and building, *ibid.*—The indenture, *ibid.* The parcels. The term. The rent. The covenant to repair. A proviso. An averment of performance, 25, 26, 27.—A *Breach* for not repairing, *ibid.*

A *Declaration* in Covenant by the Dean and Chapter of *Trinity Church* in *Bristol*, against an executor of an assignee of the reversion of a term for want of repairs, 27. Setting forth, that G. H. the lessee became possessed of the reversion of the term. That the first term expired. That George enter'd. That this estate came to W. G. That W. G. made his will.—That he died possessed, &c.—That C. G. proved the will. An averment of performance. A *Breach* assigned for want of repairs, 27, 28, 29. A *Bar* as to the want of repairs in the Chancel, that the Dean and Chapter did not demise, &c.

and an *Issue*. And as to the breach of covenant for want of repairs of the Barn, a *Demurrer*. A *Replication* as to not repairing the Barn; a joinder in *Demurrer*. The continuances. The award of the *Venire*, as well to try the issue, as to enquire of the damages, if judgment should be given on the *Demurrer*, P. 28, 29, 30. The case that the plaintiff had not called the defendant executor in the beginning of the declaration, 31.

A *Declaration* in Covenant upon an indenture of bargain and sale. A *Breach* that the counsel devised a note of a fine to be levied. The Fine. The Breach, that he refused to acknowledge the fine. A *Bar*, that he did not request, &c. and issue thereupon, 31, 32.

A *Declaration* in Covenant for assigning the premises without the leave of the lessor.—Setting forth the covenant not to assign without consent.—The entry of the lessee. A Protestation of performance by the lessor. The *Breach*, 32, 33.

A *Declaration* in Covenant for the sale of an office, and the vendor to have the pension, &c. belonging to it for life. Setting forth the agreement.—The consent and approbation of the Queen. An averment that the plaintiff surrendered. That the defendant was admitted. A *Breach* that the plaintiff hindered the defendant from receiving the profits, 34, 35.—A *Plea* that the defendant permitted the plaintiff to receive the profits, &c. with

Contained in this VOLUME.

with a *Traverse* of the receipt of any money by the defendant, *Page* 34, 35, 36. The case, whether the breach was well assigned, 36.

A *Declaration* in Covenant for want of repairs, 36, 37.

A *Declaration* in Covenant upon indentures of apprenticeship, according to the custom of the city of *London*. Setting forth the custom. The indentures of apprenticeship. An averment of performance on the part of the plaintiff. The breach in departing the service before the end of the term, 37, 38, 39.

A *Declaration* in an action of Covenant for want of repairs, brought by the plaintiff as son and heir, upon a Covenant with his father. The memorandum.—The declaration, setting forth the indenture, bearing date *August* 24, 1656.—The Covenant to repair.—And to leave the said premises well repaired, &c. at the end of the term. That *Jasper* entered into the premises by virtue of the demise; that *Thomas Walton*, the father died. That the premises descended to *Thomas Walton* the son. A *Plea* that after the lease made to the said *Jasper*, and before the premises fell to the ground, the defendant assigned his term to *George Johnson*. By virtue of which assignment *George Johnson* entered and was possessed, and that the premises were burnt down by the great fire of *London*; and that within a convenient time after, they were repaired. A *Demurrer*, with

causes of *Demurrer*, *Page* 39, 40, 41, 42.

A *Declaration* in an action of Covenant for not paying 3*l.* for a heriot brought against an executor upon a lease made to the testator to commence after the death of one *J. C.*—Setting forth the indenture of demise to the testator. (Except the Tin works, &c.)—For the term of ninety-nine years. If *James* and *Julian Cara* should so long live, to commence after the death of *Sibill Cara* for 40*s.* per *Ann.* rent. And a capon, paying also the high rent, or chief rent. And 3*l.* for a heriot.—And to do harvest-work. A *protestation* of the non-performance. That *Sibill* died *Oct.* 1. in the nineteenth year of the reign of king *Charles* the Second. That *James Cara* made his will, and *Robert Cara* and *J. Cara* executors, and died.—That they undertook the charge of the executorship.—And the breach in non-payment of the heriot, 43, 44, 45.—The case, whether the heriot could be due before the commencement of the term 45.

A *Declaration*, for that the defendant's assignee would not permit the plaintiff to make a drain, pursuant to a Covenant with the defendant, (being the first lessee)—Setting forth the indenture.—The *Habendum*.—The *Reddendum*.—A Covenant by the plaintiff to make single houses into double houses. A Covenant by the defendant, and her assigns, to permit the plaintiff to make a drain.—

A TABLE of the Declarations and Pleadings

That the plaintiff entered by virtue of his lease.—And made the single houses into double houses. That the defendant granted a lease of a piece of land and two stables to J.—That by virtue of which the said J. entered, and afterwards died. That administration was granted to his wife, who married to S. Carter.—That they the said S. C. and his wife entered.—And would not permit the plaintiff to make the drain, but disturbed him therein. A *Plea*,—That the drain might have been made in the passage, and that the plaintiff gave him free liberty so to do; which he refused, *Page* 46, 47, 48, 49.—The case, 49, 50.

A *Declaration* in Covenant, by an assignee of an assignee, against an executor for want of repairs. That the Earl of Clare was seised in fee. And demised by indenture. For forty-one years. *Reddendum*. The Covenants.—To pull down some houses, and build up new ones in their room.—That the lessee entered, and was possessed. That the defendant sold the reversion for a year. By virtue whereof, and of the statute of uses, the bargainee became possessed.—The lessor releases the inheritance to the use of himself for life. And after his decease to the grantees for 1000 years.—Seisin thereof by virtue of the statute of uses. That the tenant for life died seised.—That the grantees possessed of the term of 1000 years, by an indenture granted to the de-

fendant's testator for the residue of the term. The tenant for years attorned. The tenant in possession makes his will, and makes the defendant's father his executor, and died possessed; and the defendant proved the will, and entered, and was possessed.—And the grantee in reversion made his will, and devised the reversion to the plaintiff for life; and after his decease to his son in tail, and made the plaintiff his executor, and died; and the plaintiff proved the will, and claimed the tenement by virtue of the bequest. Protesting that the defendant did not perform the covenants on his part. A breach assigned in permitting the premises to be out of repair. Setting forth the particulars. Another breach assigned for want of repairs. Another breach assigned for want of repairs. A *protest* of the will, *Page* 53, 54, 55, 56.

The Defendant pleads performance specially to each breach assigned. An issue tendered, but not taken. Another issue tendered. A third issue tendered. A Demurrer to the first part of the plea. The case, 56, 57.

A *Declaration* in Covenant against an assignee of an executor for rent in arrear.—That the plaintiff was possessed of a term of years yet in being.—And by an indenture demised to the testator. The *Habendum* as to part for such a term. *Habendum* for a further term as to the other part. The *Reddendum* so much as to part. *Reddendum* so much as to the other

Contained in this VOLUME.

other part. A proviso. A clause of re-entry. A covenant for the payment of the rent. An indorsement on the back of the deed. The entry and possession by the lessee.—That the lessee made his will, and appointed the assignor his executrix, and died. And that she proved the will, and entered. And assigned to the defendant. Who entered, and still is possessed. A breach assigned in non-payment of the rent, Page 58, 59, 60, 61.

The Defendant pleads that he assigned over the premises before any rent due. A *Demurrer* to part. A joinder in *Demurrer*.—*Judgment* for the part confessed, and an award of a *Unica Taxatio* as to the costs, 62, 63.

A *Declaration* against one that received the profits of a lunatic's estate, and did not account according to his Covenant. Setting forth the articles. Reciting that Sir *Bethel Wray* was a lunatic.—That the custody of his person and estate was granted to *J. C.* The articles mentioned to be annexed to those on which the action is brought. A *Protestation* of performance. The *Breach*, 63, 64, 65, 66.

A *Plea*,—That before the receipt of the 1800*l.* he laid out 1810*l.* And that he retained the said 1800*l.* towards satisfaction.—A *Demurrer*.—A joinder in *Demurrer*. With *Continuances*. The like. *Judgment*. That the plea is insufficient. A writ of *enquiry* awarded. The case, 67, 68, 69.

A *Declaration* in *Covenant* upon

Articles of Copartnership concerning the trade of a taylor. Setting forth the plaintiff to have such rooms, &c. And the defendant, or his wife, not to ask for the work of their customers after the term, nor to work for them.—The plaintiff to have 50*l.* a year. That if either party died, the survivor within one month should account with the executors or administrators of the party dying. That *Thomas Nicholas* should take or turn away the servants. That neither of the parties should take other servants without the consent of the other. That neither party should owe, or be bound or bail for above 5*l.* A *Covenant* to make up an account at the end of the term, and divide the profit and loss. And after such division, each party to cast a dye for the choice. And he or she that had the highest dye should choose. Each of the said parties should authorize the other to sue. And that *Samuel Hodges*, the husband, should not meddle or concern himself with the partnership-trade. That *Thomas Nicholas*, and no other person, should have the use of the cutting-room, An averment that she lived out the time of the partnership, and is now alive. Performance by the plaintiff. The first *Breach* assigned for not permitting the plaintiff to carry on the trade in the house, but that the defendants hindered the plaintiff therefrom. And denied the plaintiff the sole use of the cutting-room, &c. Another *Breach* that the defendant

A TABLE of the Declarations and Pleadings

defendant solicited the Lord Herbert and Sir William Monack, two customers, after the end of the partnership. That they made several suits of clothes for them. That they did not do their utmost to turn over the partnership trade to the said Thomas. That they the defendants by instigation, solicitations, &c. drew away and prevailed upon people not to employ the plaintiff. That the defendant kept the partnership books from the plaintiff. Several other Breaches of the same nature at several times. That the defendant Samuel became indebted to Peter Humes in more than the sum of 5*l*. And confessed a judgment.—Upon which a *Fieri facias* was sued out. That the sheriff by virtue thereof entered into the house, and took the plaintiff's goods in execution. And that thus the defendant broke the Covenant, Page 71, 72, 73, 74, 75, 76, 77, 78, 79.

An *Impar lance* and a *Plea*.—As to the first Breach in not permitting the plaintiff to carry on the trade in the house.—And an *Issue* joined thereon. To the third Breach the defendant denies it, and tenders an *Issue*, and there is *Demurrer* to that. To the fourth Breach the defendant pleads that neither he or his wife were ever requested, &c. As to the fifth Breach, that they never diverted or drew away any customers, and an *Issue* thereon. To the 6th, 7th and 8th, Breaches that the plaintiff from time to time might have had

the inspection, &c. As to the ninth Breach, that the sheriff of Middlesex did not enter and take the plaintiff's goods.—A *Demurrer* to the several pleas. A joinder in *Demurrer*. *Curia advisare vult* to the *Demurrer*. A *Venire facias* awarded, as well to try the issues as to assess damages, if judgment should be given on the *Demurrers*. The writ of *Nisi prius*, &c. The *Postea*. The first *Issue* found for the plaintiff. The second *Issue* also found for the plaintiff. The third *Issue* found for the defendant. The fourth *Issue* found for the plaintiff. Conditional damages found on the *Demurrer*. Judgment for the plaintiff for part upon the *Demurrer*. Judgment for the defendant for part upon the issue. The case, from Page 78 to 90.

Debt.

A Declaration in debt upon an *Emisset* brought by the plaintiff as executor against the defendant for goods sold by the testator, 177.

A Declaration in debt upon a *Mutatus* by an executor, and the husband and wife co-executrix of an executor of the testator, *ibid*.

A Declaration in debt upon a bond, 178.

A Declaration in an action of debt upon a *Bond* brought by the surviving obligee, *ibid*.

A Declaration upon a bond in an action brought by husband and wife,

Contained in this V O L U M E.

wife, as co-executrix of the of the last will and testament of the obligee, and the other co-executrix against the heir of the obligor, *Page* 179.

A Declaration upon a bond against an executor, *ibid*.

A Declaration upon a bill penal for sixty pounds, by the administrator of *Rock*, against the defendant as aunt and heir of *Elizabeth Clealand*, daughter and heir of *Benjamin Clealand*, *Setting forth* that the said *Benjamin*, whose daughter and heir the defendant is, on *Aug. 2, 1683*, obliged himself, &c. in 60*l.* for the payment of 30*l.* 16*s.* on the third of *February* then next, 180.

A Declaration upon an assignment of a Bail-bond against the principal defendant, at the suit of the assignee of the sheriff, by force of the statute, 181.

Setting forth that the plaintiff sued out a *Capias*. The tenor thereof. That it was delivered to the sheriff — And thereupon the defendant was arrested; that he with others gave a Bail-bond. With a condition to appear at the return of the writ. An averment that he did not appear. That the bond became forfeited, and the same was assigned to the plaintiff. Whereby an action accrued, &c. 181, 182.

A Declaration in an action of debt for rent upon a lease parol laid two several ways, 183.

Setting forth that the Plaintiff demised the premises for a year certain, and so from year to year, &c. Under the rent of 40*l.* per *Ann.* payable quarterly. That the defendant held and occupied, &c. Laid another way. That the plaintiff demised, &c. For a year certain, and then at will. — At the same rent. That the defendant entered, and occupied the premises, *page* 183, 184.

A Declaration upon a recognizance upon a *Habeas Corpus* after judgment in the Common Pleas affirmed in the King's Bench upon a writ of error.

Setting forth that the defendant entered into a recognizance to appear in an action of trespass, &c. And that if judgment should be given for the plaintiff against the defendant, he should pay the money, or render himself to the Fleet, or the money to be levied of the goods and chattels of the conuzor. That the recognizance was delivered into court by the judge to be enrolled. That in this action of trespass a plaint had been levied in the sheriff's court. That before the said morrow of the Ascension the plaintiff sued out an original. — That the defendant appeared thereto. And the plaintiff recovered judgment. — That the judgment was removed by a writ of error. — An averment of the identity. — The breach, 184, 185, 186,

A

A TABLE of the Declarations and Pleadings

A Declaration upon a Judgment in the King's Bench, P. 186.

A Declaration upon a bond against the devisee, pursuant to the statute of 3 & 4 W. 186, 197.

A Declaration in debt against an administrator for rent in arrear, as well in the time of the intestate, as in the time of the administratrix,

Setting forth that N, was seised in fee Nov. 26. 15 Car. 2. and demised the premises to the intestate for seven years, at 20l. per annum rent. That by virtue of the lease the intestate entered, and 17 Sept. 17 Car. 2. died intestate; and administration was granted to the defendant's wife, whereby they entered and were possessed. And ten Pounds were in arrear. The breach.—The case, 187, 188, 189.

A Declaration in debt for rent by the grantee of the reversion, against a tenant that came to the tenements by several mesne assignments,

Setting forth that 16 Apr. 4 C. 1. P. M. was seised in fee. And the same day demised it to T. W. *Habendum* for ninety-nine years, if the lessee and T. B. and A. his wife should so long live.—Rendering 20 s. per Annum rent. That on the first day of April, 20 Car. 2. the lessor died seised of the reversion; that it descended to R. M. his grandson and heir. That on the thirteenth of October, 28 Car. 2. by an indenture for a certain sum of money, he bargained and sold the reversion to the plaintiff. To hold for

a year from the date. That by virtue thereof, and by force of the statute, the bargainee became possessed.—And the fourteenth of Oct. granted the reversion in fee. That the residue of the term came to the defendant by several mesne assignments. The entry of the defendant. The rent in arrear. The breach, P. 190, 191, 192.

A Declaration in debt for rent brought by devisee of the grantee of a reversion, against the lessee of a tenant, by the curtesy,

Setting forth that *Crafford Gibbens* was seised in fee of the reversion expectant on an estate for life; and being so seised on the sixth day of February, 20 Car. 1. by an indenture demised the tenements to *John Litton* for twenty-one years, to commence after the death of tenant for life,—for the rent of ten pounds. That *John Litton* entered by virtue of his lease; that the 18th of March, 20 Car. 1. *Crafford*, by a bargain and sale, inrolled the nineteenth of March, 20 Car. 1. For 87 l. 10 s. Bargained and sold the premises to *Gilbert Kinder*. That the premises were parcel of the manor of B. otherwise D. That by virtue of the bargain and sale, and inrolment, and the statute of uses, *Gilbert Kinder* was seised in fee, and *John Litton* was possessed of the term. That *Gilbert* made a will the ninth of December,

Contained in this V O L U M E.

ber, 22 *Car.* 1. and devised to M. and died.—That Margaret claimed the reversion by the devise. That Margaret afterwards married C. Tooke.—That C. Tooke died, and Margaret became sole seised. That Jn. Litton assigned the term to J. G. the defendant.—That G. G. the tenant for life died. That 5*l.* were in arrear, whereby an action accrued.—The breach, 192, 193, 194.—A *Plea*, That long before Crafford Gibbens had any thing, J. R. H. T. W. R. N. L. and H. F. were seised in fee to the use of Dame Johanna Bradbury in fee. That the second of March, 21 *H.* 8. S. B. devised the premises to Guy Crafford and Johanna his wife in tail.—That Dame J. B. died, and the trustees were seised to the use of the said Guy Crafford and Johanna his, wife in tail.—And then came the statute of uses, by which *cestui que Use* became seised. That Guy Crafford and Johanna his wife died seised, &c.—And the estate descended to Arthur Crafford in tail.—That Arthur died, and the estate descended to M. and W. Crafford as coheirs.—That 44 *Eliz.* he died, and W. became sole seised.—And 18 *Jac.* George Gibbens married W. And became seised in right of the said W. of the estate-tail. That on the last day of December, 2 *Car.* 1. M. W. died, and George became

tenant by the curtesy.—(The reversion belonging to Crafford Gibbens in tail.) That Crafford Gibbens seised of the reversion demised to the said John Litton for twenty-one years, to commence after the death of G. G. tenant for life, at 10*l.* *per Ann.*—That Crafford Gibbens the eighteenth of March, 20 *Car.* 1. by a bargain and sale enrolled, bargained and sold the premises to Gilbert Kinder in fee, by virtue whereof, and of the statute of uses, the bargainee was seised. That John Litton assigned the term to the defendant.—That the tenant for life died. And the defendant as assignee entered, but pleads further that Crafford Gibbens, before Michaelmas, on the twentieth of April, 14 *Car.* 2. died, and the premises descended to S. G. as sole daughter and heir; and the twenty-seventh of September, 19 *Car.* 2. entered upon the defendant and ejected him. And became seised of an estate-tail.

Replication, that the defendant ought not to be admitted to alledge that the lands descended to S. G. as daughter and heir, &c. because that after the bargain and sale, and before the entry of S. G. Crafford Gibbens and Anne his wife levied a fine in Michaelmas-Term 1649, to John Leach.—The fine, with proclamations. *Prout patet per Record* of

A TABLE of the Declarations and Pleadings

of the fine, &c. That by the fine the premisses remained to Margaret and her heirs. The plaintiff prays judgment whether the defendant shall be admitted to plead against the fine; and prays likewise judgment of the debt and damages.

Rejoinder and Protestation that the premisses were divided from the manor; likewise that the premisses were not contained in the fine; that G. K. after the will, and before the fine, died. The case, *Page* 195, 196, 197, 198, 199, 200, 201,

A Declaration for an amercement in a Court-leet,

Setting forth the seisin of K. James I. of a Court-leet. A grant thereof to *Wentworth* by letters patent to be held at such days and times as the said grantee should think fit. That the grantee being seised held several courts, and died. Descent to his son and heir who was seised. Who died without issue, whereby they descended to his brother. Who being seised, by lease and release conveyed to the plaintiff. That the plaintiff thereby became seised. That the defendant was an inhabitant within the jurisdiction of the leet, and owed suit. A court held the twenty-fourth of April 1703. Whereof notice was given to the inhabitants.—The defendants made default in not appearing, whereby the jury presented

him. And he was amerced by the court, and the amercement was affected by the two assessorors chosen and sworn, at 39s. 11d. whereof he had notice, whereby an action accrued, &c.—The case, *Page* 201, 202, 203, 204, 205.

A Declaration in debt for 203l. 10s. upon an escape of R. D. out of execution,

Setting forth that judgment was had in Common Pleas. A *ca. sa.* sued out the same term. The first of August the same year the sheriff made his warrant to the bailiff of the liberty of *Pontefract*. On the first of November in the same year the said R. D. was taken in execution by the defendant, then bailiff of the liberty, and escaped at *Leeds Feb. 3.* That administration was granted to the plaintiff by the Archbishop of *York*.

Plea.—That before the escape supposed, viz. 23 Jan. a writ of *Habeas corpus* issued. The delivery of the writ to the sheriff Jan. 27. by virtue of which writ he had the body of the defendant in court at the day of the return. The return of the cause of his commitment. The commitment of R. D. to the prison of the *Fleet*. An averment that it is the same escape, 207, 208.

Replication protesting that the writ of *Habeas corpus* was not delivered to the defendant before the escape. That the twenty-eighth of November an
Habeas

Contained in this V O L U M E.

Habeas corpus issued, that it was delivered to the defendant the twenty-ninth of December. That after the return thereof, viz. Feb. 3. he took the said R. D. by colour of that writ, and carried him to *Westminster* Feb. 6. and the same day by fraud, &c. the *Habeas corpus* mentioned in the plea was sued out and delivered to the defendant, and not before; that by virtue of the last writ of *Habeas corpus*, the said R. D. was carried to *Westminster* the same sixth of Feb. and thereupon committed to the Fleet; and a *traverse* that he was taken out of prison, and carried to *Westminster*, by virtue of the *Habeas corpus* in the defendant's plea. A special Demurrer. The case, Page 208, 209, 210.

Debt for 800 l. upon a Charter-party of Affreightment,

Setting forth the Charter-party made the fourteenth of February 1698. Whereby the plaintiff granted and demised to the defendant a ship for a trading voyage. That when he should find it convenient he would set sail with his loading of coals, and deliver them at some Western coast, and then set sail to *Sligo* in *Ireland*, and there receive the defendant's merchandizes, and then set sail to such port in *Newfoundland* as the defendant should direct, and there deliver their goods, and then receive on board other goods of the defendant's, and then set sail to some port in *Spain*, *Portu-*

gal, or *France*, as the defendant should direct, and there deliver the defendant's Goods, and take in others. And then set sail to *London*, *Hull*, or *Newcastle*, as the defendant should direct, and then deliver the defendant's goods. A Covenant by the plaintiff that the ship should be well tackled, &c. The defendant's Covenant to load, unload, and dispatch the ship to the said ports, and to pay the plaintiff 50 l. a month.—The several times of payment. The plaintiff and defendant bind themselves in 800 l. for the performance. An averment of performance of every thing on his part. An averment that there were ten months elapsed since the first breaking ground in the Western coast, to the end of the voyage. The Breach, Page 211, 212, 213, 214, 215.

A Declaration upon a judgment in the Common Pleas 216.

A special Plea to a bond for the performance of an award—*Replication* setting forth the award. The case, 217, 218, 219.

A Declaration in debt upon an award. The case, 219, 220.

A Declaration in an action of debt *Qui tam* upon the statute of non-residence.

A writ of error. The return.—The *Placita* in the King's Bench. The memorandum.—The Declaration upon a Botomry bond. Continuances.—

A

A TABLE of the Declarations and Pleadings

A Demurrer. A joinder in *Demurrer*. A joinder in *Demurrer*. Continuances of the *Demurrer*. The *Judgment*.—Errors assigned, P. 221, 222, 223, 224.

A Declaration in debt upon a by-law by a corporation by prescription,

Setting forth that it is an antient vill. A corporation time out of mind to plead and be impleaded. A custom to make by-laws, and to impose penalties. A custom to elect a bailiff annually. The by-law set forth.—The forfeiture. The defendant elected bailiff.—The defendant refused to execute the office.—The case, 225, 226.

A Declaration in an action of debt upon a bill penal, by an executor against an heir. *Riens per discent* pleaded. A *Replication* thereto, 226, 227, 228.

A plea of the statute of Usury to an action of debt upon a bond. The condition. The statute. The usurious contract. A replication. The case, 228, 229, 230.

A special plea to an action of debt upon a bond, with a condition to surrender copyhold lands. *Oyer* of the condition. The *Plea*. That the next court, after making the bond, was held on the fourth day of *April* 1654. that then and there Simon surrendered into the hands of the Lord of the Manor the copyhold lands, to the use of John Wade. That

John after making the surrender peaceably enjoyed the lands, &c. without the interruption of the defendant, or his heirs, &c. A *Replication*. That the messuage, &c. was copyhold, &c. And that the eighth of *April*, 22 Jac. the Lord granted, &c. the lands to P. H. for life; remainder to L. S. A *Surrender* to the use of P. H. for life. Remainder to J. S. and Jane his wife. Remainder to the right heirs of J. S. That L. S. and J. were admitted tenants, &c. That L. S. and P. H. March 1, 1652. died. That Jane entered as into her estate for life. The case, P. 231, 232, 233.

A Declaration upon a by-law of the company of Stationers for not accepting the livery, 235, 236, 237, 238.

A Declaration in debt for the breach of a by-law,

Setting forth that the vill of *Cambridge* is an antient vill. That King James I. by letters patents, granted that they should be a corporation.—That the mayor, bailiffs and burgeses should be a body corporate, by the name of the mayor, &c. With a power to make by-laws.—And to impose fines. That K. Charles I. by his letters patents, granted that one of the burgeses should be mayor, &c. and twelve capital burgeses who should be aldermen, and of their privy council. And that there should be twenty-four common council, assistants, &c.

Contained in this VOLUME.

&c. The by-law, that if any of the common council voluntarily resigned, he should pay 10*l.* to the use of the corporation: A new patent of incorporation by King Charles II. That the defendant was appointed of the common council. And on the thirtieth of April 1689. resigned his place, whereby an action accrued, &c.—The case, *Page* 241.

A Declaration upon a bill penal. And upon an *Emisset*. Impar lance. Payment pleaded as to part. An issue upon the payment, 241, 242. As to the *Emisset* the defendant wages his law, 242.

A Declaration in debt where the defendant is bound in a statute-staple, 243.

A Declaration in debt upon a recognizance acknowledged in the high court of Chancery, *ibid.*

A Declaration in debt upon an award. *ibid.*

A Declaration in debt by a servant against his master for wages, 244.

A Declaration in debt for nursing the plaintiff's child, *ibid.*

A Declaration in debt for an annuity granted by the defendant's wife before marriage, *ibid.*

A Declaration against the warden of the Fleet, for an escape of one committed upon an *Habeas corpus*,

Setting forth that the plaintiff

such a term recovered judgment. The award of execution. Another judgment recovered by the plaintiff.—The commitment to the warden in execution.—The escape.—The case, *P.* 245, 246, 247.

A Declaration in debt for an attorney's fees, 247.

Prohibition.

A Suggestion to have a Prohibition for words.

Setting forth the custom of London to punish whores by carting and whipping.—An averment of the words having been spoken in London, 352, 354, 355.—The case, 356.

A Declaration upon an attachment on a Prohibition.

Setting forth that Huntspill is an antient parish. That the plaintiff is an inhabitant and landholder in the said parish. A Modus of tithing set forth. That Huntspill and Puriton is an antient hundred. That the parish of Huntspill is within that hundred. A custom for the inhabitants within the hundred to be discharged of tithes of meadow and pasture for barren cattle not milched, and employed to the pail or plough, not to be titheable.—That the plaintiff is an inhabitant and landholder within the hundred, and fed cattle there.

A TABLE of the Declarations and Pleadings

there.—That the defendant not being ignorant of the premisses, drew the plaintiff into a suit before the ecclesiastical judge for non-payment of tithes.—

The libel, &c. The case, Page 356, 357, 358, 359.

A Suggestion setting forth the statute of Rich. 2. whereby the admiralty hath no cognizance of any thing done upon the land. Also another statute of Rich. 3. to the same purpose. Another statute of 2 Hen. 4. confirming the former. That the exposition of the statutes belongs to the temporal courts. The breach. By process out of the Admiralty for goods and labour. The libel set forth. An averment that the goods and work were for a ship in the river Thames.—The breach, that the defendant drew the plaintiff into a suit in the court of Admiralty, 359, 360, 361.

A Declaration in Prohibition,

Setting forth that pleas of debt, or upon a contract, or upon the case, for fees, are to be tried in the King's secular courts, and not in the court-christian. *Setting forth* the act of parliament of 20 Hen. 8. that no person should be summoned out of the diocese where he lives. That the plaintiff is an inhabitant within the peculiar jurisdiction of the diocese of Sarum. That he was no inhabitant at London, nor within the diocese of Canterbury. The libel, that it appeared to the judge that he was with-

in age; and although he would have proved all the premisses to be true, yet the said judge refused to admit the allegation and proof, Page 362, 363, 364.

A Plea,

Setting forth the death of the Queen. A writ of consultation. That in the above recited act it was further enacted, that no person should be cited before any ordinary out of the diocese where the person lives, except in case that a bishop, or other inferior judge, having under him jurisdiction in his own right, make request to any Archbishop, &c. That the defendant is one of the Proctors, &c. and at the request of guardian to the plaintiff, brought a citation against the executors of the plaintiff's grandfather, and caused the said executor to be excommunicated. And because she refused to pay, the defendant endeavoured to get his money by suit in the peculiar jurisdiction of Sarum. That the Dean of Sarum made request to the judge of the Prerogative Court of Canterbury. That the Canon law affirmeth the execution of such request.—That the said defendant commenced the suit before the Prohibition came to his hands.

A Replication by protestation, that the Civil or Canon law doth not affirm the execution of the said request. **A Demurrer.** A joinder in Demurrer, 366, 367.

A Dis-

Contained in this V O L U M E.

A Declaration in Prohibition.

Setting forth that time out of mind there hath been a Rector and Vicar, a Rectory and Vicarage of the parish church of Corhampton.—That there hath been, and is a great deal of arable land there. That there has been a great deal of corn reapt there, which would not have been if the hedges and fences had not been kept up, that the tithes have been paid to the rector, his farmer, or deputy;—that there is a custom for the tithes of frithwood; that the wood being used in repairing the hedges.—That the farmer should be encouraged to exercise vilage, and that the hedges might be kept in good repair.—By which the rector has a larger share of tithes which were set out and taken in kind by the rector, &c. in lieu of all tithes of the said frith or wood.—That in the year 1662 and 1663. eighty load of frith had been cut, &c. and had been used and applied to the repairing of the hedges. Sets forth the act of parliament of 2 Rich.—The *Gravamen*, Page 367, 368, 369, 370.

An Imparlane.—A *Plea* denying that the defendant sued after a Prohibition, 371.—The case 371, 372.

A *Suggestion* to have a Prohibition for defamatory words, *Setting forth* the words.—The *Gravamen* by a prosecution

in the court christian, Page 372, 373, 374.

A *Suggestion* by the husband, that the wife ought not to have made a will without his assent. The *Gravamen*, with an allegation that the wife made a will.—That the husband did not assent.—And prayed letters of administration, that notwithstanding the spiritual court proceeded to prove the will, and to give a definitive sentence thereon, 374, 375.

A *Suggestion* for a Prohibition to the spiritual court,

Setting forth that customs ought to be tried at Common law, and belong to the temporal courts of law.—That the defendant libelled the plaintiff, setting forth that there had been, and then was a custom to pay 5 s. for marrying without licence.—That the defendant was Vicar.—The libel. The *Gravamen* that the spiritual court refused a plea, &c. proceeded to sentence, 375, 376, 377.

A *Prohibition* to the spiritual court for tithes upon a suggestion of an antient parol agreement between the predecessor of D. and the proprietors and ter-tenants of the parish of, &c. and to which he had agreed, 378, 379.

Detinue.

Declarations.

A Declaration in Detinue for chattels, [422] a.

The

A TABLE of the Declarations, &c.

The like for a bond, [R. 422.] a:
The like for a box with charters,
which came to the defendant's
hands by finding, *ibid.*

Pleas.

A Plea where the defendant
brings the box into court, and
prays garnishment. Sets forth
that the box was delivered up-
on condition, Prays that the
garnishee may be summoned to
shew cause. A Scire facias is
awarded. An *idem dies datus*.

The return of the Scire facias.

A *Testatum* awarded. The re-
turn of that Scire facias. An
imparlance, [422] b. 423 a.

A Plea in detinue of an horse,
that the plaintiff delivered the
same to the defendant to de-
pasture at his own peril, and
a Traverse that he delivered it
to be safely kept, &c. [423] a.

A Plea as to the detinue of chat-
tels upon an Emisset, where
the defendant says that the
plaintiff, after the bargain
made, commanded and re-
quired him to sell them, [423]
a.

A Replication denying the com-
mand and request, and an Issue
thereon.

Judgment by *Non sum Informatus*
in detinue, [423] b.

COVENANT.

Covenant.

JOHN NUTT and JOSEPH BAKER against WILLIAM HODGSON.

Mich. 3. King George the Second.

London: JOHN NUTT and Joseph Baker, late of London, merchants, were summoned to answer William Hodgson in an action that they perform to him the covenants made between the said William and the said J. and J. according to the force, form and effect of certain indentures of charter party, executed between them, &c. And whereupon the said William, by J. M. his attorney, declares, that whereas by a certain indenture made on the 24th day of October, 1728, at London, (that is to say) in the parish of *St. Mary le Bow*. in the ward of *Cheap*, between the said W. by the name of *W. Hodgson*, mariner, master of the ship *The Happy Return*, burthen fifty tons, or thereabouts, now in the river of *Thames*, of the one part, and the said J. and J. by the name of *John Nutt* and *Joseph Baker* of London, merchants, of the other part, (which said other part thereof sealed with the seals of the said J. and J. the said William brings here into this court, the date whereof is the same day and year) it is testified, that whereas the said master had letten, and the said merchants had hired the said ship for a voyage, in and upon the terms and conditions following: *In the first place*, the said master, for himself, his executors and administrators, hath covenanted, promised and agreed, to and with the said merchants, their executors, administrators and assigns, by the same indenture, the said ship having liberty to take a loading of coals at *Newcastle*, to be delivered at *Hamburgh*, should depart with all convenient speed out of the river of *Thames*, and within ten running days after her arrival at *Hamburgh*, and being ready to take goods, should load, receive, and take on board her, from the said merchants, their factors or assigns; one full and complete loading of pipe staves, or other goods, not exceeding what she could reasonably stow and carry in her, over and above her tackle, apparel and furniture; and the said ten running days being expired, that

A Declaration for Breach of Covenants in an indenture of Charter-party, in not paying for Demurrage, Primage, the Dover duty, and for Freight.

The Charter party set forth,

Covenant.

(P 2)

the said ship (or the said ship there sooner dispatched) should directly, as wind and weather would permit, sail and proceed to *Oporto* in *Portugal*, (or so near thereunto as she might safely come) and there stay till the last day of *January*, then next new stile, if the said ship arrived at *Oporto* before the said first day of *Jan.* but if the said ship should arrive there after the said first day of *Jan.* then the said ship should stay there thirty running days after her arrival, not only to unload and deliver to the said merchants, their factors or assigns, such pipe staves, or other goods, as should be by them, or either of them, loaden on board the said ship at *Hamburgh* aforesaid, but also to reload and receive and take on board her from the said merchants, their factors or assigns, a full and complete loading of wines, not exceeding what she might reasonably stow and carry in her, as aforesaid, and therewith directly as wind and weather would permit, should sail and return to this port of *London*, and there stay twenty days, if not sooner discharged, to unload and deliver to the said merchants, their factors or assigns, all such wines as should be by them, or either of them, loaden on board the said ship at *Oporto* aforesaid, and so end her voyage (the perils and dangers of the seas, and restraint of princes and rulers, during the voyage, always excepted). In consideration whereof, the said merchants, for themselves, executors, and administrators, did jointly and severally covenant, promise and agree, to and with the said master, his executors, administrators and assigns by the said indenture, that they the said merchants, their factors, or assigns, should and would not only fully load the said ship, with pipe-staves and other goods at *Hamburgh*, and unload and discharge the same out of her at *Oporto*, and there fully reload the said ship with wines, and unload and discharge the same out of her at *London*, and in that manner, and within the several days and times therefore above limited, or days of demurrage thereafter mentioned; but also should and would well and truly pay, or cause to be paid unto the said master, his executors or assigns, in full for the freight or hire of the said ship, for the said voyage from *Hamburgh* to *Oporto* and back to *London*, reckoning the same on the wines tonnage, at and after the rate of 2*l.* 5*s.* of lawful money of *Great Britain*, per ton for every ton of wine or other goods that should be loaden on board the ship at *Oporto*, and delivered out of her at *London*, and so proportionably for a lesser quantity than a ton, accounting two pipes or four hogsheds of wine, of the usual and accustomed size to a ton, and ether goods according to custom: together with a hogshedd of good wine, as a present to the master; also primage and average as accustomed; and all port charges and pilotage that should accrue at *Oporto*, the said master being obliged to pay all other port-charges and pilotage that should accrue during the said voyage.

Covenant.

voyage, the said freight to be paid in this manner, viz. 50l. part thereof to become due and be paid upon delivery of the pipe-staves at *Oporto*, at the course the exchange should then rule between *Oporto* and *London*, and the remainder upon the said ship's unloading and right delivery at *London*. *Provided always*, that it should be lawful for the said *merchants*, their factors or assigns, to keep the said ship on demurrage, at *Hamburgh*, *Oporto* and *London*, for the space of fourteen days at each place, besides the days above limited, for her stay at the same, or so many of them as need should require, they or one of them *paying* to the said *master*, his executors or assigns, for every day of such detention, the sum or value of thirty shillings *sterling*, every day, day by day, as the same should grow due, any thing therein contained to the contrary notwithstanding. And to the performance hereof the said parties to the said indenture bound themselves, their executors and administrators, especially the said *master*, his said ship, her freight and appurtenances; and the said *merchants* their goods, to be loaden on board her either to the other, in the penal sum of 300l. *sterling*, firmly thereby, as by the said indenture of charter-party more fully may appear. And although the said *William* hath well and duly performed and fulfilled all and singular the covenants, grants and agreements contained in the said charter-party, on the part of the said *William*, to be performed and fulfilled, the said *William* saith, that in fact after making the said charter-party, (that is to say) on the 19th day of *November*, in the year of our Lord, 1728. the said ship called *The Happy Return*, mentioned in the said charter-party, departed with all convenient speed, out of the River of *Thames*; and from thence, as wind and weather would permit, sailed towards *Hamburgh* and upon the 15th day of that *November*, the said ship safely arrived at *Hamburgh* aforeaid; and after the said arrival of the said ship at *Hamburgh*, (that is to say) on the 19th day of *November* aforeaid, the said ship was then, and not before, fit and ready to receive on board, a full and complete loading of pipe-staves, or any other goods and merchandizes of the said *J.* and *J.* to carry the same to *Oporto* aforeaid, according to the tenor of the said charter-party, of which said premises the said *William* afterwards, (that is to say) the same day and year last mentioned at *Hamburgh* aforeaid, in the parish and ward aforeaid, gave notice to the said *J.* and *J.* and the said *William* further saith, that within ten days after such notice given to the said *J.* and *J.* as above, or within fourteen days after the expiration of the said ten days, that the said ship was so fit and ready as aforeaid, to receive in her such full and complete loading of pipe-staves, or other goods and merchandizes of the said *J.* and *J.* or at any time from thence till the 20th day

(P 3)

Averment
of perfor-
mance by
the plain-
tiff.

That the
ship set sail
such a day.

Arrived at
Oporto.

And was
there ready
to her load-
ing on
board.
Notice.

Covenant.

That they did not load her pursuant to the charter-party. of *March*, in the said year of our Lord, they the said *J. and J.* or either of them, or any other person, by their or either of their order, did not load the said ship with pipe-staves, or any other goods or merchandizes, to be carried from thence to *Oporto*, mentioned in the said charter-party, as by their covenants in the said charter-party on their parts to be performed, they ought to have done. And the said *William* further saith, that in fact, the said ship after her arrival at *Hamburgh* aforesaid, (that is to say) on the said 19th day of *November*, and not before, was fit and ready to receive into her a full and complete loading of pipe-staves, or other goods and merchandizes of the said *J. and J.* and that by defect of loading the said ship by the said *J. and J.* to be loaded according to the tenor of the said charter-party, the said ship was obliged to stay at *Hamburgh*, not only by the space of fourteen days, beyond the said ten days after notice, as aforesaid, given to the said *J. and J.* that the ship was fit and ready to receive into her such pipe-staves, or other goods and merchandizes as aforesaid; but also by the space of sixty-eight days then next following the expiration of the said fourteen days after such notice given as above, by reason of which delay the said *J. and J.* became liable to pay to the said *William*, not only 30s. a day for demurrage of the said ship at *Hamburgh*, for every day of the said fourteen days, in all amounting to twenty-one pounds; but also the said *J. and J.* became and are further liable to pay to the said *William* his damages for his said further demurrage of his said ship at *Hamburgh* aforesaid, by the reason aforesaid, beyond the said fourteen days; which said damages in the whole, amount to the sum of 200*l.* whereof the said *J. and J.* afterwards, (that is to say) on the said day and year, in the parish and ward aforesaid, had notice from the said *William*; which said several sums of 2*l.* and 200*l.* or any part thereof, the said *J. and J.* (although thereto often required) have not, or either of them hath paid to the said *William*, but have and each of them hath altogether refused, and still do refuse to do, contrary to the form and effect of the covenants in the said charter-party on their parts to be performed. And the said *William* further saith, that in fact, as soon as the said *J. and J.* had loaded the said ship at *Hamburgh* aforesaid, (that is to say) on the 20th day of *March*, 1728, the said ship loaded with pipe-staves of the said *J. and J.* departed from *Hamburgh* aforesaid, and proceeded on and sailed towards *Oporto*, mentioned in the said charter-party, and there safely arrived loaded with pipe-staves, as aforesaid, upon the 20th day of *April*, 1729. And the ship so arrived at *Oporto* aforesaid, as soon as the said ship was unloaded at *Oporto* aforesaid, (that is to say) on the 5th day of *May*, in the year aforesaid, the said *J. and J.* loaded

That the ship was obliged to stay there from such a time to such a time.

[P 4]

That they had not paid for the same.

That the ship set sail from *Hamburgh* to *Oporto*.

Covenant.

Loaded the said ship with ninety-eight ton of *bay berries*, one half ton of *fruit in chests*, two ton, thirteen hundred and a half of cork, to be carried from the said place, called *Oporto*, to *London* afore said, in the said parish and ward. And that the said ship loaden with the goods afore said, as soon as wind and weather would permit, proceeded and sailed from *Oporto* afore said, towards *London* afore said. And on the 26th day of *May* in the year last mentioned, the said ship loaded as afore said, with the goods of the said *J. and J.* safely arrived at *London* afore said, in the said parish and ward, and ended her voyage, and there perfected a due unloading of the said goods and merchandizes at *London* afore said, in the said parish and ward, according to the tenor of the said charter-party. And the said *William* saith, that the freight of the goods and merchandizes afore said, by the said *William*, for the said *J. and J.* carried from *Oporto* afore said to *London* afore said, at the rate of forty-five shillings for every ton of the same, computing two pipes or four hogheads to a ton, according to the said charter-party; in the whole amounted to 234l. 7s. 10d. of which said premisses the said *J. and J.* afterward, (that is to say) the same day and year last above mentioned at *London* afore said, in the said parish and ward, had notice thereof from the said *William*: And that the said *J. & J.* or either of them, altho' often requested, have not paid to the said *William*, the afore said sum of 234l. 7s. 10d. for the freight afore said, according to the tenor of the said charter-party, or any part thereof, as they ought to have done; and the said *William* further saith, that in fact the primage for the said goods and merchandize due and paid by the said *William*, for the said ship, from *Oporto* afore said to *London* afore said, by the said *J. and J.* according to the usage of merchants, within that part of *Great Britain* called *England*, used and approved of, (that is to say) at *London* afore said, in the said parish and ward; and the duty payable at *Dover*, called the *Dover duty*, which he the said *William* had paid for the said *J. & J.* that is to say, at *London* afore said, in the parish and ward, for the said goods and merchandizes of the said *J. and J.* carried by the said *William* from *Oporto* afore said, to *London* afore said, and which ought to be repayed to the said *William*, by the said *J. and J.* according to the tenor of the said charter-party, amounts to the sum of 75s. of lawful money of *Great Britain*, whereof the said *J. and J.* afterwards, (that is to say) the day and year last above-mentioned at *London* afore said, in the said parish and ward, had notice from the said *William*, which last mentioned sum, or any part thereof, the said *J. and J.* or either of them (tho' often required) have not, or either of them hath paid to the said *William*, according to the form and effect of the said charter-party. And

Loaded with bay-berries, &c.

Artived at London, and perfected her voyage.

What was due for the freight.

The amount of the primage. (P 5) And of the Dover duty.

Covenant.

so the said *William* saith, that the said *J.* and *J.* (though often required) have not performed, but broken their said covenants made with the said *William*, as above; and have, and each of them hath refused, and still do refuse to perform the same, whereupon the said *William* saith, that he is injured and damaged to the value of 300*l.* and therefore he brings his suit, &c.

Plea, as to the demurrage, that they loaded when she was ready to take in her loading; but that they could not load her, for the river Elye was frozen up.

[P 6]

As to the freight, primage and Dover-duty, that it was paid,

And the said *J.* and *J.* by *S. Draper*, their attorney, come and defend the force and injury, and damages, and whatever else they ought to defend, when and where the court will consider thereof. And as to breaking the covenants, as above supposed to be broken in not paying the said several sums of 21*l.* and 200*l.* the said *J.* and *J.* say that the said *William* ought not to have his action thereof against them, because they plead that right and true it is, that the said ship arrived at *Hamburgh* aforesaid, as the said *William* above in declaring hath alledged; but the said *J.* and *J.* do further plead, that at the time when the said ship was there fit and ready to receive her loading, and from that time until she was loaded, as hereafter mentioned, the said *J.* and *J.* had there ready, and would have loaded her with a full and complete loading of pipe-staves; but that the said ship, at that time, and until the 20th of *March*, 1728, was so hindered and detained there in the river *Elve*, with frost and ice; and the river there during all that time, was so frozen, that the said *J.* and *J.* could not begin to load the said ship with her said loading, till the said 10th day of *March*, betwixt which day and the said 20th day of the same *March*; being the 10th day next after the impediment removed, the said *J.* and *J.* did load the said ship with her full and complete loading of pipe-staves (that is to say) at *Hamburgh* aforesaid, on which day last mentioned, the said ship departed and proceeded from *Hamburgh* to *Oporto*, in such manner and form as the said *William*, by way of declaring hath above alledged; and this they are ready to verify; whereupon they pray judgment, whether the said *William* ought to have his said action against them, as to breaking the said covenant above supposed to be broken, in not paying the said several sums of 21*l.* and 200*l.* and as to breaking the said covenant above supposed to be broken in not paying the said freight, the said *J.* and *J.* plead, That they paid the said *William* the said freight according to the intent and purport of the said charter-party, (that is to say) at *London* aforesaid, in the said parish and ward; and thereof they put themselves upon their country; and the said *William* thereof does likewise the same: And as to breaking the said covenant above supposed to be broken, in not paying the primage and Dover-duty, the said *J.* and *J.* plead that they paid the said *William* the said duty, according to the intent and purport of the

Covenant.

the said *charter-party*, (that is to say) at *London* aforesaid, in the said parish and ward. And this they are ready to verify; and thereof they put themselves upon their country; and the said *William* thereof does likewise the same.

J. BAINS.

And the said *William*, as to breaking the said covenants, in not paying the said several sums of 21l. and 200l. replies, That he, notwithstanding any thing above alledged in the plea of the said *J.* and *J.* ought not to be precluded from having his said action thereof against them, because the said *William* saith, that the River Elbe, mentioned in the said plea was thawed so as to be able to set sail for *Oporto*, before the said tenth day of *March*, in the said plea mentioned, (that is to say) on the nineteenth day of *December*, mentioned in the said declaration, (that is to say) at *Hamburgh* aforesaid, in *London* aforesaid, in the said parish and ward; and this the said *William* prays may be enquired of by the country; and the said *J.* and *J.* pray likewise the same, &c.

Replication on that the river was thawed at the time the defendants plead it was frozen, and might have set sail sooner had she been loaded.

This cause was tried in Michaelmas Term, in the second year of his present Majesty, before the Lord Chief Justice Eyre, at the sittings at Guildhall, London, and the plaintiff obtained a verdict. The declaration was perused and settled by Sir John Cheshyre, one of his Majesty's Serjeants at Law.

Luck against Luck.

Trin. 1 Jac. 2. Roll 1709.

Suffex, ff. John Luck, late of *Penshurst*, in the county of *Kent*, yeoman, otherwise called, &c. (as in the deed), *Thomas France*, late of *Penshurst*, in the said county of *Kent*, otherwise called (as in the deed), and *John Turner*, late of *Penshurst*, in the said county of *Kent*, yeoman, otherwise called, &c. (as in the deed), were summoned to answer to *John Luck*, of *Wadhurst*, in the county of *Suffex*, gent. in an action that they perform to him the covenant made between *John Luck* (now deceased), *Thomas France* and *John Turner*, and one *Peter Sharpe*, now deceased, and the said *John Luck*, the now plaintiff, according to the intent and purpose of a written agreement made between them. And whereupon the said *John Luck* (the now plaintiff, by *Robert Spiller*, his attorney, declares, that whereas by a certain written agreement, made at *Wadhurst*, on the first day of *November*, in the year of our Lord 1678, by the said *John Luck*, (the now defendant) *Thomas France*, and *Margaret* his wife, and *John Turner*, together with the said *Peter*, now deceased, and *Frances* his wife, by the names of (P 7)

N. L. 93. Declaration in covenant, for not saving the plaintiff harmless, &c.

Setting forth the indenture.

John

Covenant.

Recital
that T. L.
died intestate leaving an
estate to
the value
of 705l. 7s.
6d.

That a
moiety belonged to
M. L. relict of T. L. and
another moiety to the defendants and P. S. and
that the defendants have received of the
plaintiff 387l. 13s. 9d. in full
payment of the said moiety and
of their shares.

Breach.

John Luck of *Penshurst*, in the county of *Kent*, yeoman, only brother to *Thomas Luck*, late of *Penshurst* aforesaid, deceased, *Peter Sharpe*, of *Bettenden*, in the said county, gent. and *Frances* his wife, one of the sisters of the said *Thomas Luck*, *Thomas France* of *Penshurst* aforesaid, gent. and *Margaret* his wife, one other of the sisters of the said *Thomas Luck*, and *John Turner* of *Penshurst* aforesaid, yeoman, the only child of *Anne Turner*, widow, deceased, one other of the sisters of the said *Thomas Luck*, (which said indenture, sealed with the seals of the said *John Luck*, the now defendant, *P. S.* and *F.* his wife *T. F.* and *M.* his wife, and *J. T.* the said *John Luck*, the now plaintiff, brings into this court, the date whereof is the same day and year). *It is witnessed*, That the said *J. L.*, the now defendant, *P. S.* and *T.* his wife, *T. F.* and *M.* his wife, and *J. T.* by the said writing brought into this court, reciting therein that the said *T. L.* had died intestate, and had left a considerable estate, to the value of 1775l. 7s. 6d. one moiety or half-part whereof, of right, belonged to the said *Mary Luck*, as relict to the said *Thomas Luck*, which said *Mary* had then lately died intestate; and another moiety or half-part thereof did (as was supposed) belong to the said *John Luck*, now one of the defendants, *Peter Sharp*, *Thomas Frances* and *John Turner*, made it known to all men, that they the said *J. L.* now defendant, *P. S.* and *T.* his wife, *T. F.* and *M.* his wife, and the said *J. T.* had and received of the said *J.* (the now plaintiff) by the name of *J. L.* of *P.* in the county of *Sussex*, Gent. eldest brother to the said *Mary Luck*, now deceased, the full and just sum of 387l. 13s. 9d. of lawful money, in full payment and satisfaction of the said moiety, and of all and whatsoever of their several and respective portions, shares and dividends (the receipt whereof the said *J. L.* now defendant, *P. S.* and *F.* his wife, *T. F.* and *M.* his wife, and *J. T.* by the said writing, severally and respectively acknowledged) and further, by the said writing, they the said *J. L.* (now defendant) *P. S.* *T. F.* and *J. T.* promised for themselves, their executors, administrators and assigns, to save and keep harmless and indemnified, the said *John Luck*, (the now plaintiff) his executors, administrators and assigns, and his and their goods, lands and tenements, from the said moiety; and from every part and parcel of the said moiety, dividend and share; and from all persons who then did, or ought, or might claim any right or interest in the said moiety, share or dividend, as aforesaid: as by the said writing brought into this court more fully may appear. And the said *J. L.* (the now plaintiff) in fact declares, that after the making of the said writing, and before the day of suing out the said original writ, of the said *J. L.* the now plaintiff, (that is to say, on the last day of *June*, in the

Covenant.

The year of our lord, 1683, one *Elizabeth Cambridge*, widow, sister to the said *T. L.* claiming a title and interest in the said moiety of the said estate of the said *T. L.* which by the said writing was supposed to belong to the said *J. L.* (now defendant) *P. S.* and *F.* his wife, and *T. F.* and *M.* his wife; and *T. F.* commenced a suit against the said *J. L.* (the now plaintiff) in the *Court Christian*, held at *Wadhurst* aforesaid, before the worshipful Sir *Richard Lloyd*, Doctor of Laws, Surrogate to the Worshipful and Excellent Sir *Leoline Jenkins*, Knt. also Doctor of Laws, Guardian or Commissary of the prerogative *Court of Canterbury*, lawfully constituted, for her share of the said moiety of the goods of the said *T. L.* which by the said writing was supposed to belong to the said *J. L.* (now defendant) *P. S.* and *F.* his wife, *T. F.* and *M.* his wife, and *J. T.* and in the same *Court Christian*, before the said spiritual judge, prayed to be allowed her share of the said goods, of the said *T. L.* deceased, according to the act of Parliament in that case made and provided; whereupon such proceedings were had in the said *Court Christian*, before the said spiritual judge, that afterwards (that is to say) on the 6th day of *July*, in the said year of our Lord 1683, the said spiritual judge in the said spiritual court, held at *Wadhurst*, in the said county, according to the course of the said court, pronounced and decreed that the said *Elizabeth Cambridge* be allowed her share of the goods of the said *T. L.* and then and there decreed and allowed the same, which said share of the said *Elizabeth*, allowed to her by the said *Court Christian*, as above, amounted in the whole to 43l. 1s. 6d. And the said *J. L.* (the now plaintiff) further declares, that he the said *J.* afterwards (that is to say) on the same day and year last above-mentioned, at *Wadhurst* aforesaid, gave notice to the said *J. L. P. S. F. F. & J. T.* of the said suit and decree had and obtained by the said *Elizabeth* against the said *John* (the now plaintiff) as is above set forth; nevertheless the said *J. L.* (now defendant) *P. S. T. F.* and *J. T.* in the life-time of the said *P. S.* and the said *J. L.* (the now defendant) *T. F.* and *J. T.* after the death of the said *P.* have hitherto not saved harmless, and kept indemnified the said *J. L.* (the now plaintiff) from the said suit and decree had and obtained by the said *Elizabeth*, against the said *J. L.* (the now plaintiff) according to the form and effect of the said indenture; so that the said *J. L.* (the now plaintiff) declares that the said *J. L.* (the now defendant) *P. S. T. F.* and *J. T.* in the life-time of the said *P. S.* and the said *J. L.* (the now defendant) *T. F.* and *J. T.* after the death of the said *P. S.* (although often requested) have not, nor either of them hath performed their said covenant, inasmuch as the said *J. L.* (the now defendant) *P. S. J. F.* and *J. T.* had promised to save harmless

That E. C. sister to the intestate of the father's side, sued the plaintiff in the prerogative court.

[P 8]

For her moiety.

And that thereupon such proceedings were had, that there was a decree against the plaintiff for 43l. 1s. 6d.

Notice.

Breach.

Covenant.

harmless and keep indemnified the said *J. L.* (the now plaintiff) his executors, administrators and assigns, and his and their goods, lands and tenements, from all persons who then claimed, or who ought to, or might claim any right or interest in the said moiety, share part or dividend of the said estate of the said *J. L.* as aforesaid; but they have hitherto altogether refused, and still do refuse to perform the same to the said *J. L.* (the now plaintiff) whereupon the said *J. L.* (the now plaintiff) declares he is injured and endamaged, to the value of 60*l.* and therefore he brings his suit, &c.

(P 9)

ALDWORTH against HUTCHINSON.

Pasch. 4 Jac. 2. Roll 322.

I ut. 329.
N. L. 98.

Declarati-
on that one
Joseph
Aldworth
was out-
lawed at
the suit of
J. S.

That the
23d of
June, 2
Jac. 2. a
special
outlawry
issued a-
gainst A.

T H. late of *Drayton*, in the said county, taylor, otherwise called, &c. (as in the deed) was summoned to answer to *Katharine Aldworth*, Widow, in an action, that he perform to her the covenant made between them, according to the force, form and effect of a certain writing, executed between them, &c. And whereupon the said *K.* by *R. B.* her attorney declares, That one *J. A.* late of *D.* aforesaid, yeoman, on *Monday next after the feast of the apostles Philip and James*, in the second year of the reign of his present Majesty, by due process of law, before that time issuing out of the court of *Common Bench*, of our said Sovereign Lord the King here (that is to say) at *Westminster*, in the county of *Middlesex*, was outlawed in *London*, at the suit of one *James Stonehouse*, in an action of debt, as by the Record thereof, now remaining in the said court of *Common Bench* of our said Sovereign Lord the King, (to wit) in *Easter Term*, in the second year of the reign of his present Majesty, more fully may appear; and the said *Joseph* (being so outlawed, as aforesaid) the said *James Stonehouse*, upon the said outlawry, afterwards, (to wit) on the 23d day of *June*, in the said second year, sued and prosecuted out of the same Court, here, (to wit) at *Westminster*, against the said *Joseph*, his Majesty's writ of *Capias Utlagatum*, directed to the then sheriff of the county of *Berks*; by which said writ our said Sovereign Lord the King, commanded the said then sheriff, that he should not omit, by reason of any liberty in the same county; but that by the oath of honest and lawful men of the same county, he should diligently inquire what goods and chattels, lands and tenements the said *J. A.* had in his Bailiwick. on the said *Monday next after the said feast of the Apostles, St. Philip and James*, in the said second year, or at any time after; and that by their oath,

Covenant.

he should extend, and cause them to be appraised, according to their true value, and take them (being so found there) into the hands of our said Sovereign Lord the King, and safely keep them, so that he answer to his said Majesty, for the true value and profits thereof (and the same being so extended and appraised) whatsoever he should do thereon, he should cause it to be known to his said Majesty's Justices of the Common Bench here, (to wit) at *Westminster* aforesaid, on the octave of St. Martin, then next following, plainly and distinctly, under the said sheriff's seal, and their seals by whose oath he should so make such extent and appraisement. And further, the said sheriff was commanded by the said writ, that he should take the said *Joseph*, if he should be found in his bailiwick, and safely keep him, so that he have his body before the said justices, at the said time, to do and receive that which the said court should consider of in this particular; which writ afterwards, and before the return thereof, (to wit) on the 25th day of *June*, in the said second year, at *Abington* in the said county of *Berks*, was delivered to one *Edward Wiseman*, the younger, Esq; then sheriff of the said county of *Berks*, to be executed in due form of law; and at the time of suing out of the said writ, and of taking the inquisition herein after specified, the said *K.* had in her hands 100*l.* which was then the proper monies of the said *Joseph*, (to wit) at *Abington* aforesaid, and the said *Edward Wiseman*, being then sheriff, as aforesaid, of the said county, at the return of the said writ, returned here to this court, (to wit) at *Westminster* aforesaid, on a certain inquisition taken before him at *Abington* aforesaid, on the 26th day of *July*, in the said 2d year, by the oath of twelve honest and lawful men of the said county of *Berks*, by virtue of the aforesaid writ, by which it is found that the said *J. A.* on the said Monday aforesaid next after the feast of the apostles St. Philip and James, in the said 2d year, and afterwards was possessed of the said 100*l.* as the proper money of the said *J.* being then in the hands and custody of the said *K.* and the said sheriff, then and there further returned to this court, that he the said sheriff, on the day of taking the said inquisition, as much as in him lay, took the said 100*l.* into the hands of our Sovereign Lord the King, (that is to say) he caused the said money to be attached in the hands of the said *K.* to the use of our said Sovereign Lord the King, but could not obtain the actual possession thereof; and that the said 100*l.* then remained, and was in the hands and custody of the said *K.* as by the record thereof remaining in the said court of Common Bench of our said Sovereign Lord the King, at *Westminster* aforesaid, more fully may appear; after which inquisition so taken, as aforesaid, and before the return of the

(P 10)

Delivery of the writ, to be executed.

That at the time of the delivery thereof, the Plaintiff had in her hands 100*l.* of the monies of *J. A.*

Covenant.

That after the inquisition, and before the return of the writ, the Plaintiff paid to H. at the request of the Defendant, 64l. part of the 100l. That the defendant covenanted to save the plaintiff harmless from paying the money.

If a suit should be commenced for so much so that such suit be brought before the end of Michaelmas term then next.

(P II)

Averment that the Defendant hath not paid the 64l.

That a transcript of the Record of the outlawry was delivered to the court of Exchequer

That a scire facias issued out of the court of Exchequer a-

gainst the plaintiff,

the said writ, (to wit) on the 24th day of *August*, in the said 2d year of our said Sovereign Lord the King, at *Abington* afore said, the said *K.* at the request of the said *J. A.* paid to *T. H.* the sum of 64l. part of the said 100l. being in the hands of the said *K.* and in consideration thereof the said *T. H.* afterwards, (to wit) on the same 25th day of *August*, in the said 2d year at *Abington* afore said, by his certain writing, sealed with his seal (which the said *K.* brings into this court, the date whereof is the same day and year) thereby reciting that the said *K. A.* at the request of the said *Joseph*, had paid to the said *T.* the said sum of 64l. out of the monies of the said *J. A.* by the said writing the said *T.* for himself, his executors and administrators, covenanted, promised and agreed to and with the said *K.* her executors and administrators, to keep indemnified, and defend the said *K.* her executors and administrators, of and from all, and all manner of suits, actions, processes, losses, costs, damages, troubles and incumbrances, whatsoever, which should be commenced, arise, happen or accrue to the said *K.* her executors or administrators, by reason of her payment of the said sum of 64l. to the said *T.* or of any suit, process, matter, cause or thing whatsoever, concerning the said payment, or relating thereto, so far as the said sum so paid to the said *Thomas*, amounted to, so that such suit, action, process, complaint, trouble, claim or demand, as should so happen, be brought or commenced against her or them, by or before the end of *Michaelmas* term then next following, as by the said writing more fully may appear; and the said *K.* in fact declares, that the said *T.* at any time hitherto after the making of the said writing, hath not paid to our said Sovereign Lord the King the said 64l. nor hath he paid the same to the said *K.* and that a transcript of the record of the said outlawry, and the said inquisition taken thereupon, was by his said Majesty's court of *Common Bench* delivered into his said Majesty's court of *Exchequer*, at *Westminster*, in the same *Michaelmas* term, above-mentioned in the said writing, that being *Michaelmas* Term, in the 2d year of his said present Majesty, in order for a further execution to be made thereupon, for our said Sovereign Lord the King, by his said court of *Exchequer*, as by the record of the said transcript, now remaining on record in the said court of *Exchequer* more fully may appear. And that in the same *Michaelmas* Term, in the said 2d year, there was sued out of his said Majesty's court of *Exchequer*, his Majesty's writ of *Scire facias*, directed to the then sheriff of the county of *Berks*, by which said writ our said Sovereign Lord the King commanded the then sheriff, that by honest and lawful men of his bailiwick, he should make it known to the said *K.* that she was to be before the Barons of

the

Covenant.

The *Exchequer* at *Westminster* aforesaid, on the octave of *St. Hillary*, then next following, to shew and propose, if the should have or knew any thing to say for herself, why his said Majesty should not have an execution against the said *K.* for the said 100*l.* by virtue of which said writ one *Samuel Jones*, Esq; then being a sheriff of the said county of *Berks*, afterwards, and before the return of the said writ, and before the end of the said *Michaelmas* Term, in the said 2d year, (to wit) on the 27th day of *November*, in the same term, by *John Rose*, and *William Desborough*, honest and lawful men of his bailiwick, he made it known to the said *K.* that she was to be before the said Barons of the *Exchequer*, at the day and place specified in that writ, to shew and propose, according to the tenor of the said writ; and at the day of the return of that writ, the sheriff returned the said writ to the said court of *Exchequer*, at *Westminster* aforesaid; executed in manner as above, as by the record thereof remaining in the said court of *Exchequer* more fully may appear. And inasmuch as the said *K.* had nothing to shew and propose, in bar of the said execution, she the said *K.* did not appear at the said day of the return of the writ of *scire facias* aforesaid, in the said court of *Exchequer*, but made default, for which reason it was then adjudged by the said court, then at *Westminster* aforesaid, that his said Majesty should have his execution against the said *K.* for the said 100*l.* as by the record of the award of the execution remaining in the said court of *Exchequer* at *Westminster*, may likewise more fully appear. And the said *K.* in fact declares that the said *K.* by reason of suing out of the said writ of *scire facias*, before the end of the said *Michaelmas* Term, specified in the said writing, and the award of the execution thereupon, became and is now chargeable to pay to our said Sovereign Lord the King, into the said *Exchequer*, the like sum of 64*l.* paid by the said *K.* to the said *T.* as aforesaid, out of the proper monies of the said *K.* so that the said *K.* declares that the said *T.* (although often thereto requested) hath not performed the said covenant in that particular, but hath broken the same, and hitherto hath refused, and still doth refuse to perform the same to the said *K.* whereupon the said *K.* declares she is injured and endamaged to the value of 100*l.* and thereupon she brings her suit, &c.

That the sheriff before the return, summoned the defendant thereupon.

The return of the sheriff.

That the plaintiff let judgment go by default.

[P 12]

And the said *T.* by *S. T.* his attorney, comes and defends the force and injury when, &c. and pleads that the said *K.* ought not to have her said action against him, because alledging, by way of protestation, that the said *K.* from the time of making the said writing, before the end of *Michaelmas* Term, in the said 2d year, was not damnified, by reason of paying the said sum of 64*l.* to the said *T.* nevertheless, for his defence the said

Plea in bar, with a protestation that the plaintiff was not damnified before the end of *Michaelmas* term.

Covenant.

Traverse as to the time of suing out the writ. said *T.* pleads that his said Majesty's writ of *scire facias* sued out of his said Majesty's court of *Exchequer* in the said declaration, above-mentioned, in truth issued against the said *K.* after the end of the said term, (to wit) on the thirtieth day of *November*, in the said 2d year, *without that*, that his said Majesty's writ of *scire facias*, supposed to have issued out of his Majesty's court of *Exchequer* at *Westminster*, for the recovery of the 100l. in the said declaration mentioned, actually issued before the end of *Michaelmas* term, in the said 2d year, as the said *K.* above declares against him; and this he is ready to verify; whereof he prays judgment, whether the said *K.* ought to have her said action against him, &c.

Rep. And the said *K.* replies, that notwithstanding any thing above alledged, she ought not to be precluded from having her said action against him, because she avers that his said Majesty's writ of *scire facias* bears date on the 29th day of *November*, in the 2d year of the reign of his said present Majesty, that being the last day of the said *Michaelmas* term then following the date of the said writing, *as by the record remaining in his said Majesty's court of Exchequer, more fully may appear*; whereupon she prays judgment, whether the said *T.* shall be permitted to contradict the date of the said writ, *without that*, that his said Majesty's writ of *scire facias*, sued out against the said *K.* out of his Majesty's court of *Exchequer* at *Westminster*, for the recovery of the said 100l. above supposed in the said declaration to have issued, was actually sued out against the end of *Michaelmas* Term, in the year aforesaid, as the said *T.* hath above alledged. *And whereupon*, inasmuch as the said *T.* doth not deny his breaking the said covenant, the said *K.* prays judgment; and that her damages, by reason of the premises, may be awarded to her, &c.

I do not find any material exception to this declaration.

(P 13)

PYKE against PULLEIN.

Trin. 5 W. & M. Roll 660.

Lut. 343.
N. L. 103.
Declaration by an attorney.

London. Robert Pullein, late of *London*, Esq; otherwise called, &c. was attached by their Majesties writ of privilege, issuing out of this Court, to answer to *Richard Pyke*, Gent. one of the attornies of their Majesties court of *Common Bench*, according to the liberties and privileges of the said court, time out of mind used and approved of in the same, for such like attornies, and other officers of the same bench, *in an action* that he perform to him the covenant made between the said *Richard* and *Robert*, according to the form and effect of certain articles of agreement,

Covenant.

ment, executed by the said *Robert* to the said *Richard*; and where- Upon arti-
upon the said *Richard* personally declares, That whereas by cer- cles to per-
tain articles of agreement, made at London aforesaid, [to wit] mit the de-
in the parish of the blessed *Mary of the Arches*, in the ward of fendant to
Cheap, on the 8th day of *July*, in the year of our Lord 1691, receive
between the said *R. P.* by the name of *R. P. of Cambridge*, tithes.
Gent. of the one part, and *R. Pullein*, of the Middle Temple,
London, Gent. of the other part, (which other part sealed with
the seal of the said *Robert*, the said *Richard* brings here into
this court, the date whereof is the same day and year) it was
agreed as followeth: *Imprimis*, It was agreed between the said
parties that *T. P.* vicar of *Southo*, in the county of *Hunting-*
don, should permit and suffer the said *R. P.* to take and receive
to his own use and behoof the tithes, duties and payments
arising, in one whole year, of, from and within the said
parish of *Southo*, and which should be due to the said Accruing
T. P. as vicar of *Southo*, at *Michaelmas* then next, and to *T. P.* as
all the profits, rents and payments which should arise vicar.
within the said parish of *Southo*, or which should be due or
payable at *Michaelmas* then next, to the vicar thereof; and that
the said *T. Pyke*, (if he should be thereto requested) should
make such grant of the said vicarage, and of all manner of That a
tithes and profits belonging to the same, to the said *R. Pullein*, grant shall
as he should think fit and be advised, for the term of the natural be made
life of the said *T. Pyke*, to begin at the feast of *St. Michael* for life.
then last past; and that the said *T. Pyke* should by all lawful
ways and means, upon the request of the said *R. Pullein*, sur- And to sur-
render the said vicarage into the hands of the diocesan, of the render the
said diocese, so that the said *R. Pullein* might present anew to vicarage
the said vicarage, (except the tithes and payments arising out for the de-
of *Haleweston*, which were due at *Lady-day* then last past; fendant to
and an half year's rent of the glebe of the said *Lady-day* then present.
last past) which was agreed to be due and payable to the said
T. P. his executors and administrators, and the said *R. Pullein*,
by the said articles promised to pay to the said *R. Pyke*, his exe-
cutors, or administrators, the sum of 150*l.* upon the second day Covenant
of *February*, then next, in lieu of the said tithes and profits. to pay the
And it was agreed between the said parties that all the small plaint. ff
tithes of the said vicarage, which were payable at the feast of 150*l.* in
St. Martin, the bishop in winter, commonly called *Martinmas*, lieu of
and which did then remain unpaid, should be payable to the tithes.
said *T. P.* his executors or administrators, and not to the said (P 14.)
R. Pullein; and all sums of money due and payable from *Laurence*
Peak, for the great tithes of the said vicarage, for one year then
last past, should be and remain due and payable to the said
Thomas Pyke, his executors and administrators, and not to the
said *R. Pullein*, and that the curate of *Southo* should from
thence

Covenant.

Averment
of perfor-
mance.

Breach
that the
defendant
hath not
paid the
150l.

thence be paid by the said *Robert Pullein*, (as by the said articles more fully may appear) and the said *Richard* declares, that in fact, the said *Thomas Pyke* above-named in the said articles, vicar of the vicarage of *Southo* aforesaid, in the said county of *Huntingdon*, always from the time of making the said articles, had hitherto permitted and suffered the said *R. Pullein* to take and receive to his own use and behoof all the tithes, duties, profits, rents and payments arising and becoming due to the said *Thomas Pyke*, as vicar of the vicarage of *Southo* aforesaid, for one whole year, ending at the said feast of *St. Michael the archangel*, then next following the date of the said articles (except as was before in the said articles before excepted); and the said *Richard* further declares that in fact the said *Robert Pullein* hath not at any time hitherto after the making of the said articles paid to the said *Rich.* the said sum of 150l. or any part thereof, according to the intent and purpose of the said articles; so that the said *Richard Pyke* declares that the said *Robert* altho' often requested) hath not performed, but broken his said covenant made with the said *Richard*, as aforesaid; whereupon he declares he is injured and endamaged to the value of 200l. and therefore brings his suit, &c.

The pledges for prosecuting are { *John Doe*
and
Richard Roe.

Plea that
T. P. died
at Southo.

And the said *Robert*, by *J. R.* his attorney, comes and defends the force and injury when, &c. and pleads that the said *Richard* ought not to have his said action against him, because he avers that after the making of the said articles above recited in the declaration of the said *Richard*, and before the feast of *St. Michael* then next following, (that is to say) on the last day of *July*, in the year aforesaid, the said *Thomas Pyke* died at *Southo* aforesaid; and by his death his title to the said tithes, profits and payments was at an end; whereby the said *Robert* could not take and receive the tithes, duties, profits, rents and payments, payable to him by the said articles, for one whole year, according to the form and effect of the said articles; and this he is ready to verify; wherefore he prays judgment, whether the said *Richard* ought to have his said action against him, &c.

Case.

To which there was a demurrer, and a joinder in demurrer. The defendant in his plea had alledged the death of *T. Pyke* to be in *London*; and it was for that reason held ill, therefore I have alledged his death to be at *Southo*. 1 Sid. 234. 1 Saund. 84. 3 Cro. 184.

Covenant.

** An exception was taken, that this was a Simoniackal Contract; [P* 15] but the court held that the covenant made by the defendant was not in consideration of the former covenants, but merely distinct and independent, and without a special averment; for that purpose they would not intend it a Simoniackal Contract. 1 Lut. 346. N. L. 103.*

Mich. 3 W. & M. Roll 395.

MAJOR, administrator of the goods of J. WOOD,
unadministered by D. WOOD, against D. PECK,
and U. his wife, executrix of R. WOOD.

Heretofore, as it appears, it is thus contained in Roll 1508, of the Term, of the Holy Trinity last past. 1 Lut. 338. N. L. 102.

London, ff. *Daniel Peck*, late of the parish of St. Paul, Covent-garden, in the county of Middlesex, laceman, and *U.* his wife, executrix of the testament of *Richard Wood*, her late husband, deceased, otherwise called, * *Es.* were summoned to answer to *Thomas Major*, administrator of the goods and chattels which were of *John Wood*, at the time of his death, not administered by *D. Wood*, late executrix of the testament of the said *John* with the said will annexed, † *during the minority of Rebecca Wood*, in an action that they perform to the said *Thomas* the covenant made between the said *John* and *Richard*, when they were alive, according to the † form and effect of the said indenture, executed between them and one *Benj. Wood*; (a) and whereupon the said *Thomas*, by *R.H.* his attorney, declares, that whereas by a certain indenture made on the 21st day of Dec. in the 34th year of the reign of his late Majesty King *Charles II.* at London, (to wit) in the parish of the *Blessed Mary of the Arches*, in the ward of *Cheap*, between the said *J. Wood*, in his life-time, by the name of *John Wood*, &c. (as in the deed) of the one part, and the said *Richard Wood*, in his life-time, and the said *Benjamin Wood*, by the names, *Es.* (as in the deed) of the other part, (which other part sealed with the seals of the said *Richard* and *Benjamin*, in the life-time of the said *Richard*, the said *Thomas* brings here into this court, the date whereof is the same day and year) *It is testified* that the said *John Wood*, for and in consideration of the rents and covenants thereafter reserved and contained in the said indenture, on the part and behalf of the said *Richard* and *Benjamin*, their executors, administrators and assigns, to be paid, done and performed, had demised (b) and to farm letten, and by the same indenture did

Declarati-
on by an
admini-
strator of
an admini-
strator, du-
ring the
minority of
an infant,
against a
man and
his wife,
executrix.

An inden-
ture of de-
mise from
the plain-
tiffs intestate, to the
defendants
testator,
and to one
Benjamin
Wood, on
the 21st of
Decemb.
34 Car. 2.
of a house
in Pater-
noster-row

VOL. II. C demise,

* *Richard Wool*, citizen and haberdasher, of London.

† See note 2, page 18. — † force. — (a) &c. — (b) granted.

Covenant.

demise, (a) and to farm let, to the said *Richard* and *Benjamin* all that messuage or tenement, with the appurtenances, commonly called or known by the name of the sign of the *Hare*, situate and being in *Paternoster-row*, in *London*, then in the tenure or occupation of the said *John*, together with all and every the shops, cellars, sollowers, chambers, rooms, ways, passages, lights, easements, water-courses, profits, commodities and appurtenances whatsoever, belonging, or in *any wise appertaining to the said messuage or tenement, and premisses, (excepted and always reserved out of the said demise, to the said *John* and his family, the use of all the (b) messuage or tenement, and free liberty of ingress, egress and regress, in, to and from the said house; and also in, to and from the said shop and warehouse, from time to time, and at all times, during the first two years of the term of years thereafter granted by the said indenture *To have and to hold* the said messuage or tenement, (b) and all and singular the other premisses before by the said indenture mentioned to be demised, and every part thereof, with the appurtenances, (except before excepted) to the said *Richard* and *Benjamin*, their executors, administrators and assigns, from the feast day of the birth of our Lord Christ, next following the date of the said indenture, unto the full end and term of twenty-one years then next following, and fully to be compleat and ended, *Yielding* and *Paying* therefore yearly, and every year, during the said term, the yearly rent or sum of 70l. of lawful money of * *England*, at the four most usual feasts or days of payment in every year, (that is to say) *the Feast of the Annunciation of the Blessed Virgin Mary, the Feast of St. John the Baptist, St. Michael the Archangel, and the Birth of our Lord Christ*, by even and equal portions, free and clear of all taxes, (c) duties, payments and charges whatsoever. And the said *Richard* and *Benjamin*, for themselves, and for each and every (d) of them, their and every of their executors, administrators and assigns, have covenanted, promised and granted, and each of them hath covenanted, promised and granted, to and with the said *John Wood*, his (c) executors, administrators and assigns, and every of them, by the said indenture, in manner and form thereafter following in the said indenture, (that is to say) that they the said *Richard* and *Benjamin* their executors, administrators or assigns, or some, or one of them, should and would well and truly pay, or cause to be paid to the said *J. Wood*, his executors, administrators or assigns, the said annual rent of 70l. at the said four most usual feasts or days of payment in every year, before mentioned in the said indenture, by even and equal portions, during

[P* 16]

Except the use of the house for the first two years of the term

For 21 years, from Christmas then next.

At the rent of 70l. per annum. * Now it must be Great Britain.

The lessees covenant jointly and severally,

That they or one of them would pay the rent.

(a) grant.—(b) aforesaid.—(c) assessments.—(d) Lutwyche in the Anglice, translates the word EVERY in the text of Mallory, by EITHER. (e) heirs.

Covenant.

during the said term of twenty-one years, granted as above by the said indenture, as by the said indenture among other things may appear, by virtue of which said demise they the said *Richard* and *Benjamin*, in the life-time of the said *Richard*, entered into the said tenements, with the appurtenants, and were thereof possessed; and being so possessed thereof, he the said *John*, afterwards, (to wit) on the 20th day of *Decem.* in the 35th year of the reign of our late Sovereign Lord *Charles* the second, late King of *England*, at *London* aforesaid, in the said parish and ward, made his last will and testament in writing, and then and there did thereby constitute the said *D.* sole executrix of his said testament, and afterwards, (to wit) on the tenth day of March, in the year of our Lord, 1684, the said *John* died at *London*, (e) in the said parish and ward, possessed of the reversion, (f) with the appurtenances, after whose death the said *D.* afterwards, (that is to say) on the 21st day of March, in the year of our Lord 1684, at *London* aforesaid, in the said parish and ward, undertook the charge (g) of the said testament, *and then and there proved the same in due form of law; and the said *Richard* afterwards, (that is to say) on the 15th day of Jan. in the year of our Lord 1685, at *London* aforesaid, in the said parish and ward, made his last will and testament in writing, and did thereby (h) constitute and ordain the said *Ursula* sole executrix of his said testament, and afterwards there died, after whose death the said *Ursula* (while she was yet sole) undertook the charge of the execution of the said testament of the said *Richard*, and proved the same in due form of law (namely) at *London* aforesaid, in the said parish and ward. And the said *Thomas* further declares, that the said *Deborah* afterwards, (that is to say) on the 31st day of May, in the year of our Lord 1688, at *London* aforesaid, in the said parish and ward, died intestate, after whose death, (that is to say) on the 21st day of June, in the said year of our Lord 1688, Administration of all the goods and chattels which were the said *John's*, at the time of his death unadministered by the said *Deborah*, late, as aforesaid, executrix of the testament of the said *John*, was by *William*, by Divine Providence, Archbishop of *Canterbury*, Primate and Metropolitan of all *England*, at *London* aforesaid, in the said parish and ward, in due form of law granted to the said *Thomas*, with the said will annexed, until *Rebecca Wood* should attain her age of 21 years; and the said *Ursula* afterwards, namely on the 10th day of June, in the year of our Lord, 1689, at *London* aforesaid, in the said parish and ward, was married to the said *D. Peck*; and the said *Thomas* in fact declares, that 87l. 10s. of the said annual rent for one whole year, arrear.

C 2

(e) aforesaid.—(f) of the said tenements.—(g) of the execution. then and there.

That the lessor the 20th of Dec.

25 Car. 2. made his will, and the said Deborah executrix.

That the 10th of Mar. 1684, he died possessed of the reversion.

[P* 17]

That she proved the will.

That the lessee, Richard Wood, 15 Jan. made his will, and the defendant Ursula executrix.

That she proved the will.

That D. died intestate, & administration de bonis non was granted to the plaintiff, during the minority of R. Wood.

Marriage of the defendant. Rent in year, arrear.

Covenant.

year and a quarter of a year, ending at the feast of *St. John Baptist*, in the 3d year of the reign of their present Majesties, our Sovereign Lord & Lady the King & Queen, after the death of the said *J. W.* and *D.* and after the marriage celebrated between *Daniel* and *Ursula*, were due in arrear, and are yet unpaid, which said 87l. 10s. they the said *D.* and *U.* have not, or either of them hath paid, or caused to be paid, according to the form and effect of the said indenture of *demise*; and therefore the said *Thomas* declares, that the said *D.* and *U.* (altho' often requested) &c. have not, nor either of them hath performed, but have broken the said covenant, made between the said *John Wood* and *Richard Wood*, as above set forth; and they altogether have, (a) and still do refuse to perform the said covenant to the said *Thomas*, to the damage of the said *Thomas* 100l. and therefore he brings (b) this suit; and he brings into this court the *administratorial letters* of the said Archbishop, which testify that *administration* hath been granted to the said *Thomas*, as above alleged, (c) together with this, that the said *Thomas* is ready to verify that the said *Rebecca Wood* is now alive, and within the age of nineteen years, and no more, namely, at *London* aforesaid, in the said parish and ward, &c.

Proffert of
letters of
admini-
stration.
Averment
of the life
of Rebecca
Wood.

Bar. Im-
parlance.
Plea after
the last
continu-
ance, that
Rebecca
Wood was

(P* 18)

And the said *D.* and *U.* by *J. F.* their attorney, come and defend the force and injury, when, &c. and pray leave to imparl thereto till *three weeks from the day of St. Michael*, and they have it, &c. the same day is given to the said *Thomas*, here, &c. at which day come hither, as well the said *Thomas*, as the said *Daniel* and *U.* *his wife, by their said attorneys; and thereupon the said *Thomas* prays that the said *D.* and *U.* may answer to his said declaration; and the said *D.* and *U.* by their attorney, come and defend the force and injury, when, &c. and plead that the said *T. M.* ought not to have his said *action* against them, because they aver that after the last continuance of the said plea, namely, on *Friday* after the morrow of the *Holy Trinity* last past, from which day the plea was last continued to this day, (to wit) on *Friday next after three weeks of St. Michael*, and before this day, (that is to say) on the first day of *October*, in the third year of the reign of his present Majesty, the said *Rebecca Wood*, named in the said declaration, arrived at her full age of twenty-one years, namely, at *London* aforesaid, in the said parish and ward; and this they are ready to verify; wherefore they pray judgment, Whether the said *T. M.* ought to have his said *action* against them, and so forth.

Quære, Whether this be a good plea or not, for it seems by the following cases, Gouldsb. 136. Rolls, Tit. Executors, 188. Brownl. 83.

(a) then and there refused.—(b) brings suit, &c.—(c) &c.

Covenant.

Brownl. 83. 2 Saund. 48. Yelv. 125. 1 Mod. 62. *that an administrator cannot proceed in the action after his authority determined.*

Note—the declaration was held ill for want of those words in the beginning of the declaration which are here printed in Italic, by which it appears to the court, that the plaintiff is but a qualified and limited administrator. 1 Lut. 342.

Temp. Hill, 5 W. & M.

BROOK against JOWET,

Yorksh. ff. William Jowet, late of Hardin, in the said county, miller, otherwise called, &c. was summoned to answer to William Brook, in an action that he perform to the said W. a covenant made between them, according to the force, form, and effect of certain indentures thereof executed between them, &c. and whereupon the said William Brook, by J. C. his attorney, declares, that by a certain indenture made at the Castle of York, (so the plaintiff goes on setting forth the demise of the premisses to the defendant for thirteen years, rendering him 10l. 10s. rent, at the feast of Pentecost, and at Martinmas, with a covenant by the defendant for repairs, and the breach assigned thus;

N. L. 106.
1 Lut. 347.
In covenant for non-payment of rent, and for want of repairs.

And although the said William Brook, hath well and truly performed and fulfilled, all and every thing contained in the said indenture, on his part to be performed and fulfilled; and also alledging by way of protestation, that the said William Jowett hath not performed or fulfilled any thing contained in the said indenture, on his part to be performed and fulfilled, the said William Brook saith, that in fact 31l. 10s. of the said rent, for three years, ending at St. Martin the bishop, in winter, were in arrear at the said feast, and are yet unpaid; and that at the feast of the Annunciation of the Blessed Virgin Mary, in the fifth* year of the reign of their said present Majesties, and for a whole year then last past, a messuage, a barn, a stable, and two other edifices, parcel of the demised premisses were uncovered, for want of a proper covering, whereby the rafters, beams and timber thereof became rotten, ruinous, and in great decay; and the wood and under-pinnings were broken, and greatly decayed, for want of repairs and amendments, and so they remained, during the whole time aforesaid, and the boards of all the chambers of the said messuage, mill and buildings were broken, and became rotten, and greatly decayed, and so remained for the whole time aforesaid; and the windows thereof, during the whole time, became ruinous for want of glazing, and the pails, (to wit) two hundred thereof, and the hedges, (to wit) forty perches of hedges, and the ditches, (to wit)

Breach that 31l. 10s. was in arrear for rent due at Martinmas.
(P* 19)
And that at Lady-Day, and for a year before, the premisses were out of repair.

Covenant.

wit) one hundred perches of ditches, the rails, (to wit) one hundred rails, the gates, (to wit) ten gates, and the stiles, (namely) five stiles, part of the demised premises, remained in great decay, during all that time, for want of repairs and amendments, and the walls of the messuage, stable, barn, and two edifices aforesaid, and the said mill, and the wheels, and grinding-stones thereof, during all that time, wanted repairs, so that the said *William Jorwell*, (although often requested) hath not performed but broken his said covenant with the said *William Brook*, and altogether hath, and still doth refuse to keep the same, to the damage of the said *William Brook*, 40*l.* and therefore he brings his suit, &c.

Bar. And the *W. J.* by *J. B.* his attorney, comes and defends the force and injury when, &c. and as to breaking the said *covenant*, in not paying the said rent, above supposed to be in arrear, the said *W. J.* pleads that the said *W. B.* ought not to have his said action thereof against him, because suggesting, by way of protestation, that the 31*l.* 10*s.* of the said rent, for three years, ending at *St. Martin, the bishop, in winter*, in the 4th year of the reign of their present Majesties, were not in arrear and unpaid to the said *W. B.* at the said feast, the said *W. J.* for his defence pleads, that after the said feast of *St. Martin the bishop, in winter*, in the 4th year of the reign of their said present Majesties, and before the day of suing out the said original writ of the said *W. B.* (that is to say) on the 21st day of *December*, in the same year, at the said castle of *York*, he the said *W. J.* paid to the said *W. B.* 5*l.* 5*s.* in full satisfaction of all rent then due to the said *W. B.* by him the said *W. J.* and of the breach of the said *covenant* in that particular, which said

And as to the want of repairs, that when the premises were out of repair, he repaired them in a convenient time. (P* 20) 5*l.* 5*s.* the said *W. B.* then and there received and accepted of in full satisfaction of all rent due to the said *W. B.* by him the said *W. J.* and of the breach of the said *covenant*, in that particular; and this he is ready to verify; wherefore he prays judgment, whether the said *W. B.* ought to have his said action against him, &c. And as to breaking the said *covenant* in not repairing and supporting the said messuage, barn, stable, mill, two other edifices, pails, hedges, ditches, rails, gates, stiles, and other the said premises, above supposed to be in decay, and out of repair, the said *W. J.* saith that the said *W. B.* ought not to have his said **action* thereon against him, because he pleads that when, and as often as the same, or any part thereof became decayed or wanted any repairs, he the said *W. J.* in a convenient time afterwards, from time to time, well and sufficiently amended and repaired all the said premises in every particular, according to the form and effect of the said *covenant* for that purpose; *Without that*, that the said messuage, barn, stable, mill, two other edifices, pails, hedges, ditches, rails, gates,

Covenant.

gates, stiles, and other the premises, above therefore specified, And ^{tra-} were or any part thereof was out of repair, or in decay, for ^{verses that} want of repairs, in such manner and form as the said *W. B.* hath ^{the mes-} above alledged; and this he is ready to verify; wherefore he ^{suages} prays judgment, whether the said *W. B.* ought to have his said repair. ^{were out of} action against him, &c.

And the said *W. B.* (as to the said plea of the said *W. J.* ^{Replicati-} as to breaking the said covenant, in not paying the said rent ^{on as to the} above pleaded) replies that he ought not to be precluded from ^{rent, non-} having his said action thereon against the said *W. J.* by any ^{payment.} thing above alledged in the said plea, because he replieth that the said *W. J.* hath not paid to the said *W. B.* the said 5*l.* 5*s.* in such manner and form as the said *W. J.* has above alledged in his plea; *and this he prays may be enquired of by the country*; and the said *W. J.* prays likewise the same; and as to the said plea of the said *W. J.* as to breaking the said covenant, in not supporting the said messuage, barn, stable, mill, two other edifices, pails, hedges, ditches, rails, gates, stiles, and all ^{And as to} other the said premises above-mentioned in the said *declaration* the repairs ^{the plain-} above pleaded, the said *W. B.* replies, that he ought not to be ^{tiff main-} precluded from having his said action thereof against the said ^{tains his} *W. J.* by reason of any thing above alledged by him in his ^{declaration} plea, for that the said *W. B.* saith, as before, that the said messuage, barn, stable, mill, two other edifices, pails, hedges, ditches, rails, gates, stiles, and all other the said premises, above specified in the said *declaration*, were out of repair, for want of reparations in such manner and form as the said *W. B.* hath above declared in this particular; *and this he prays may be enquired of by the country*; and the said *W. J.* likewise prays the same.*

Mich. 10 Will. 3.

LAMPLUGH against SHIRES,

Lut. 351.
N. L. 106.

Middlesex, ff. Elizabeth Shires, late of *Slyfield*, in the county of *Surrey*, widow, assignee of one *John Griffin*, was summoned to answer to *Thomas Lamplugh*, clerk, assignee of *Sir Philip Meadows*, Knt. *John Ewer*, *Jacob Harvey* and *Richard Ashby*, who were assignees of one *Thomas Ashby*, in an action that he perform to him the covenant made between the said *Thomas Ashby* and the said *John Griffin*, according to the force, form and effect of certain indentures executed between them; and whereupon the said *Thomas Lamplugh*, by *J. R.* his attorney, declares, That the said *Thomas Ashby*, on the eleventh day ^{A declara-} ^{tion for not} ^{repairing} ^{one of 15} ^{messuages} ^{that was} ^{burnt} ^{down by} ^{fire.} ^{That the} ^{12th of} ^{May, 3*W.*} ^{&M. T. A.} ^{day} ^{was seized} ^{in fee of lands.}

* Therefore, &c.

Covenant.

[P* 21] day of *May*, in the third year of the reign of (a) *their said present Ma^{ty} jesties* was seised of a piece of land, in the parish of *St. Margaret's, Westminster*, in the county of *Middlesex*, in his demesne, as of a fee, and being so seised, he the said *Thomas Ashby* afterwards, (that is to say) on the 11th day of *May*, in the said third year, at the parish aforesaid, in the said county, by a certain indenture, &c. And then the declaration sets forth the demise to Griffin, for sixty-one years, rendering to Ashby, and his heirs, 100l. a year, payable at the four most usual feasts; the first payment to be made on the 25th of March, 1692, and then comes this covenant. And the said *John Griffin*, for himself, his executors, administrators and assigns, and every of them, covenanted, promised, granted and agreed, to and with the said *Thomas Ashby*, his heirs and assigns, in the manner and form following, (that is to say) that he the said *John Griffin*, his executors, administrators and assigns, at or before the feast day of the *Annunciation of the Blessed Virgin Mary*, next following the date of the said indenture, at his and their own costs and charges, in a substantial and workmanlike manner, would erect, build, and fully complete, or cause to be erected, built, and fully completed, fifteen new, good and substantial messuages or tenements, upon the land, or fifteen tofts, thereby demised, the same to be built three stories high, besides cellars and garrets; and also that he the said *John Griffin*, his executors, administrators or assigns, yearly, and every year, during the last sixteen years of the said term thereby granted, would well and truly pay, or cause to be paid to the said *T. Ashby*, his heirs and assigns, the said annual rent of 100l. of lawful money of *England*, upon the feasts and quarterly days above limited and appointed for payment thereof, according to the reservation aforesaid; and that the said *John Griffin*, his executors, administrators and assigns, from time to time, and at all times thence forward, during the said term, from and after finishing the said messuages and edifices, at his and their own costs and charges, would well and sufficiently support, sustain, uphold, maintain, repair, glaze, pave, empty, scower, cleanse, amend and keep the said fifteen messuages or tenements, and premises then begun and intended to be built and finished as aforesaid, upon the said tofts, pieces and parcels of land demised by the said indenture, with the appurtenances, in, by and with all and all manner of necessary reparations, glazings, pavements and cleanings whatsoever, when, and as often as occasion should be or require, by virtue of which said demise, he the said *John Griffin*

A demise
to G.

Covenant
that G.
should
build 15
houles be-
fore Lady-
day then
next.

And to pay
such a rent.
And like-
wise a co-
venant for
repairs.

[a] Of our Lord William, the new King, and our Lady Mary, the late Queen of England, &c.—for the word SAID, &c. in Mallory's text is nonsense, the King or Queen not being before-mentioned.

Covenant.

Griffin entered into the said premises, with the appurtenances, and was thereof possessed, and in and upon the said demised premises afterwards, (that is to say) on the twelfth day of *May*, in the said third year, erected, built and completely finished fifteen messuages, according to his said covenant; and the said *John Griffin* being so possessed, as aforesaid, of the said demised premises, with the appurtenances; and the said *T. A.* being seised of the reversion of the said messuages, with the appurtenances in his demesne, as of a fee, he the said *T. A.* afterwards, (namely) on the 28th day of *September*, in the third year of the reign of his present Majesty, and of our late Sovereign Lady Queen *Mary*, late King and Queen of **England*, (P* 22) &c. at the parish and county aforesaid, by a certain indenture made between the said *T.* of the one part, and Sir *Philip Meadows*, Knt. *John Ewer*, *Jacob Harvey* and *Richard Ashby*, by the names of (as in the deed) of the other part; (which said one part of the said indenture, sealed with the seal of the said *Thomas Ashby*, he the said *Thomas Lamplugh* brings into this court, bearing date the same day and year) in consideration of five shillings of lawful money of *England*, in hand paid to the said *T. L.* by the said *P. M. J. E. J. H.* and *R. A.* at and before the sealing and delivery of the said indenture, bargained and sold to the said *P. M. J. E. J. H.* and *R. A.* and their heirs, the reversion of the said before demised messuages, with their appurtenances, to have and to hold the said reversion of the said tenements, with the appurtenances, to the said *P. M. J. E. J. H.* and *R. A.* their executors, administrators and assigns, from the day next before the date of the said indenture, for and during the full term of one whole year, from thence next ensuing, and fully to be completed and ended, by virtue of which said bargain and sale, and by force of the statute for transferring uses into possession, made and provided, they the said *P. M. J. E. J. H.* and *R. A.* were possessed of the reversion of the said demised premises, with the appurtenances, for the term of one year aforesaid; and they being so possessed thereof, the said *T. A.* afterwards, (namely) on the twenty-ninth day of *September*, in the said third year, at the parish and county aforesaid, by another indenture tripartite, made between the said *T. A.* of the first part, *Katharine Slaughter*, widow, of the second part, and the said *P. M. J. E. J. H.* and *R. A.* of the other part, (the said one part of which tripartite indenture, sealed with the seal of the said *T. A.* he the said *T. L.* brings here into this court, bearing date the same day and year) remised, released, and confirmed to the said *P. M. J. E. J. H.* and *R. A.* and their heirs, the reversion of the said tenements, with the appurtenances, by virtue of which said indentures of bargain, sale and release, and by force of the statute for transferring uses into possession, they

That 15
 houses
 were built.

That T.
 A. granted
 the rever-
 sion to Sir
 P. M. and
 others by
 lease and
 release.

The lease.

The re-
lease.

Covenant.

they the said *P. M. J. E. J. H.* and *R. A.* were seised of the reversion of the said demised premises, with the appurtenances in their demesne, as of a fee; and being so seised thereof, and the said *John Griffin*, being possessed, as aforesaid, of the said tenements, with the appurtenances, they the said *P. J. J.* and *R.* afterwards, (to wit) on the 19th day of *May*, in the fourth year of the reign of his present Majesty, and of his late beloved consort, late *Queen of England*, at the parish and county aforesaid, by a certain indenture, [and so lets forth a bargain and sale from the said *P. J. J.* and *R.* to the plaintiff, *Thomas Lamplugh*, which, to avoid an useless repetition, I have here omitted, inasmuch as it is to be set forth as in the former,] by virtue of which said indentures of bargain, sale and release, and by force of the said statute, the said *T. L.* became seised of the reversion of the said tenements, with the appurtenances, and is now seised thereof in his demesne as a fee, and the said *T. L.* further declares, that in fact the estate, term and interest of the said *John Griffin*, of and in the said tenements, with the appurtenances, demised as aforesaid, to the said *John Griffin*, afterwards, (to wit) on the twenty first day of *May*, in the said fourth year, at the parish aforesaid, in the county aforesaid, became duly vested in the said *Elizabeth Shires*, by virtue whereof the said *E. S.* was, and is now possessed of the said messuages, with the appurtenances; and the said *T. L.* in fact declares, that although the said *T. L.* from the said twentieth day of *May*, in the said fourth year, hath hitherto well and truly observed, performed and fulfilled all and singular the covenants, grants and agreements contained in the said indenture of demise, granted to the said *J. G.* as aforesaid, on the part of the said *Thomas Ashby*, his heirs and assigns, to be observed, performed and fulfilled, according to the form and effect of the said first recited indenture of demise; nevertheless, after that the said *E. S.* became possessed as aforesaid, of the said tenements, (to wit) at the feast of *St. Michael the Archangel*, in the ninth year of the reign of his present Majesty, 55*ol.* of the said rent, for five years and a half, ending at the said feast, was in arrear to the said *T. L.* at the same feast, and were, and now are unpaid by the said *E. S.* and the said *T. L.* further declares, that in fact, after building and finishing the said fifteen messuages, (that is to say) on the fifth day of *March*, in the fifth year of the reign of his present Majesty, and of the said late *Queen*, at the said parish and county, one messuage of the said messuages was burnt and thrown to the ground, and ever since hath, and now doth remain unrepaired and unbuilt, and therefore the said *Thomas* declares that the said *Elizabeth*, although often requested, hath not performed, but broken the said covenant of the said *John Griffin*, inasmuch as the said *John* covenanted for himself,

That Sir
P. M. and
others by a
bargain
and sale
granted
the reversi-
on to the
plaintiff.

(P* 23)
That the
21st of May
4 W. & M.
the term
for years
granted to
G. came by
assign-
ments to
the de-
fendants.

Breach
that 55*ol.*
was in ar-
rear.

That after
the fifteen
houses
were built,
one of
them was
destroyed
by fire, and
not rebuilt.

Covenant.

self, his executors, administrators and assigns, yearly and every year, during the last sixty years of the said term, well and truly to pay, or cause to be paid to the said *T. A.* his heirs and assigns, the said yearly rent of one hundred pounds, upon the feasts or quarterly days above limited, and appointed for payment thereof, by equal portions. And that the said *John Griffin*, his executors, administrators and assigns, from time to time, and at all times from thence, during the said term, from and after finishing the messuages and edifices aforesaid, at his and their own costs and charges, would well and sufficiently support, sustain, maintain, repair, glaze, pave, empty, scour, cleanse and keep the said fifteen messuages or tenements then begun and intended to be built and finished, as aforesaid, upon the said tofts, pieces and parcels of land, with appurtenances, demised by the said indenture, in, by and with all, and all manner of reparations, pavements, cleansing and amendments whatsoever, when and as often as need or occasion should be or require, the the said *Elizabeth* hath not performed, but broken the said covenant, and hitherto hath, and still doth refuse to perform the same to the said *T. L.* whereupon he declares he is injured and endamaged to the value of 1000*l.* and therefore he brings his suit, &c.

This action was held to lie, and the declaration good.*

Trin. 12 W. 3. Roll 305.

(P* 24)

1 Lut. 351.
N. L. 108.

*SNOW against FRANKLYN.

Rutland, ff. *Robert Franklyn*, late of *Castle Bitham*, in the said county, tallow-chandler, otherwise called, &c. (as in the deed) was summoned to answer to *Richard Snow*, Gent. in an action that he perform to him the covenant made between them, according to the force, form and effect of a certain writing executed between them; and whereupon the said *Richard*, by *J. B.* his attorney declares, that whereas by a certain writing made on the twenty-fifth day of *March*, in the year of our Lord 1695, at *Oakham*, in the said county of *Rutland*, (which the said *Richard* brings here into this court, sealed with the seal of the said *Robert*, the date whereof is the same day and year,) it was covenanted and agreed, by and between the said *Richard*, by the name of, &c. (as in the deed) and the said *Robert*, by the name of, &c. (as in the deed) that in consideration the said *Richard* would permit and suffer one *Samuel Pendock*, of *Castle Bitham* aforesaid, Gent. or his assigns, to have and enjoy a certain farm and certain lands in *Shipsham* aforesaid, part of the estate of *Richard Snow*, for a year and a half, to begin from the

Covenant upon an indenture for non-payment of rent.

That the defendant covenanted, that in consideration the plaintiff would permit S. P. to have and enjoy a day

* On demurrer.

Covenant.

arm for a day of making the said writing, at the yearly rent of 72*l.* and year and a half, at the subject to the covenants and agreements then before made concerning the premises, between the said *Richard* and *Samuel Pendock*, that he the said *R. F.* his heirs, executors or administrators, would pay or cause to be paid to the said *R. S.* the sum of 200*l.* then due from the said *Samuel Pendock*, to the said *R. S.* at or before the 25th day of *March* then next following the rent of 72*l.* per annum that the defendant would pay to the plaintiff 200*l.* which that would be due from the said time of making the said writing for the said premises, during the said year and half, and would in all things do and perform those things which were to be done and performed by the said *Samuel Pendock*, relating to the premises, by virtue of a certain agreement, dated on the tenth day of *September*, in the year of our Lord 1693, as by the said writing more fully may appear; and the said *Richard* declares, that in fact, he the said *Richard* permitted and suffered the said *Samuel Pendock*, named in the said writing, to have and enjoy the said farm and lands in *Clipsbam* afore said, mentioned in the said writing, for the said year and an half, beginning from the afore said day of the said writing (that is to say) on the twenty-sixth day of *March*, in the said year of our Lord 1695, at the said yearly rent of 72*l.* and subject to the covenants and agreements then before made concerning the premises between the said *Richard* and *Samuel*, according to the form and effect of the said writing, (that is to say) at *Oakham* afore said; and the said *Richard* further declares, that in fact, the said yearly rent of 72*l.* become due for the premises afore said, during the said year and an half, amounted to 108*l.* (that is to say) at *Oakham* afore said; and the said *Richard* further declares, that in fact, the said *Robert* hath not *paid to the said *Richard* the said yearly rent, for the said premises, during the said year and an half, (to wit) 108*l.* according to the form and effect of the same writing; and thus the said *Robert*, (although often requested) hath not performed to the said *Richard*, but broken his said covenant, and hitherto hath, and still doth refuse to perform the same; whereupon the said *Richard* declares, he is endamaged to the value of 500*l.* and therefore he brings his suit, &c.

Bar. And the said *Robert* by *Richard Borman*, his attorney, comes By concord and defends the force and injury when, &c. and pleads that the said *Richard* ought not to have his said action against him, because he avers that after making the said writing, and before any cause of action accrued to the said *Richard*, by reason of any of the covenants mentioned in the said writing, (that is to say) on the twentieth day of *April*, in the said year of our Lord, 169 , at *Oakham* afore said, it was agreed by the said *Richard* and *Robert*, that he the said *Robert* should pay to the said *Richard* 20*l.* of lawful money of *England*, in full satisfaction

By concord in satisfaction of covenants before any breach.

[P* 25]

Covenant.

saction and discharge of the said covenant; and the said *Richard* then and there received and accepted the said 20*l.* from the said *Robert* in full satisfaction and discharge of the said covenant; and this he is ready to verify; wherefore he *prays judgment*, whether the said *Richard* ought to have his said action against him.

This was held no good plea, the covenants not being broken at the time of the discharge; but if it had been pleaded in discharge of the damages after the covenant broken, it would have been good. *Lut.* 359. 2 *Cro.* 99. *Palm.* 110. 6 *Co.* 43.

RABBET and STOKER.*

* 2 Roll.
Rep. 187.
Contra.

Covenant
in an in-
denture for
not suffici-
ent repair-
ing and
building.

The in-
denture.

The par-
cels.

[P* 26]
The term.

The rent.

John Fry, late of *T.* in the county aforesaid Gent. otherwise called *J. F.* of *E. Sc.* was summoned to answer to *R. M. R. H. Sc.* in an action that he perform to them the covenant made between them, according to the force, form and effect of certain indentures thereof executed between them; and whereupon the said *R.* and *R.* by *J. L.* their attorney declares, That whereas by a certain indenture made at *H.* on the twenty-second day of *September*, in the fifth year of the reign of our Sovereign Lord the King, that now is, between the said *R. M.* and *R. H.* by the names of *R. M. Sc.* of the one part, and the aforesaid *J. F.* by the name of *J. F. Sc.* of the other part, (the other part whereof sealed with the seal of the said *J.* the said *R.* and *R.* bring here into court, the date whereof is the same day and year,) *It is witnessed* that the said *R. M.* and *R. H.* by the same indenture, did demise and to farm let to the said *J. F.* all their mansion-house and farm called *H.* with the water-mill, chapel, dove-house, and all the houses, buildings, gardens, orchards, waters, fishings, lands, meadows, rivers, and pastures, accepted, used, demised, occupied or reputed as parcel or appertaining to the same farm of *H.* and then in the occupation of *W. W.* or his assigns, and all manner of woods and underwoods, of and upon the premises, to have and to hold the said mansion-house, messuage and farm, mill, lands and all* other the premises, by the same indenture demised to the said *J. F.* and his assigns, from the feast of *St. Michael* the archangel, then next following, unto the end and term of 31 years, from thence next following and fully to be complete and ended; yielding therefore yearly, during the term aforesaid, to the same *R. M.* and *R. H.* their heirs and assigns, 50*l.* of lawful money of *England*, at the feast of the annunciation of the Blessed Virgin Mary, and *St. Michael* the Archangel, at the then mansion-house of the said *R. M.* at *S.* in *H.* near *Canterbury*, by equal portions; and the said *R. M.* and *R. H.* for themselves, and each of them, for their and each of their heirs, executors

Covenant.

Covenant
to repair.

Proviso.

Averment
of perfor-
mance

(P* 27)

cutors and assigns, and every of them, by the said indenture, covenanted to and with the said *F.* his executors and assigns, in manner and form following, (that is to say) that the said *J. F.* and his assigns, should and might dig and stub up all the alders and other trees growing or being in the Low Grounds, called the *Brooks*, parcel of the premises demised by the said indenture, and to have and enjoy the same so stubbed up, to his own proper use. And the said *J. F.* for himself, his heirs, executors and assigns, by the same indenture covenanted and granted to and with the same *R. M.* and *R. H.* their heirs and assigns, in the manner following (that is to say) that the said *J. F.* his executors and assigns, from time to time, during the said term, would sufficiently repair and uphold the aforesaid mansion-house, mill, and other the premises, and the mill-dams, barns, fences and enclosures of the premises, from time to time, as often as need should be, and would leave the same so sufficiently repaired at the end, or other sooner determination of the aforesaid term. And that the whole crop of corn, other than the hay and pudware growing upon the premises, should be laid into the barn, and expended on the said premises, and not elsewhere, during the said term. And it was provided by the same indenture, that the said *J. F.* his executors and assigns, should not at any time, during the aforesaid term, consent or suffer the said term demised by the said indenture, or any part thereof, to be demised, granted, or by any means to be alienated to any person or persons, without the consent of the said *R. M.* and *R. H.* their heirs and assigns, in that behalf first had in writing, unless it should be to his wife or sons, daughters or mothers, or to his children issuing of his body. And if the said yearly rent of 50*l.* should happen to be in arrear and unpaid, by the space of four days next after either of the said feasts, at which it ought to have been paid, then five pounds to be forfeited and distrained for and in the name of a pain. And if the aforesaid yearly rent should happen to be behind by twenty-eight days after either of the aforesaid feasts, that then it should be lawful for the said *R. M.* and *R. H.* their heirs and assigns, to re-enter into the aforesaid mansion-house, mill, and other the premises demised by the said indenture, and to possess the same, as in their former estate, as by the said indenture it more fully appeareth. And the said *R. M.* and *R. H.* in fact aver, that although they have performed, fulfilled and kept all and singular the covenants in the indenture aforesaid specified, on their parts to be performed and fulfilled, according to the form and effect of the said indenture; protesting also that the said *J.* hath not kept nor performed any of the covenants or grants above specified in the said indenture on his part to be performed. The said *R.* and *K.* in fact aver that the aforesaid *J.* hath not

Covenant.

not from the time of making the said indenture aforesaid, Breach for hitherto sufficiently repaired and upheld the said mansion-house, mill and other the premises above demised, (that is to say) one hall to the value of 76s. and 8d. a certain inner parlour to the value of 53s. 8d. [and so recite all the places not repaired.] according to the force and effect of the said indenture. And so the said R. and K. alledge that the said J. (inasmuch as the said J. and his assigns, from time to time, during the said term, ought sufficiently to have repaired and upheld the said mansion-house, mill and other the premises, and the mill-dams, barns, fences and inclosures of the premises from time to time, as often as need should be, (although often required) hath not kept his said covenant with the said R. and K. but hath broken the same, and hitherto hath and still doth refuse to keep the same; whereupon they declare that they are injured and endamaged to the value of 100l. and thereof they bring their suit, &c.

As one declaration in covenant seldom differs from another in any thing but the breach; and as the covenants upon which the breaches are to be assigned, must be set forth as in the deed, I apprehend it a needless prolixity to recite every deed itself in the declaration, unless it be in cases where the covenants themselves are very special, and such as could not properly be described otherwise than by setting them forth; I have therefore only inserted a few precedents with common covenants, because the method may be thereby plainly seen and discovered how other declarations in Covenant are to be drawn, and have only been particular as to the several breaches, and in taking notice of some special pleadings under this title.

Mich. 9 Car. 2.

1 Saund.
104.

The DEAN and CHAPTER of BRISTOL against GUYSE.

The plaintiff declares in an action of Covenant, shewing that the Dean and Chapter, on the fifth day of July, in the ninth year of the reign of Queen Elizabeth, did by their indenture demise to George Harvey, the rectory and parsonage of Berkley, with the appurtenances in the county of Gloucester, for sixty years, to commence after the determination of another estate then in esse, and that Harvey covenanted with them for him and his assigns to repair and keep in repair the said premises, and further the declaration goes on as follows: -

As by the said indenture, amongst other things more fully may appear, by virtue of which said indenture the said George Harvey possessed of the reversion of the term.

Covenant by the dean and chapter of Trinity church Bristol, against an executor of an assignee of the reversion of a term.

That G.H. the lessee, became possessed of the reversion of the term.

Covenant.

(P* 28) *Harvey* was possessed of such his estate in *reversion* of and in the said rectory and tithes, and the rest of the premisses, with the appurtenances, after the end and expiration of the residue of *the said term of sixty years, above demised to *T. T. W. L.* &c. [naming the rest of the lessees of the first term,] and the said *G. H.* being so possessed of such his estate, and they the said *Dean and Chapter*, being seised of the *reversion* of the said rectory, they the said *Dean and Chapter* declare, that afterwards, namely, on the fourth day of *May*, in the year of our Lord 1621, the said estate and term of sixty years, heretofore demised to the said *T. T. W. L.* &c. and of all other the tenants and occupiers of the premisses, or any part thereof, ended and determined by means whereof the said *G. H.* afterwards, (that is to say) on the fifth day of *March*, in the year of our Lord, 1621, entered into the said premisses demised to him as afore-
 That Geo. entered.
 That his estate came to W. G.
 That W. G. made his will.
 That he died possessed, &c.
 That W. G. proved the will.
 Averment of performance.

said, by the said *Dean and Chapter*, and was thereof possessed, which said estate and interest of the said *G.* of and in the premisses, one *W. Guyse*, Esq; late had, by proper assignments, and was thereof possessed, and being so possessed, the said *W. G.* afterwards, (that is to say) on the tenth day of *November*, in the year of our Lord 1657, at the said parish of *B.* made his last will and testament in writing, and thereby constituted and appointed the said *Christopher*, the defendant, sole executor of his said will, and afterwards died there, possessed as aforesaid, of the said rectory, tithes and premisses, for the residue of the said term of sixty years, demised to the said *G. H.* in the manner as above set forth; after whose death the said *Christopher Guyse*, the defendant, duly proved the said last will and testament of the said *W. G.* and undertook the charge of the execution of the said will; whereupon the said *C. G.* entered into the said rectory, tithes and premisses demised to the said *G. H.* in the manner as above set forth, and thereof was and now is possessed, during the residue of the said term of sixty years yet to come and unexpired. And the said *Dean and Chapter*, alledging by way of *protestation*, that they have, ever since the making of the said *indenture*, hitherto performed, fulfilled and kept, all and singular the covenants specified in the said *indenture*, on the part of the said *Dean and Chapter* to be performed, fulfilled and kept, according to the form and effect of the same *indenture*, alledging also, by way of *protestation*, that *G. H.* after making the said *indenture*, and before the time that the said *W. G.* had any estate in the premisses; and the said *W. G.* after that the term of the said *G. H.* came to him the said *W. G.* in his life-time, and the said *C. G.* after the death of the said *W.* or either of them, have not performed, fulfilled or kept any of the matters above specified in the said *indenture*, on the part of the said *G. H.* to be performed, fulfilled

Covenant.

fulfilled and kept, according to the form and effect of that indenture, they the said *Dean and Chapter* aver, that in fact, after making the said indenture to the said *G. H.* and after that the estate and interest of the said *G.* in the said rectory, tithes and premisses, became as aforesaid, vested in the said *W. G.* (to wit) on the tenth day of *August*, in the year of our Lord 1657, and after the decease of the said *William*, (to wit) on the 10th day of *August*, in the 16th year of the reign of our Sovereign Lord *Charles* the Second, now King of *England*, &c. the chancel of the parish church of *Berkley* aforesaid, part of the *demised premisses let to the said *G. H.* by the said indenture, was ruinous and in decay, and became naked and uncovered, for want of roofing and leading, whereby the great timber and rafters of the said chancel became (a) rotten, ruinous and in great decay; and also the doors of the said chancel, for want of amendments and repairs, became broken and in great decay; and also the windows of the said chancel, for want of glazing became rotten and ruinous; and the walls of the said chancel became broken and in great decay, for want of sufficient repairs; and also a barn called *Canbury Barn*, in *Berkley* aforesaid, part of the demised premisses, let as above by the said indenture, to the said *G. H.* (to wit) on the 10th day of *August*, in the year last above-mentioned, and for the space of a year afterwards, was ruinous and in decay for want of repairing thereof; and he the said *C. G.* hath permitted the said barn to remain thus ruinous and in decay, for the whole time aforesaid, whereby the great timber of the said barn became rotten and totally spoiled by the rain descending from the skies, and the barn aforesaid, by reason thereof fell to the ground, and became of no value; and neither the said *W.* in his life-time, nor the said *Christopher*, after the death of the said *W.* repaired the said barn, but permitted the same to be thus ruinous and in decay; and the said *Dean and Chapter* further declare, that the said *C. G.* from the said tenth day of *August*, in the said 16th year of his said present Majesty King *Charles* the Second, hath permitted the said chancel and barn to be thus out of repair, ruinous and in decay, so that the great timber, the rafters, doors, windows and walls of the said chancel and barn, by the rain falling from the sky, were and are very rotten, ruinous and spoiled, and the said *Dean and Chapter* declare that inasmuch as the said *G. H.* covenanted for himself, his heirs, executors and assigns, to and with the said *Dean and Chapter*, and their successors, that the said *G. H.* his executors and assigns, would from time to time, during the said term, sufficiently repair, amend and uphold the said barn, houses,

[P* 29]

Breach assigned for want of repairs.

VOL. II.

D

(a) very.

Covenant.

houses, edifices, and other the premisses, when and as often as need should require, and would leave and surrender the same to the said *Dean and Chapter*, at the end of the said term of sixty years, thus sufficiently repaired and amended, he the said *C. G.* (altho' often requested) hath not performed, but hath thus broken the said covenant of the said *G. H.* and the said *C. G.* hitherto altogether hath and still doth refuse to perform the said covenant, to the damage of the said *Dean and Chapter*, 500*l.* and therefore they bring their suit, &c.

Bar. And now at this day (namely) on *Friday* next after the morrow of the *Holy Trinity*, this same term (till which day the said *C. G.* had leave to imparl, and then to answer to the said bill, &c. as well the said *Dean and Chapter*, by their said attorney, as the said *C. G.* by *W. S.* his attorney, come before our Sovereign Lord the King, at *Westminster*; and the said *C. G.* defends the force and injury, when, &c. and pleads that the said *Dean and Chapter* ought not to have or maintain their said action against him, because as to breaking of the said covenant relating to the want of repairs of the said chancel above assigned, the said *C. G.* pleads *that the said *Dean and Chapter* did not *demise* to the said *G. H.* the said chancel in such manner and form as the said *Dean and Chapter* have alledged by the above declaration thereupon; and thereof he puts himself upon his country; and the said *Dean and Chapter* do likewise the same; and as to breaking the said covenant, relating to the want of repairs of the said barn above assigned, the said *C. G.* pleads that the declaration aforesaid of the said *Dean and Chapter*, and the substance therein contained, are not sufficient in law for the said *Dean and Chapter* to have and maintain their said action against the said *C. G.* to which said declaration, in that particular, he the said *C. G.* is under no necessity, or is in any way bound by the law of the land to answer; and this he is ready to verify; wherefore by reason of the defect of the said declaration in that particular, he the said *C. G.* prays judgment; and that the said *Dean and Chapter* be precluded from having their said action against him the said *C. G.* on that occasion, &c.

(P* 30)

And as to the breach of covenant for want of repairs of the barn. **Demurrer.** And the said *Dean and Chapter* reply, That they ought not to be precluded from having their said action against the said *C. G.* on that occasion, because as to breaking the said covenant above assigned, relating to the want of repairs of the said barn, they the said *Dean and Chapter* aver, that the said declaration, in that particular, and the matter therein contained are in law good and sufficient for the said *Dean and Chapter* to have and maintain their said action against the said *C. G.* on that occasion; which said declaration, in that particular, and the matter therein contained, they the said *Dean and Chapter* are ready to verify.

Replication,

As to not repairing the barn, a joinder in demurrer.

And the said *Dean and Chapter* reply, That they ought not to be precluded from having their said action against the said *C. G.* on that occasion, because as to breaking the said covenant above assigned, relating to the want of repairs of the said barn, they the said *Dean and Chapter* aver, that the said declaration, in that particular, and the matter therein contained are in law good and sufficient for the said *Dean and Chapter* to have and maintain their said action against the said *C. G.* on that occasion; which said declaration, in that particular, and the matter therein contained, they the said *Dean and Chapter* are ready to verify.

Covenant.

ready to verify and prove, as the court shall direct; and because that hat said *C. G.* hath not answered to the said declaration in that particular, nor hath hitherto in any manner denied the same, they the said *Dean and Chapter* pray judgment; and that their damages occasioned by the breach of the said covenant, relating to the want of repairs of the barn aforesaid, above imputed to him, may be awarded to them, &c. but because the court of our Sovereign Lord the King, now here, are not advised of giving their judgment of and upon the premisses, whereof the said parties have submitted themselves to the judgment of the court, a day therefore is given to the said parties before our Sovereign Lord the King at *Westminster*, on *Wednesday* next after three weeks of *St. Michael*, for hearing their judgment of and upon the premisses, because the court of our said Sovereign Lord the King are not yet determined, &c. And as to trying the said issue above joined, between the said parties to be tried by the country; as also to enquire what damages the said *Dean and Chapter* have sustained by reason of the breach of the said covenant, whereof the parties have submitted themselves to the judgment of the court, if judgment should happen to be given thereupon for the said *Dean and Chapter*, against the said *C. G.* let a jury therefore come before our Sovereign Lord the King, at *Westminster*, on *Wednesday* next after three weeks of the Holy Trinity, and who neither, &c. to recognise, &c. because as well, &c. the same day is given to the said parties to be there, &c.

Continuances.

Award of the venire, as well to try the issue as to enquire of the damages if judgment should be given on the demurer.

*The exception taken to this declaration was, that the plaintiff had not called the defendant executor in the beginning of the declaration, but had sued him in his own right, so that care must be taken by those that make use of this precedent, to name the defendant executor; for the exception was allowed to be good. 1 Saund. 104. 1 Hob. 932, 188, 283. 2 Cro. 647. Palm. 314. 1 Roll Abr. Dyer 324b. 1 Cro. Eliz. 560. And quære, Whether the plaintiff should have shewn the estate out of which the term was created. Salk. 317. Hut. 35.

BROKE against FULLERHURST.

Lut. 284.
N. L. 89.

The declaration sets forth the bargain and sale, and a covenant to discharge from incumbrances, and another to deliver the writings, evidences and muniments of the estate; and likewise a covenant that the vendor was seised in fee, and had a power to sell, concluding as by the said indenture may plainly appear.

An action of covenant upon an indenture of bargain and sale. Breach, That counsel devised a note of a fine to be levied.

And the said *Ralph* alledging by way of protestation, that the said *Robert* and *Bridget* have not performed, fulfilled or kept any thing in the said indenture, on their parts to be performed, fulfilled and kept, according to the form and effect of the said indenture, he the said *Ralph*, in fact pleads, that one *John Norberry*, (being a counsel skilled in the law,*) after the making of the said inden-

D 2

ture,

* Counsel learned in the law of him the said *Ralph*.

Covenant.

The fine.

ture, and before the day of suing out the original writ of the said *Ralph*, (to wit) on the sixteenth day of *March*, in the seventh year of the reign of her present Majesty, at *London*, aforesaid, in the said parish and ward, devised a note of a fine to be levied for the better assurance of the premisses, with the appurtenances, to have and to hold to the said *Ralph*, and his heirs, in the manner and form following, (that is to say) *Cheshire*, ff. *Command Robert Fullerhurst, Esq; and Bridget his wife, that they justly, &c. perform to Ralph Broke, gent. the covenant made between them, of twenty acres of meadow, and twenty acres of pasture, with the appurtenances, in Worleston and Eadleston. And unless, &c. And the agreement is such, That the said Robert and Bridget have acknowledged the said tenements, with the appurtenances, to be the right of the said Ralph as those which the said Ralph hath of the gift of the said Robert and Bridget; and those they have remised and quit-claimed for themselves and their heirs, to the said Ralph and their heirs, for ever. And moreover, they the said Robert and Bridget have granted for themselves, and the heirs of the said Bridget, that they will warrant the said tenements, with the appurtenances, to the said Ralph, and his heirs, against all men for ever. And for this, &c. which said note of the said fine, the said Ralph afterwards, and before the day of suing out the original writ of the said Ralph, (to wit) on the 20th day of April, in the 7th year of the reign of his present Majesty, at *Crue*, in the said county, requested the said *Robert* and *Bridget* to acknowledge before Sir *John Throckmorton, Knt.* then one of her said Majesty's justices of the said county palatine of *Chester*; but the said *Robert* and *Bridget*, then and there altogether refused to acknowledge the same; and therefore the said *Ralph* declares, that the said *Robert* and *Bridget*, (altho' often requested) have not kept their said covenant made between them, for the assurance of the said premisses, according to the form and effect of the said indenture, but have broken, and altogether refused to perform their said covenant; and do, even now, refuse so to do: whereupon the said *Ralph* declares, that he is injured and endamaged in the value of 50*l.* and thereupon he brings his suit, &c.*

The breach.
That the plaintiff required them to
[P* 32] acknowledge the fine, and they refused.

Bar, That he did not request them, and issue thereupon.

And the said *Robert*, by *Thomas Allen*, his attorney, comes and defends the force and injury, when, &c. and alledging by way of protestation, that the said *John Norberry*, a counsellor at law to the said *Ralph*, did not devise any such note of a fine, as the said *Ralph* doth above suppose by his said declaration, he the said *Robert* pleads for his defence, that the said *Ralph* did not request the said *Robert* to acknowledge the said note of the fine before Sir *John Throckmorton*, to be levied for the better assurance of the said premisses, to the said *Ralph*, and his heirs, as the said *Robert* doth by his declaration above suppose: and

Covenant.

and therefore he puts himself upon the country; and the said Ralph doth likewise the same. *

Hill. 2 Jac. 2. Roll 1385.

KNIGHT against GREENE.

Lut. 297.
Cooke.

Berksh. ff. The declaration sets forth the indenture of demise made by the plaintiff to J.W. the defendant's intestate of a messuage in Chilrey, to hold for ninety-nine years, if the lessee Priscilla, his wife, and John their son, should so long live, rendering twenty-two shillings a year rent; and also rendering to the plaintiff a heriot upon the death of either of the lessees; with a covenant for the lessee to pay the rent and heriot, a covenant to repair, having great timber allowed for that purpose, a covenant likewise to repair the fences, not to make waste, to pay the tithes and taxes, to do suit and service, and the following covenant, (viz.)

Declarati-
on in cove-
nant for
assigning
the pre-
misses
without
the leave of
the lessor.

And that the said John Webb, his executors, administrators and assigns, would not demise, let or set the said demised premises, or any part thereof, to any person or persons whatsoever, during the said term granted by the said indenture, without the license of the said Roger Knight, his heirs or assigns, first had or obtained in writing, under his or their hands and seals. And the said Roger Knight, by the said indenture, for himself, his heirs, executors and administrators, further covenanted, promised and agreed, to and with the said John Webb, his executors, administrators and assigns, and every of them, that he the said John Webb, his executors, administrators and assigns, by and under the said several yearly rents, conditions, covenants and agreements, reserved and mentioned in the said indenture, on his and their parts and behalf, to be paid, performed and kept, would lawfully, *quietly and peaceably have, hold and enjoy the messuage or tenement, and one yardland and an half, and all and singular the said premises, and every part and parcel thereof, with the appurtenances, during the said whole term of ninety-nine years (determinable as aforesaid) without any lawful impediment, charge, suit, molestation or interruption of the said R. K. his heirs or assigns, or any other person or persons whomsoever lawfully claiming, or who should claim, by, from or under him, them, any or either of them, as by the said indenture, amongst other things, may more fully appear; and the said R. further declares, that the said J. by virtue of the said demise in the said indenture above-mentioned, entered into the said tenement, with the appurtenances above demised by the said

Setting
forth the
covenant
not to as-
sign with-
out con-
sent.

(P* 33)

Entry of
the lessee.

D 3

indenture,

* In Lut. said to be ex. MSS. Justice Warburton.

Covenant.

Protesta-
tion of per-
formance
by the les-
sor.

The
breach.

indenture, and was possessed thereof; and although the said *R.* well and truly fulfilled and kept all and every of the covenants, grants and agreements above specified in the said indenture, on his part to be performed, fulfilled and kept, according to the form and effect of the same indenture, alledging also by way of protestation, that the said *J. Webb*, in his life-time, had not performed, fulfilled or kept any of the covenants, promises, grants or agreements above specified in the said indenture, on his part to be performed, fulfilled and kept, according to the form and effect of the said indenture, the said *R. declares*, that in fact, the said *John*, being in his life-time possessed of the said tenements, with the appurtenances, in the manner, as above, he the said *John* afterwards, (that is to say) on the last day of *February*, in the thirty-sixth year of the reign of his late Majesty, King *Charles* the Second, at *Norberry* aforesaid, without the licence of the said *Roger*, in writing, under his hand and seal, first had and obtained, for that purpose, aliened and assigned, to one *R. Bunce*, of *Chilzey*, aforesaid, yeoman, all and every of the tenements and premisses, aforesaid, with the appurtenances, in and by the said indenture above demised, and all his estate and interest, of and in the same tenements, with the appurtenances, for and during all the then residue of the said term (determinable as aforesaid) contrary to the form, and effect of the said indenture, whereby the said *Roger* lost his heriot, due upon the death of the said *John Webb*, according to the form and effect of the said indenture, so that the said *Roger* declares that the said *John Webb*, in his life-time, did not perform, but broke the said covenant made in the manner as above; and the said *John*, in his life-time, altogether refused to perform the same; and the said *Priscilla*, after the death of the said *John*, whilst she was sole, (to whom administration of all the goods and chattels which were the said *John's*, at the time of his death, after his decease, was committed at *Abingdon* aforesaid) altogether refused to perform the said covenant to the said *Roger*; and the said *Richard* and *Priscilla*, after they were married, hitherto have, and now do refuse to perform the said covenant to the said *Roger*; whereupon the said *Roger* declares that he is injured and damaged to the value of 60*l.* and therefore he brings this suit, &c.*

* 1 Sid. 228.
Stiles 463,
106.

[P* 34]

*SAWYER against KILLIGREW.

4 Mod. 39.

Carth. 196.

2 Vent. 79.

S. C.

Covenant

for the sale

of an office

and the

vendor to

have the

pension, &c.

belonging to it for life.

Middlesex, ff. *George Sawyer*, late of *Westminster*, in the said county, otherwise called (as in the deed) was summoned to answer Sir *William Killigrew*, Knt. in an action that he performed to him a covenant made between them, according to the form, form and effect of a certain written agreement, executed between them. And whereupon the said *William*, by *John*

E. d. 10

Covenant.

Edkins his attorney, complains, that whereas he the said *William*, on the twenty-seventh day of *July*, in the thirtieth year of the reign of his present Majesty, at the parish of *St. Martin in the Fields*, in the said county, had held and exercised the office of Vice Chamberlain to her most Serene Majesty, *Katherine*, then Queen of *England*, consort to his late Majesty, and now Queen Dowager of *England*, then and there alive, and to the profits belonging and appertaining to the said office. And whereas afterwards, (that is to say) on the twenty-seventh day of *July*, in the thirty-fourth year of his said late Majesty, at the parish of *St. Martin in the Fields*, in order for a sale of the said office, to be made by the said *William* to the said *George*, by a certain written agreement, executed between the said *William*, by the name of *Sir William Killigrew*, and the said *George*, by the name of *George Sawyer, Esq.* (which said written agreement, sealed with the seals of the said *William* and *George*, bearing date the same day and year, he the said *William* brings into this court) he the said *George*, with the consent and approbation of the said *Queen*, agreed with the said *William* for his said office of Vice Chamberlain; and that he the said *William*, during his natural life, by the agreement of the said *Sir George*, and with the consent of the said *Queen*, should hold, have, enjoy and receive all the profits of the said office of Vice Chamberlain, as fully as he the said *William* held the same (to wit) the yearly pension of two hundred pounds a year of lawful money, to be paid by the said *Queen*, during the life of the said *William*, and his yearly New-year's gifts of one hundred and twenty pounds of lawful money, *per annum*, during his life; and also the yearly fees and livery, being sixty-six pounds a year; and also the salary and board-wages of the Cofferer's-office of one hundred and thirty pounds a year, amounting in the whole to five hundred and sixteen pounds a year, or thereabouts, all which the said *George*, by the said writing, obliged himself that the said *William* should have and enjoy, during the natural life of the said *William*; and that he the said *George* should receive no part thereof, until after the death of the said *William*; and the said *George*, by his said writing, agreed to let the said *William* have, during his life, the lodgings at *Somerset-house*, and the coach-houses there, as by the said writing more fully may appear; and that he the said *William Killigrew*, by his said agreement, by and with the consent of the said *Queen*, was to have, and during his natural life, to enjoy and receive all the profits of the said office of Vice Chamberlain, as fully as he then held the said *office, the said two hundred pounds a year, from the said *Queen*, for a pension, during the life of the said *Queen*; and also the yearly New-year's gift of one hundred and twenty pounds, for his life;

Setting forth the agreement.

[P* 35]

Covenant.

The consent and approbation of the Queen averred. That the plaintiff surrendered. That the defendant was admitted.

The breach.

life; and also his yearly fees and liveries, being sixty-six pounds a year; and also his board-wages from the cofferer's office, of one hundred and thirty pounds a year, in the whole amounting to five hundred and sixteen pounds a year, or thereabouts, all which the said *George* did, by his said agreement, promise to the said *William*, that the said *William* should receive and enjoy, during his natural life; and that the said *George* would not receive any part thereof until after the death of the said *William*; and the said *G.* also agreed with the said *W.* to accommodate and lend to the said *W.* during his life, the use of a chamber over the coach-houses at *Somerset-house*; and the said *W.* declares, that in fact, the said *Queen* then and there consented and approved of all the matters contained in the said agreement; and that he the said *W.* in pursuance of the said agreement, afterwards, (that is to say) the same day and year, at the parish of *St. Martin in the Fields*, in a proper manner, surrendered the said office to the said *Queen*; and thereupon in further pursuance of the said agreement, he the said *G.* by the procurement of the said *W.* was duly admitted into the said office, by the said *Queen*; and he hath ever since held and enjoyed, and now doth hold and enjoy the said office, together with the profits thereto belonging and appertaining; and instead of permitting the said *W.* to receive the said salary and board-wages from the cofferer's-office, of one hundred and thirty pounds a year, nevertheless the sum of seven hundred and eighty pounds of the said salary and board-wages, payable from the cofferer's-office to the vice-chamberlain for six years, ending at the feast of *St. Michael* 1688, was in arrear at that feast, and according to the said covenant and agreement to the said *G.* ought to have been paid to and received by the said *W.* but he the said *George*, after the said feast of *St. Michael*, in the year of our Lord, 1688, and before the suing out of the original writ of the said *W.* (namely) on the first day of *November*, in the year last past above-mentioned, at the parish aforesaid, in the said county, hindered and obstructed the said *W.* in receiving the said sum of seven hundred and eighty pounds, and the said *George*, then and there received the same himself, and (altho' often requested) he the said *George* hath not paid the said sum of seven hundred and eighty pounds to the said *William*, or any part thereof, so that the said *W.* avers that the said *George* hath not performed but broken the said covenant made with the said *W.* in this particular, and always hitherto hath, and still doth refuse to perform the same; whereupon the said *W.* declares he is injured and endamaged to the value of eight hundred pounds; and thereupon he brings his suit, &c.

And

Covenant.

And the said George Sawyer, by H. S. his attorney, comes and defends the force and injury when, &c. and saith that the said W. ought not to have or maintain his said action against him, because he pleads that he the said George, ever since the time of making the said written agreement, even to the day of suing of the said original writ of the said W. hath permitted the said W. to receive yearly, all the sums of money payable from the cofferer's office to the said officer of vice-chamberlain, according to the intent and purpose of the said agreement: *without that*, that the said George hath at any time since the making of the said agreement, to this very time, received or enjoyed any of the profits belonging or appertaining to the said office of vice-chamberlain; and this he is ready to verify; wherefore he prays judgment whether the said W. ought to have or maintain his said action thereon against him, &c.

To which plea the plaintiff demurred, and upon the demurrer judgment was given as follows:

At which day, as well the said plaintiff as the said defendant, by their said attornies, came here; and thereupon the justices of this court, having viewed the premisses, and the same being by them fully understood, it appears to the said justices here in this court, that the said plea of the said G. in such manner and form as the same is above pleaded, and the matter therein contained, are not sufficient in law to preclude the said W. from having his said action against the said George, as the said George has above alledged; therefore it is adjudged that the said W. take no benefit by his said writ, but that he be amerced for his groundless claim; and that the said George be therefrom forever dismissed the court.

Two justices against two, were of opinion that the breach was *well assigned*, because the plaintiff did not shew that the plaintiff was hindered by the defendant in receiving the said money; therefore have altered the words of the breach, as you may see by the words *printed in italic*.

And the said George, for himself, his heirs, executors and assigns, covenanted, promised and agreed, to and with the said Cornelius, his heirs and assigns, by the same indenture, in the manner and form following, (that is to say) that he the said George, his heirs, executors and assigns, from time to time, and at all times, during the said term, demised by the said indenture, at his and their proper costs and charges, would well and sufficiently repair, uphold and maintain the said messuage and tenement, with the edifices thereon; and all the banks, ditches, bridges and fences thereto belonging, in, by and with all and all manner of requisite and necessary reparations, banking, cleansing, dressing, and fencing, and would at the

Plea that the defendant permitted the plaintiff to receive the profits, &c. [P* 36]

Traverse of the receipt of any money by the defendant.

The Case.

Declaration in covenant for want of repairs.

Covenant.

the end of the said term peaceably and quietly leave, surrender and yield up the said premisses demised by the said indenture, together with the said edifices, banks, goytes, bridges and fences, well and sufficiently repaired, banked, cleaned, dressed and fenced, as aforesaid, to the said *Cornelius*, his heirs, or assigns, as by the said indenture, amongst other things may more fully appear; and the said *Cornelius* further declares, that the said *George*, by virtue of the said demise, mentioned in the indenture aforesaid, entered into the said *tenements, with the appurtenances, and was possessed thereof, during the said term, in the said indenture above-mentioned. And altho' the said *Cornelius* hath well and truly performed, fulfilled and kept all every of the covenants, grants and agreements above specified, in the said indenture, on the part of the said *Cornelius* to be performed, fulfilled and kept, according to the form and effect of the said indenture; and the said *Cornelius* also alledging, by way of *protestation*, that the said *George* hath not performed, fulfilled or kept any of the covenants, grants or agreements contained in the said indenture brought into this court, on his part to be performed, fulfilled and kept, according to the form and effect of the said indenture, the said *Cornelius* declares, that in fact, the said *George*, being possessed of the said tenements, with the appurtenances, in the manner, as above, afterwards (to wit) on the twenty-fifth day of *March*, in the first year of the reign of his present Majesty, the said messuage and buildings, and the said banks, (to wit) twenty perches of banks, each perch thereof of the price of ten pounds, ten bridges, each thereof of the price of forty shillings, one hundred perches of fences, each perch thereof of the price of four shillings, one hundred perches of ditches, each perch thereof of the price of four shillings, belonging to the said above demised premisses, were broken down, destroyed, consumed and spoiled, and in great decay for want of convenient and necessary repairing and cleansing thereof; which said messuage, edifices, banks, bridges, fences and ditches so broken down, consumed, spoiled and destroyed, and in great decay, remained thus unrepaired and not upheld from the said twenty-fifth day of *March*, in the said first year to the end of the said term, (that is to say) till the twenty-fifth day of *March*, in the third year of the reign of his present Majesty, so that the said *Cornelius* declares, that the said *George*, altho' often requested) hath not performed, but broken his said covenant with the said *Cornelius*, and hitherto hath, and still doth refuse to perform the same; whereupon the said *Cornelius* declares he is injured and endamaged to the value of two hundred pounds; and therefore brings his suit, &c.

London

Covenant.

London, ff. *E. W.* late of, &c. was summoned to answer to *J. H.* in an action that he perform to him the covenant, &c. And whereupon the said *J.* by *T. L.* his attorney, declares, That whereas the city of *London* is an ancient city, in which said city there is, and time out of mind hath been such an ancient custom used and approved of (that is to say) That every infant, being of the age of fourteen years, and upwards, and within the age of twenty-one years, which puts himself an apprentice to any person, being a citizen, and living within the said city, for the term of seven years or above, to be instructed in the art of such a citizen, and to abide with him after the manner of an apprentice, for the said term of seven years, or above agreed between them; and by his indenture, with his seal sealed and enrolled in the court of our Sovereign Lord the King, holden at the *Guild-hall* of the same city, within *one year and one day after the date of the indenture aforesaid, before the Mayor of the said city, for the time being, covenants with his master to serve his said master, after the manner of an apprentice, during the said term of seven years, or more, agreed on between the same apprentice and his master, is holden and bound to serve such his master, after the manner of an apprentice, during such term agreed on as aforesaid: And if such an apprentice, by his said indenture, covenants with his said master, that he during the term agreed on between him and his said master, will well and truly serve his said master, as well in his art as in other his lawful and honest commands, where-soever to be done; and that he will not absent or eloin himself from his service, but will in all things, as a good and faithful servant, behave himself towards his said master, during the term agreed on between them: And if the apprentice shall do to the contrary thereof, and shall not so well and faithfully, during the said term of seven years, or more, agreed on between him and his master, serve his said master after the manner of his apprenticeship, that then the master of such an apprentice shall have such remedy against his said apprentice, as he would have if such an apprentice had, at the time of making of his indenture aforesaid, been of the full age of twenty-one years or more. And the said *J.* further declares, that the said *E.* being within the age of twenty-one years, (that is to say) of the age of fifteen years, on the twenty-second day of *June*, in the sixth year of the reign of our Sovereign Lord the King, that now is, at *London*, in the parish of the *Blessed Mary*, &c. by his certain indenture made between him and the said *J.* of the one part, and the said *E.* of the other part, (the other part whereof, sealed with the seal of the said *E.* he the said *J.* brings here into this court, the date whereof is the same day and year) covenanted with the said *J. H.* &c. (as in the indenture)

A declaration in covenant upon indentures of apprenticeship, according to the custom of the city of *London*. Setting forth the custom.

[P* 38]

The indentures of apprenticeship.

Covenant.

Averment
of perfor-
mance on
the part of
the plain-
tiff.

The
breach.

(P* 39)

ture) as it may by the said indenture more fully appear; which said indenture, within one year and one day next after the date thereof, that is to say, (such a day and year) was enrolled of record, before the Right Hon. Sir R. B. Knt. then Lord Mayor of the city of *London*, at the *Guild-hall* of the same city. And the said *J.* further declares that he is, and at the time of making of the indenture aforesaid, was a citizen and haberdasher of *London*, and inhabiting within the same city, and hath from the time of making the indenture aforesaid, hitherto occupied the art of a brazier. And the said *J.* further declares, that he hath well and faithfully performed, fulfilled and kept all and singular the covenants, articles and agreements in the indenture aforesaid, above specified, on his part to be performed, fulfilled and kept, according to the form and effect of the indenture aforesaid, alledging, also, by *protestation*, that the aforesaid *E.* hath not performed, fulfilled or kept any of the covenants, articles or agreements in the indenture aforesaid, above specified, on his part to be performed, fulfilled and kept, according to the form and effect of the indenture aforesaid. In fact the said *J.* avers, that the said *E.* after the aforesaid feast of the Purification of the *Blessed Virgin Mary*, in the sixth year aforesaid, and before the end of *the said term of nine years in the aforesaid indenture, above specified, (that is to say) on the second day of *February*, in the second year of the reign of our Sovereign Lord the King, that now is, at *London*, in the parish and ward aforesaid, departed from the service of him the said *J.* without the licence of him the said *J.* his said master, and did utterly refuse further to serve him the said *J.* in his art aforesaid, contrary to the form and effect of the indenture aforesaid; and so the said *E.* (although often times required) hath not performed the covenant aforesaid, inasmuch as the said *E.* hath not abode and dwelt with the said *J.* and served him in the said art of a brazier, as a servant, according to the law and form of the statute in such case made and provided, from the feast of the *Purification of the Blessed Mary*, then next following the date of the indenture aforesaid, until the end and term of one whole year, and so from year to year, until the end and term of the aforesaid nine years, from thence next following, and fully to be completed and ended, but hath broken his said covenant, and hitherto hath, and still doth refuse to perform the same; whereupon the said *J.* declares that he is injured and endamaged to the value of forty pounds; and therefore he brings his suit, &c.

Covenant.

Pasch. 24 *Car.* 2. Roll 180.

WALTON against WATERHOUSE.

2 *Saund.*
415.
3 *Keb.* 40.

London, ff. Be it remembered, that on *Wednesday* next after 15 days from *Easter* day, this same term, *Thomas Walton, Gent.* son and heir of his late father, deceased, one of the clerks of *Sir Robert Henly, Knt.* chief clerk to our Sovereign Lord the King, assigned to inroll pleas in the Court of our said Sovereign Lord the King, before the King himself, according to the liberties and privileges for such chief clerk and his clerks, used and approved of in the same court, for so long a time that there is no remembrance of any man to the contrary, came before our said Sovereign Lord the King at *Westminster*, in his own person, and then brought here into this court of our said Sovereign Lord the King, his bill against *Jasper Waterhouse, Gent.* one of the clerks of *Sir Thomas Fanshawe, Knt.* coroner and attorney to our said Sovereign Lord the King, in his said Majesty's court, before the King himself personally present here in this court, in an action for a breach of covenant, and there are pledges for the prosecution, (namely) *John Doe* and *Richard Roe*; which said bill follows in these words, *ff. London, ff. Thomas Walton, Gent.* son and heir to *Thomas Walton, (a)* deceased, one of the clerks of *Sir Robert Henley, Knt.* chief clerk of our said Sovereign Lord the King, assigned to inroll pleas in the court of our Sovereign Lord the King, before the King himself, according to the liberties and privileges for such chief clerk, and his clerks, used and approved of in the same court, for so long a time as that there is no remembrance of any man to the contrary, came (b) before our said Sovereign Lord the King, at *Westminster*, in his own (c) person, complains of *Jasper Waterhouse, Gent.* one of the clerks of *Sir Thomas Fanshawe, Knt.* coroner and attorney of our said Sovereign Lord the King, in his said Majesty's court, before the King himself, personally present here in this court, in an action for a breach of covenant for this cause (namely) that whereas the said *Thomas Walton*, the father in his life-time, (to wit) on the eleventh day of *August, 1656.* was seised of and in a messuage, with the appurtenances, situate, lying and being in the parish of *St. Bridget, alias St. Bride's, London*, in the ward of *Farringdon without*, in his demesne, as of a fee; and being thus seised thereof, he the said *Thomas Walton*, the father, (when alive) namely, on the said twenty-fourth day of *August*, in the said year of our Lord 1656,

A declaration in an action of covenant for want of repairs, brought by the plaintiff, as son and heir, upon a covenant to his father. The memorandum

The declaration.

(P* 40)

Setting forth the

(a) His late father.—(b) the word came is not in the original.—(c) proper.

Covenant.

indenture,
bearing
date the
twenty-
fourth day
of August,
1656.

The cove-
nant to re-
pair.

And to
leave the
said pre-
misses well
repaired,
&c. at the
end of the
Term.

[P* 41]

1656, at *London* aforesaid, in the said parish and ward, by an indenture then and there executed between the said *Thomas*, by the name of *Thomas Walton*, of the parish of *St. Giles in the Fields*, in the county of *Middlesex*, citizen and sadler of *London*, of the one part, and the said *Jasper*, by the name of *Jasper Waterhouse*, of *Staple's Inn*, *Holborn*, in the said county, Gent. of the other part, which other part of the indenture (sealed with the seal of the said *Jasper*) the said *Thomas*, the son, brings into this court (bearing date the same day and year) demised, granted, and to farm let to the said *Jasper Waterhouse*, the messuage aforesaid, with the appurtenances [reciting the deed with this covenant]. And the said *Jasper Waterhouse*, for himself, his executors, administrators and assigns, and every of them, by the same indenture, covenanted, promised and granted, to and with the said *Thomas Walton*, the father, his heirs and assigns, in manner and form following, (that is to say) that he the said *Jasper Waterhouse*, his executors, administrators and assigns, some or one of them, at his or their, or some of their own costs and charges, would well and sufficiently support, uphold, maintain and keep, and against wind and tempest make defensible the said messuage or tenement, and all other the premises granted by the indenture aforesaid, in, by and with all, and all manner of needful and necessary reparations and amendments whatsoever, when, where, and as often as need should be or require, during the term demised by the indenture aforesaid; and would also, at his and their like costs and charges, during the term demised, as aforesaid, pave, repair, scour, cleanse and amend, all and singular the pavements, widraughts, sewers, sinks and gutters, of and belonging to the said demised tenement, as well within the said messuage as without; and the pales before the door, together with the brick-wall in the yard, and backside joining to the square, there, when, and as often as need should be or require, and would, at the end of the said term of twenty-one years, or other sooner determination of the said indenture, which should first happen, peaceably and quietly surrender and yield up the premises aforesaid, thus well and sufficiently repaired, supported, paved, scoured and cleansed in every particular; and all the glass-windows, with the shutters thereof, well and sufficiently glazed and amended; together with all such sheds and partitions as should then afterwards be built on any part of the premises demised by the indenture aforesaid: as by the said indenture, among other things, it doth and may more fully and at large appear, by virtue of which demise, the said *Jasper* entered into the said messuage, with the appurtenances (the reversion thereof belonging to the said *Thomas Walton*

Covenant.

the father, and his heirs) and he the said *Jasper*, being thus possessed, as aforesaid, of the said messuage, with the appurtenances; and the said *Thomas Walton*, the father, being seised of the reversion of the messuage aforesaid, in his demesne, as of a fee, he the said *Thomas Walton*, the father, afterwards, (to wit) on the 20th day of *Sept.* in the 20th year of the reign of his present Majesty at *London* aforesaid, in the said parish and ward, died seised of the reversion of and in the said messuage, with the appurtenances, after whose decease the said messuage, with the appurtenances, descended to the said *Thomas*, the son, as son and heir to the said *Thomas*, the father, whereby the said *Thomas* the son, became seised of the reversion of the said messuage, with the appurtenances, in his demesne as of a fee; and the said *Thomas*, the son declares, that in fact, he the said *Thomas* the son, being thus seised, as aforesaid, of the messuage aforesaid, with the appurtenances; and the said *Jasper Waterhouse*, being possessed, as aforesaid, of the said messuage, with the appurtenances, afterwards, (namely) on the Twentieth day of *September*, in the twentieth year aforesaid, the said messuage, with the appurtenances, were totally thrown down and fell to ruin; and the said *Jasper* did not sufficiently repair, uphold or maintain the messuage aforesaid, with the appurtenances, with needful and necessary reparations and amendments; but on the day and year last above mention'd, and continually ever since, permitted the messuage aforesaid, with the appurtenances, to be totally ruinous and broken down, contrary to the intent and purport of the covenant aforesaid, of the said *Jasper*, in that particular. And the said *Thomas*, the son, declares, that the said *Jasper*, though often required, &c. hath not performed his covenant aforesaid, to the said *Thomas*, the son, but hath thus broken the same, in that instance; and hitherto hath, and still doth altogether refuse to perform the same to him, to the damage of the said *Thomas*, the son, three hundred pounds; and thereupon he brings his suit, &c.

And the said *Jasper*, in his own person comes and defends the force and injury when, &c. and pleads that the said *Thomas Walton* ought not to have his said action against him, because he avers, that after the demise of the messuage aforesaid, made to the said *Jasper*, by the said *Thomas Walton*, the father, in the manner as above; and before the said messuage was broken down and became ruinous (namely) on the twenty-seventh day of *March*, in the seventeenth year of the reign of his said present Majesty, at *London* aforesaid, in the said parish and ward, the said *Jasper*, granted and assigned, to one *George Johnson*, his executors, administrators and assigns, the messuage aforesaid, with the appurtenances; and all the estate, right, title and term of years, of him the said *Jasper Waterhouse*, of and to *George Johnson*.

That *Jasper* entered into the premises, by virtue of the demise. That *Thomas Walton*, the father, died.

That the premises descended to *Thomas Walton*, the son.

Plea that after the lease made to the said *Jasper*, and before the premises fell to the ground

Covenant.

(P* 42) and in the same, then to come and unexpired, by virtue of which said grant and assignment, he the said *George Johnson* *entered into the said messuage, with the appurtenances, and was possessed thereof; and being thus possessed thereof, the said *Jasper* further pleads that the messuage aforesaid, with the appurtenances, was afterwards burnt, destroyed, and demolished by a great fire, which burnt and consumed the greatest part of the city of *London*, and that in a convenient time, after the destruction of the messuage aforesaid, and before the exhibiting of the said *Thomas Walton's* bill, (namely) on the first day of *April*, in the twenty-first year of the reign of his present Majesty, the messuage aforesaid, with the appurtenances, were well and sufficiently rebuilt, repaired, supported, upheld and maintained, with all needful reparations and amendments, and the same are now in good and sufficient repair, according to the intent and purport of the indenture aforesaid; and this he is ready to verify; whereupon he prays judgment, whether the said *Thomas Walton* ought to have his said action against him, &c.

Edmund Saunders.

Demurrer. *And* the said *Thomas* replies, that he (notwithstanding any thing above alledged by the said *Jasper*, in his plea) ought not to be precluded from having his said action against him, because the said *Thomas* avers, that the plea aforesaid, in the manner and form as the same is above pleaded by the said *Jasper*, and the matter therein contained, are not sufficient in law to preclude the said *Thomas* from having his said action against the said *Jasper*, to which plea the said *Thomas* is under no necessity, nor in any wise bound by the law of the land to make answer; and this he is ready to verify; whereupon, for want of a sufficient answer in this particular, the said *Thomas* prays judgment, and his damages occasioned by the premisses to be awarded to him, &c. And for causes of demurrer in this plea, the said *Thomas*, according to the direction of the statute in such case made and provided, shews to and lays before this court the following reasons (namely) that the said *Jasper* doth not set forth in his said plea, by whom the said messuage was rebuilt, nor doth he shew, by his plea, within what certain time the messuage aforesaid was rebuilt after it was so burnt down, so that this court might be able to judge, whether it was rebuilt in a convenient time; and because the plea is uncertain, a negative pregnant, and defective in form, &c.

With causes of demurrer.

To which there was a joinder in demurrer, and the plaintiff had judgment; and the reporter says that the same was given as in a passion, without consideration of the matter of law, whether the plea was good or no. 2 Saund. 422.

Hill.

Covenant.

* Hill. 19 & 20 Car. 2. Roll 1534.

(P* 43)

2 Saund.
161.
1 Sid. 437.
1 Vent. 9.
91.

LANYON against CARNE and Others, Executors of CARA.†

Cornwall, ff. Be it remembered that heretofore, (namely) in the term of St. Michael, last past, *John Lanyon*, Gent. by *Arthur Painter*, his attorney, came before our sovereign Lord the King, at *Westminster*, and brought here into the court of our said sovereign Lord the King, at *Westminster*, his bill against *Robert Carne* and *J. Cara*, widow, (executors of the last will and testament of *James Cara*, lately deceased) in the custody of the Marshal, &c. in an action for a breach of covenant; and there are pledges for the prosecution (namely) *John Doe* and *Richard Roe*; which said bill followeth in these words, ff. Cornwall, ff. *John Lanyon*, gent. complains of *Robert Carne*, and *Julian Cara*, widow (executors of the last will and testament of *James Cara*, lately deceased) being in the custody of the marshal of the marshalsea of our sovereign Lord the King, before the King himself, in an action for a breach of covenant for this cause (that is to say) that whereas on the 12th day of Feb. in the fifth year of the reign of his present majesty, by an indenture executed at *Lanceston*, in the county aforesaid, between the said *John Lanyon*, by the name of *John Lanyon*, of *Bobreach*, in the parish of St. Crett, in the county of Cornwall, gent. of the one part; and the said *James Cara*, by the name of *James Cara*, of the parish of St. *Lewan*, in the said county, yeoman, of the other part, which other part of the indenture, sealed with the seal of the said *James Cara*, (when alive) the said *John* brings into this court, the date whereof is the same day and year, he the said *John Lanyon*, for and in consideration of the sum of 24ol. of good and lawful money of * *England*, in hand paid, and secured to be paid by the said *James* (when alive) to the said *John*, before the sealing and delivery of the indenture aforesaid; and also for divers other good causes and considerations, especially moving the said *John Lanyon*, demised, granted, leased and confirmed to the said *James Cara*, (when alive) his executors, administrators and assigns, all that messuage, lands and tenements; together with all and singular the appurtenances, call'd or known by the name or names of *Tredinia*, situate, lying and being in the parish of St. *Lewan*, in the county aforesaid; and then, or then late in the occupation of *William Cara* and *William Baynard*, their assignee or assigns, and theretofore demised by *James Trewren*, of St. Crett aforesaid, deceased, to one *John Roe*, of *Pennryn*, together with all the messuages, lands and tenements, houses, gardens, meadows, pastures, marshes, feedings, ways, paths, easements, commons, waters, water-courses, turze and heath, and all other advantages and appurtenances belonging, incident,

* Now of
Great Bri-
tain.

VOL. II.

E

† In some Books called Hangan v Carve.

Covenant.

(P* 44) incident, or any wise appertaining to the said premisses, or to any part or parcel thereof, (the tin and * tin-works then found and work'd, or that afterwards should be found and work'd in or upon the premisses, or any part thereof, with free liberty to dig, undermine or search for tin and pewter then found, or to be found, and to take and carry away the same from thence, together with all manner of carriages, and all the timber-trees, oak, beech and elm, and all other timber-trees whatsoever then growing, or that should afterwards grow in and upon the premisses, with liberty to cut down, fell and carry away the said trees, as aforesaid, to the said *John Lanyon*, his executors and assigns, excepted and always reserv'd,) to have and to hold all and singular the said messuages, lands and tenements, with the appurtenances, and every part and parcel thereof (except before excepted) to the said *James Cara*, his executors, administrators and assigns, for and during the time and term of ninety-nine years, fully to be compleat and ended, if the said *James Cara*, and *Julian Carne*, daughter of *Robert Carne*, of the parish of *Buryan*, in the county aforesaid, yeoman, or either of them, should happen to live so long, the said term to commence and begin upon and after the death of one *Sibill*, wife of one *William Cara*, or the resignation, forfeiture, or other determination of the estate of the premisses, aforesaid, granted by the said *James Trewen*, to the said *John Roe*, and not before, he the said *James Cara*, his executors, administrators and assigns, Yielding and Paying yearly, during the term aforesaid, after the commencement thereof, to the said *John Lanyon*, his heirs and assigns, the yearly rent of forty shillings, of lawful money of *England*, to be paid at the four most usual feasts or days of payment in the year (namely) the *Annunciation of the Blessed Virgin Mary*, the *Nativity of St. John Baptist*, *St. Michael the Archangel*, and the *Birth of our Lord Christ*, by even and equal portions; and also a capon yearly, during the said term, at the feast of the *nativity of our Lord Christ*; and also Yielding and Paying yearly, and every year, during the term aforesaid, after the commencement thereof, out of the said premisses, the annual and yearly *high rent and chief rent* due to the heirs and assigns of *Martin Boffstowe*, gent. deceased; and also Yielding and Paying three pounds of lawful money of *England*, for the best beast, for and in the name of a *Heriot* or *Farliefe*, upon and after the several deaths of them the said *James Cara*, and *Julian Cara*, and upon, and after the respective deaths of them, or either of them; and also an *Harvest Journey* yearly, in the time of *Harvest*, with a man, an horse and guide, for the carrying away of the grain of the said *John Lanyon*, his heirs and assigns, from the fields to his house, upon reasonable warning given to them for that purpose, as by the same indenture (amongst other things) it doth and may more fully and at large appear. And the said *John Lanyon*, alledging by way of

Except the
Tin-works,
&c.

For the
Term of
ninety-nine
Years.

If James
and Julian
Cara should
so long live.
To com-
mence after
the Death
of Sibill
Cara.

For 40s.
per Ann.
Rent.

And a Ca-
pon, Paying
also the
High Rent,
or Chief
Rent.

And 3l.
for a Heriot,

And to do
Harvest
work.

Produce

Covenant.

Protestation, that neither the said *James Cara* (when alive) nor the said *Robert Carne*, and *Julian Carne*, after the decease of the said *James Cara*, have not, nor either of them hath perform'd, fulfill'd or kept any of the covenants, promises or agreements above specified in the indenture aforesaid, on the part of the said *James Cara*, to be perform'd, fulfill'd and kept, according to the intent and purport of the said indenture aforesaid, the said *John* (P* 45)

* *Lanyon ayers, that in Fact, after making the Indenture aforesaid, (namely) on the first day of October, in the nineteenth year of the reign of his present majesty, the said Sibill died at Lancelton afore said, in the said county, after whose decease the said term of ninety-nine years above granted to the said James Cara, took its commencement and began; and afterwards (namely) on the first day of October, in the 20th year of the reign of his present majesty, at Lancelton aforesaid, in the said county, he the said James Cara made his last will and testament in writing; and thereby constituted them the said Robert Carne, and J. Cara, executors of his said will, and afterwards, (to wit) on the same day and year, and Robert and at the place aforesaid, departed this life; after whose decease the said Robert and Julian undertook the charge of the execution of the said will, and prov'd the same in due form of law; whereby the said three pounds became due and payable to the said John Lanyon, for a Heriot or Farliese, upon the death of the said James Cara, according to the intent and purport of the covenant aforesaid; nevertheless the said Robert Carne and J. Cara, having no regard to the said covenants and agreements in the said indenture, made by the said James (when alive) on his part, have not, nor either of them hath paid to the said John Lanyon the said three pounds above mention'd in the indenture aforesaid, for a Heriot or Farliese, upon the death of the said James, which they ought to have paid, according to the intent and purport of the covenant of the said James above mention'd in the indenture aforesaid; and the said John Lanyon declares, that the said Robert and Julian (altho' often requir'd) have not perform'd, but have broken the covenant of the said James, made to the said John, in the manner above-mention'd; and hitherto have, and still do refuse to perform the same; whereupon the said John declares he is injur'd and endamag'd to the value of five pounds; and thereupon he brings his suit, &c. To which there was a Demurrer, and a Joinder in Demurrer.*

The declaration from whence this translation is made, was for a Heriot, supposed to be due on the death of James, who is there supposed to have died in the life time of Sibill Cara, and consequently before the commencement of the term; and as that was so, the court was of opinion that the Action did not lie, for the Heriot could not be due till the commencement of the term; therefore it may be perceived that I have altered this translation so as to make the declaration good, for which I refer you to the words printed in Italick.

* TARGET against LLOYD.

A Declaration for the Defendant's Assignees making the Plaintiff to make a Drain, pursuant to a Covenant with the Defendant the Lessor.

Setting forth the Indenture.

The Habendum.

The Redendum.

Covenant by the Plaintiff to make single Houses into double Houses.

Middlesex, ss. *Elizabeth Lloyd*, late of the parish of *St James's Westminster*, in the county aforesaid, widow, was summon'd to answer to *William Target*, Bricklayer, in an action that she pernot permit to him a covenant made between the aforesaid *Elizabeth* and the said *William*, according to the force, form and effect of certain indentures, executed between the said *Elizabeth* and said *William*; and whereupon the said *William*, by *W. Butler* his attorney, declares, that whereas by a certain indenture, made and executed in the parish of *St. Margaret, Westminster*, in the county aforesaid, on the sixteenth day of *November*, in the fourth year of the reign of our late sovereign lord *James* the second, king of *England*, &c. between the said *Elizabeth*, by the name of *Elizabeth Lloyd*, (as in the deed) of the one part, and the said *William*, by the name of *William Target*, (as in the deed) of the other part, which other part of the said indenture, seal'd with the seal of the said *Elizabeth*, he the said *William* brings into this court, the date whereof is the same day and year; *It is testified* that the said *Elizabeth*, for and in consideration of the yearly rents and covenants reserv'd and contain'd in the said indenture, and for divers other good causes and considerations, especially moving the said *Elizabeth* thereto, had, and by the said indenture did demise, grant and to farm let to the said *William*, his executors, administrators and assigns, those two messuages or tenements, and small back-sides inclosed from the front with piles, situate, lying and being in *Market lane*, in the parish of *St. James's Westminster*, in the county aforesaid [mentioning the other premises] to have and to hold the said messuage and tenements, and all and singular the other premises above demised by the said indenture, with the appurtenances, to the said *William Target*, his executors, administrators and assigns, from the feast day of the *Annunciation of the blessed Virgin Mary*, then next following the date of the said indenture, until the full end and term of twenty-five years, from thence next ensuing, and fully to be complete and ended; *Yielding and Paying* yearly, during the said term, to the said *Elizabeth Lloyd*, her executors, administrators and assigns, the annual rent or sum of twenty-four pounds, of lawful money of *England*, at the four most usual feast or days of payment in the year (namely) on the feast of the *Nativity of St. John Baptist*, *St. Michael the Archangel*, the *nativity of our Lord Christ*, and the *annunciation of the blessed Virgin Mary*, by even and equal portions; and the said *William Target* declares, that he the said *William Target*, for him self, his executors, administrators and assigns, did by the same indenture, covenant, promise and grant, to and with the said *Elizabeth*, her executors, administrators and assigns, in the manner and form following, (that is to say) that he the said *William*, his executors, administrators and assigns, within three years

Covenant.

next following the date of the said indenture, would at his and their own costs and charges, make and build, or cause to be made and * built the said two messuages or tenements, which were then single into two double sufficient houses, containing two rooms on a floor; and also would at his and their own costs and charges, repair the passage belonging to the said demised premises, and would make the said passage, as it then was, three feet in breadth, and three feet and a half in the clear, the door of the house excepted. And the said *William* further declares, that the said *Elizabeth*, did by the same indenture, for herself, her executors, administrators and assigns, covenant, promise and grant to and with the said *W. Target*, his executors, administrators and assigns, in the manner and form following, (to wit) that she the said *Eliz.* her executors, administrators and assigns, would permit and suffer the said *William*, his executors, administrators and assigns, at his and their own costs and charges, to make a drain to carry off the waste water from the said houses into the great main sewer in *Six-Bell Yard*, as it doth by the said indenture, among other things, more fully appear, by virtue of which lease, he the said *William*, immediately after the feast of the *Annunciation of the Blessed Virgin Mary*, then next following the date of the said indenture, enter'd into the tenements aforesaid, with the appurtenances, and was possessed thereof; and the said *William* thus being possessed thereof, he the said *William* erected, built and made a-new the said two single messuages or tenements, with the appurtenances into two double dwelling-houses (that is to say) each containing two rooms on a floor, according to the form and effect of the indenture aforesaid; and the said *William* further declares, that altho' he the said *William*, well and truly kept, perform'd and fulfill'd all and singular the covenants, grants and agreements above specified in the indenture aforesaid, on the part of the said *William*, his executors, administrators and assigns, to be perform'd and fulfill'd; nevertheless the said *Elizabeth* being possessed of a term of twenty years, and upwards, then to come and unexpir'd, of and in a certain piece of land, and of and in divers stables, situate, lying and being in the parish of *St. James's*, in the county aforesaid, between the said houses, built by the said *William*, in the manner and form aforesaid; and the above-mention'd main shore in *Six-Bell Yard*, and through which the water ought to run from the said houses into the said main sewer, she the said *Elizabeth*, after making the said indenture to the said *William*, as above, (to wit) on the 16th day of *December*, in the year aforesaid, at the parish of *St. Margaret's Westminster* aforesaid, in the said county, granted, demised and assigned the said piece of land and stables aforesaid, to one *John Tomlinson*, his executors, administrators and assigns, for divers years then and yet to come, and unexpir'd, parcel of the term aforesaid, by virtue of which said grant, lease and assignment, he the said *John Tomlinson*, in his

(P* 47)

Covenant by the Defendant and her Assigns, to permit the Plaintiff to make a Drain.

That the Plaintiff entered by virtue of his Lease,

And made the single Houses into double Houses.

That the Defendant granted a Lease of a Piece of Land, and two Stables.

life-

Covenant.

By Virtue of which the said J. entered; and afterwards died. (P* 48) life-time afterwards, enter'd into the said pieces of land and stables, and was thereof possessed, and being thus possessed thereof, afterwards, (to wit) on the first day of *July*, in the year of our Lord 1688, at the parish of *St. James's Westminster*, in the county aforesaid, died intestate, being thus possessed of the premises, as aforesaid, after whose * death, (namely) on the ninth day of *July*, in the year of our Lord 1688, administration of all the goods and chattels, rights and credits which were the said *John's* at the time of his death, was in a legal manner committed to one *Mary Tomlinson*, late wife of the said *John*, by *John Eddebury*, doctor of laws, lawfully constituted commissary and official to the reverend persons the *Dean and Chapter* of the Collegiate Church of *St. Peter's Westminster*, by which the said *Mary* afterwards, (namely) on the day, and in the year last mention'd, enter'd into the said piece of land and stables aforesaid, and was possessed thereof by virtue of the grant and administration aforesaid; and she the said *Mary* being thus possessed thereof, afterwards, (namely) on the first day of *September*, in the year of our Lord 1688, at the parish aforesaid, in the said county, was married to *Samuel Carter*, whereby the said *Samuel* and *Mary* enter'd into the piece of land and stables aforesaid, and were possessed thereof; and they the said *Samuel* and *Mary*, being thus possessed thereof, they the said *Samuel* and *Mary* would not, but refus'd to permit, and do even now refuse to permit the said *William*, at his own costs and charges, to make a drain to carry off the said waste water from the said houses, built and made new in the manner as above set forth, through the said piece of land and stable aforesaid, into the said main sewer, in *Six-Bell Yard*, according to the intent and purport of the same indenture, but instead thereof, contrary to the tenor of the said indenture, on the second day of *September*, in the year aforesaid, when several workmen were then about and employed by the said *William*, to make a drain in the said piece of land, and through the said stables, in the parish of *St. James's* aforesaid, they the said *Samuel* and *Mary*, disturbed the said workmen in their said work, and threatened them in such a manner that they were afraid to go on with their said work in making the drain aforesaid, altho' the said *Samuel* and *Mary* were on the said second day of *September*, and several times afterwards, in the year aforesaid, requested by the said *William* to permit him to make the said drain in, and thro' the piece of land and stables aforesaid; and altho' the said *William* doth aver that there was no other convenient place near the said houses in any part of any lands or places of which the said *Elizabeth*, or her assigns were at any time possessed of, where the said drain could be conveniently made to carry off the water from off the said houses built by the said *William*, as aforesaid, except the said piece of land, and stable aforesaid; and the said *William* further declares, that the said *Elizabeth* hath thus broken her said covenant; whereupon the said *William* declares he is injured and endamag'd to the value of one hundred pounds; and therefore he brings his suit, &c.

By Virtue of which the said J. entered; and afterwards died. (P* 48) That Administration was granted to his wife, who married to S. Carter.

That they the said S. C. and his wife entered.

And would not permit the Plaintiff to make the Drain.

But disturbed him therein.

And

Covenant.

And the said *Elizabeth*, by *John Tisser*, her attorney, comes Plea. and defends the force and injury when, &c. and pleads that the said *William Target* ought not to have his said action against her, because she avers that the said passage belonging to the said premises demised to the said *William*, leads from the said houses demised to the said *William*, as aforesaid, in *Six-Bell Yard* afore- (P* 49)
 * said, in *St. Margaret's Westminster* aforesaid, and that a drain to carry off the waste water from the said house, into the said main That a
 shore, in *Six-Bell Yard* aforesaid, might have been conveniently Drain
 made in the said passage; and that she the said *Elizabeth*, after might have
 making the aforesaid lease to the said *William*, as is above-men- been made
 tion'd, (namely) on the sixth day of *November*, in the fourth in the Pas-
 year of the reign of his said late majesty, at the parish of *St.* sage, and
Margaret's Westminster aforesaid, permitted and gave free liberty that the
 to the said *William*, at his costs and charges, to make a drain in Plaintiff
 and through the said passage, to carry off the waste water from free Liber-
 the said houses into the said main sewer, in *Six-Bell Yard* afore- ty so to do,
 said, whereby the said *William*, if he thought fit, might have refused.
 made a drain in and through the said passage, for the purpose
 aforesaid, but he altogether refus'd so to do; and this she is
 ready to verify; wherefore she prays judgment whether the
 said *William* ought to have his said action against her, &c.

To this plea there was a demurrer, and a joinder in demurrer; The Case,
 and upon the argument it was alledged that the plea was insufficient;
 for when the Defendant covenanted that the Plaintiff should be per-
 mitted to make a drain for the demised premises to *Six-Bell Yard*,
 he was at his election to make it through any part of the Defendant's
 ground that lay between, though the ground were built upon, and
 though it might be very inconvenient, and there might be another
 place to make the drain in; and several cases relating to elections
 were cited; as where a feoffment is made of twenty acres of such
 a wood, &c. the feoffee may take twenty acres of which part of the
 wood he pleaseth.

But the court were rather inclined that in this covenant there
 should not be an election to make a drain through the party's stables
 and buildings, in case there were other places to make it proper and
 convenient in; for every agreement must have a reasonable construc-
 tion that it may be agreeable to and consistent with the intent of the
 parties; but no opinion was delivered as to this point, because
 there were divers exceptions taken to the declaration, some of
 which were fatal.

First, There was no certain place laid for the houses demised,
 which was said to be lying and being in the parish aforesaid;
 whereas there were two before named, *St. Margaret's* and *St. James's*,
 so it was altogether uncertain; wherefore it may be observed that I
 have ascertained the parish by the words in italick, page 46. line 25.

The second material exception was, that the Covenant there
 mentioned is that the Defendant, her executors, administrators
 and assigns, shall permit, &c. and the breach is laid that the as-
 signed

Covenant.

signee would not permit, &c. whereas it appears by the pleading that the Assignment was made to Tomlinson divers years before the demise to the plaintiff; and therefore this covenant could not be extended but to the Assignees after the demise made; wherefore it may be likewise observed, I have supposed the lease to Tomlinson to be made after the demise to the plaintiff.

(P* 50) * The third material exception was, that it is there generally said, that Carter and his wife would not permit, &c. but no special disturbance was shewn, which ought to be set forth in the declaration, for the court to judge of it; wherefore I have altered the declaration, as may be observed by the words printed in Italick, Page 48. beginning Line 30. and therein have set forth a special disturbance.

DOWSE against CALE.

Middlesex, ss. John Cale, late of London, Plumber, Executor of the testament of Richard Cale, lately Richard Cale (as in the deed), was summon'd to answer to Thomas Dowse, gent. assignee to Thomas Dowse, his father, Arthur Stanhope, Esq; Sir Edward Rossiter, knt. John Wolfenholme, Esq; and Thomas Bristowe, gent. assignees of John earl of Clare, in an action that he perform to them a covenant made between the said John earl of Clare and the said Richard Cale, in his life-time, according to the form and effect of certain indentures executed between them, &c. and whereupon the said Thomas Dowse, by Thomas Waring his attorney, declares, that whereas the said John earl of Clare, on the ninth day of December, 1647, was seised in his demesne as of a fee, of and in three messuages, with the appurtenances, in the parish of St. Clements Danes, in the said county of Middlesex, and the said John, earl of Clare, being so seised, he the said John, earl of Clare, afterwards, (to wit) on the said ninth day of December, in the said year of our Lord 1647. at the said parish of St. Clements Danes, in the county aforesaid, by an Indenture then and there executed between the said John Earl of Clare, by the name of the Right Hon. John Earl of Clare, of the one part, and the said Richard Cale, in his life-time, by the name of Richard Cale, of the Parish of St. Bridget, alias St. Brides, London, Plumber, of the other part (which other part, seal'd with the seal of the said Richard, in his life-time, the said Thomas Dowse, now plaintiff, brings into this court, the date whereof is the same day and year) demised to the said Richard the tenements aforesaid, with the appurtenances, by the name of all those his three Messuages or tenements, with the appurtenances, in the parish of St. Clements Danes, in the county of Middlesex, then or late in the tenure or occupation of Eleanor Peirson, widow, her assignee or assignees, under-tenant or under-tenants, next adjoining to the messuage or tenement (so mention the abutalls, as in

the

2 Vent. 117.
2 Lev. 264.
S. C.

Covenant
by an Assign-
nee, of an
Assignee, a-
gainst an
Executor.

That the
Earl of Clare
was seised
in Fee,

And demised
by Inden-
ture,

Covenant.

the deed) To have and to hold the said three messuages, tenements and premisses, with the appurtenances, to the said *Richard Cale*, his executors, administrators and assigns, from the feast of the *Nativity of our Lord God*, next ensuing the date of the said indenture, for and during the whole term of forty-one years, from thence next following, and fully to be complete one Year. and ended; yielding and paying therefore yearly, and every year, during the said whole term, to the said Earl, his heirs ^{For forty} ~~Redden-~~ ^{one Years.} ~~dum.~~

or assigns, the sum of twenty pounds, of lawful money of ^(P 51) ~~England~~, at or in the great hall of the capital messuage or dwelling-house of the said earl, situate in the parish of *St. Clements Danes* aforesaid, at the four most usual times and feasts of payment, in the year, (namely) on the *Annunciation of the blessed Virgin Mary*, the *Nativity of St. John Baptist*, *St. Michael the Archangel*, and the *Birth of our Lord Christ*, by even and equal portions, or within eighteen days after every of the said feasts, the first payment thereof to begin and to be made, at and upon the feast of the *Nativity of St. John Baptist*, next ensuing the date of the said indenture, or within eighteen days after the said feast; and the said *Richard Cale*, for himself, his executors, administrators and assigns, and every of them, covenanted, promised and granted, to and with the said Earl of *Clare*, his heirs and assigns, by the indenture aforesaid, that he the said *Richard Cale*, his executors, administrators or assigns, immediately after the date of the said indenture would pull and take down all the said three houses then standing and being upon the said premisses, and would erect, build and set up upon the foundation thereof, at his and their own costs and charges, three houses as valuable, firm, substantial and workman like, as to carpenters, bricklayers, smiths, plaisterers or plumbers, glaziers, masons and painters work, as he the said *Richard Cale* had then lately built for himself in *Fleet-street*, in the said parish of *St. Bridget*, alias *St. Brides*, *London*, in one of which houses he then dwelt; and also would from time to time, and at all times then and hereafter, during the said term of years, granted by the said *Indenture*, at his and their own costs and charges, well and sufficiently repair, support, uphold, maintain and keep all the houses and buildings so agreed and covenanted to be built upon the said demised premisses, or any part thereof; and also all and singular the sewers, sinks, drains and pavements made or to be made, in, by and with all, and all manner of needful and necessary reparations whatsoever, and would quietly and peaceably yield up to the said earl, his heirs or assigns, the said demised premisses; and the houses and buildings to be erected and built, and every of them well and sufficiently repair'd, supported, upheld, maintain'd and kept, at the end, or sooner determination of forty-one years, as by the same indenture it doth more fully appear; by virtue of which demise he the said *Richard Cale* enter'd into the said messuages, with the appurtenances

Great Britain.

The Covenants.

To pull down some Houses and build up new ones in their Room.

Covenant.

That the
Lessee en-
tered and
was posses-
sed.

(P* 52)
That the
Lessor sold
the Rever-
sion for a
Year.

By Virtue
whereof,
and of the
Statute of
Uses, the
Bargainees
were pos-
sessed.

nances demised as aforesaid, and was possessed thereof, the reversion belonging to the said Earl of *Clare*, and his heirs; and he the said *Richard Cale*, being so possessed of the tenements aforesaid, with the appurtenances, the reversion thereof belonging to the said *John Earl of Clare*, and his heirs; and he the said *Richard Cale* being so possessed of the said tenements, with the appurtenances; and the said *John Earl of Clare* being seized of the reversion thereof in his demesne, as of a fee, he the said *John Earl of Clare*, afterwards, (to wit) on the sixth day of *August*, in the fourteenth year of the reign of our late sovereign Lord *Charles the second*, late king of *England*, at the parish of *St. Clements Danes* aforesaid, by an indenture then made and there executed between the said *John Earl of Clare*, by the name of the right honourable *John Earl of Clare*, of the one part, and the said *Arthur Stanhope*, Esq; second son to the late right hon. *Philip Earl of Chesterfield*, Sir *Edward Rossiter* of *Somerby*, in the county of *Lincoln*, Knt. *John Wolstenholme* of *London*, Esq; and *Thomas Bristowe* of *Beesthorpe* in the county of *Nottingham*, Gent. of the other part, which one part of the said indenture, seal'd with the seal of the said Earl of *Clare*, the said *Thomas Dowse* (the now plaintiff) brings into this court, the date whereof is the same day and year last above mentioned) for and in consideration of a certain sum of money in hand paid to the said Earl of *Clare*, by the said *A. S. E. R. J. W.* and *T. B.* bargained and sold to the said *A. S. E. R. J. W.* and *T. B.* (among other things) the reversion of the said tenements, with the appurtenances demised to the said *Richard Cale*, as aforesaid, to have and to hold the said reversion to the said *A. S. E. R. J. W.* and *T. B.* their executors, administrators and assigns, from the day next after the date of the said indenture, for and during the term of one whole year, from thence next ensuing, and fully to be complete and ended; yielding and paying to the said *John Earl of Clare*, his heirs and assigns, at the feast of *St. Michael the Archangel*, next ensuing the date of the said indenture, the rent of a pepper-corn (if the same should be demanded) by virtue of which said bargain and sale, and also by force of a certain act made and published in the parliament of our late sovereign Lord *Henry the eighth* late King of *England*, at *Westminster*, in the said county of *Middlesex*, on the fourth day of *February*, in the twenty-seventh year of his reign, for transferring uses into possession, they the said *A. S. E. R. J. W.* and *T. B.* were possessed of the reversion of the said tenements with the appurtenances, the reversion over thereof belonging to the said Earl of *Clare*, and his heirs; and they the said *A. S. E. R. J. W.* and *T. B.* being so possessed of the said reversion of the tenements, with the appurtenances; and the said Earl of *Clare* being so seized of the reversion thereof. immediately expectant upon the said term of the said *A. S. E. R. J. W.* and *T. B.* in his demesne, as of a fee, he the said Earl afterwards, (to

wit)

Covenant.

wit) on the seventh day of *August*, in the said fourteenth year of the reign of his said late majesty king *Charles* the second, at the parish of *St. Clements Danes*, in the county aforesaid, by another indenture executed between the said Earl of *Clare*, of the one part, and the said *Arthur Stanhope, E. R. J. W.* and *T. B.* by the names of &c. (as in the deed) of the other part, the said one part whereof seal'd with the seal of the said Earl, he the said *Thomas Dowse* brings into this court, bearing date the same day and year, for and in consideration mention'd in the same indenture remised and released to the said *A. S. E. R. J. W.* and *T. B.* (amongst other things) his the said Earl's reversion of the tenements aforesaid, with the appurtenances, to have and to hold to the said *A. S. E. R. J. W.* and *T. B.* their heirs and assigns for ever, to the use of the said *John*, Earl of *Clare*, for the term of his natural life, and after the decease of the said Earl, to the use of the said *A. S. E. R. J. W.* and *T. B.* their executors, administrators and assigns, for and during the term of one thousand years, to be accounted from the date of the said indenture, fully to be complete and ended, by virtue of which said release, and also by force of the said statute, for transferring uses into possession, he the said Earl of *Clare* was seised of the reversion of the tenements aforesaid, with the appurtenances in his demesne, as of a freehold, for the term of his natural life, the remainder thereof limited and expectant, as aforesaid. And the said Earl being thus seised thereof, he the said Earl afterward, (to wit) on the first day of *July*, in the eighteenth year of the reign of his said late majesty, died at the said parish of *St. Clements Danes*, thus seised of his said estate therein; after whose death they the said *A. S. E. R. J. W.* and *T. B.* were possessed of the said reversion of the tenements aforesaid, with the appurtenances, for the said term of one thousand years, and being so possessed, they the said *A. S. E. R. J. W.* and *T. B.* afterwards, (to wit) on the seventh day of *July*, in the twentieth year of the reign of his said late majesty, at the said parish of *St. Clements Danes*, by a certain indenture, then and there executed between *Gilbert*, Earl of *Clare*, and the said *A. S. E. R. J. W.* and *T. B.* by the names of the right hon. *Gilbert*, Earl of *Clare*, the hon. *Arthur Stanhope*, Esq. second son to the late right hon. *Philip*, Earl of *Chesterfield*, deceased, Sir *Edward Rossiter* of *Somerby*, in the county of *Lincoln*, Knt. *John Welflen* of *London*, Esq; and *Thomas Bristowe* of *Beesthorpe* in the said county of *Nottingham*, gent. of the one part, and one *Thomas Dowse*, father to the said *Thomas Dowse*, (the now plaintiff) by the name of *Thomas Dowse*, of *Gray's Inn*, in the county of *Middlesex*, gent. of the other part (which said other part of the said indenture, seal'd with the seals of the said *Gilbert*, Earl of *Clare*, *A. S. E. R. J. W.* and *T. B.* he the said *Thomas Dowse*, (the now plaintiff) brings into this court, bearing date the same day and year last above-mention'd, for and in consideration of a certain

The Lessor releases the inheritance,

To the use of himself for life,

(P* 53)

And after his Decease to the Grantees for 1000 years.

Seisin thereof, by Virtue of the Statute of Uses.

That Tenements, thus seised of his said estate therein; after whose death they the said *A. S. E. R. J. W.* and *T. B.* were possessed of life died seised, the Grantee, possessed of the term of 1000 Years, and by an Indenture granted to the Defendant's Testator, for the residue of the term.

Covenant.

The Tenant for Years attorned.

(P* 54)

The Tenant in Possession makes his Will, and make the Defendant's father his Executor, and died possessed, and the Defendant proved the Will, and entered, and was possessed.

And the grantee in Reversion made his Will, and devised the Reversion to the plaintiff, for Life, and after his death, cease to his Son in tail, and made the plaintiff his Executor, and died, and the Plaintiff

certain sum of money in hand paid by the said *Thomas Dowse*, the father, to the said *A. S. E. R. J. W.* and *T. B.* granted to the said *Thomas Dowse*, the father, his executors, administrators and assigns (*amongst other things*) the said reversion of the tenements aforesaid, with the appurtenances, *to have and to hold* the said reversion of the tenements aforesaid, with the appurtenances to the said *T. D.* the father, his executors, administrators and assigns, for and during all the rest and residue of the said term of one thousand years then to come and unexpir'd, as by the said indenture doth more fully appear, to which grant he the said *Richard Cale* afterwards (namely on the eighth day of *July*, in the twentieth year of the reign of his said late majesty, at the said parish of *St. Clements Danes*, attorned and agreed, (he the said *Richard Cale*, then being the tenant of the tenements aforesaid, with the appurtenances, by virtue of the lease made to him, as aforesaid;) by virtue of which said grant and attornment, he the said *Thomas Dowse*, the father, was possessed of the said reversion of the tenements aforesaid, with the appurtenances, for the remainder* of the said term of one thousand years. And the said *Richard Cale*, in his life-time, (namely) on the eighth day of *July*, in the 20th year of the reign of his said late majesty, at the said parish of *St. Clements Danes*, made his last will and testament in writing, and thereby constituted the said *J. Cale*, executor, and the said *Richard Cale* afterwards, and after the said attornment was made (namely) on the 22d day of *December*, in the twenty-second year of the reign of his said late majesty, died in the said parish of *St. Clements Danes*, possessed of the tenements aforesaid, demised to him, as above-mention'd; after whose death, he the said *John Cale* undertook the charge of the execution of the said will, and as executor, as aforesaid, enter'd into the said tenements, with the appurtenances, and was thereof possessed; and being so possessed, he the said *Thomas Dowse*, the father, being possessed of the reversion thereof as aforesaid, he the said *Thomas Dowse*, the father, afterwards, (namely) on the twenty-sixth day of *February*, in the thirty-second year of the reign of his said late majesty, at the said parish of *St. Clements Danes*, made and executed his last will and testament in writing; and thereby gave and bequeath'd, (*amongst other things*) the said reversion of the tenements aforesaid, with the appurtenances, to the said *Thomas Dowse*, his son, (the now plaintiff) for the term of the life of the said *Thomas*, the son; and after his decease, then to one *Thomas Dowse*, son to the said *Thomas Dowse* (the now plaintiff) and to the heirs of the body of the said *Thomas*, the son of the said *Thomas* (the now plaintiff); and the said *Thomas Dowse*, the father, constituted his said son, *Thomas Dowse*, (the now plaintiff) sole executor of the said testament, and afterwards, (namely) on the sixteenth day of *April*, in the thirty-second year of the reign of his said late majesty, the said *Thomas Dowse*, the father, died at the said parish of *St. Clements Danes*, in the county aforesaid, possessed of the tenements aforesaid, with the appurtenances, and the said *Thomas Dowse*, his son, (the now plaintiff) proved the Will, and claimed the Tenement by Virtue of the Bequest.

Covenant.

of the said reversion of the tenements aforesaid, with the appurtenances, in the manner, as above set forth; after whose decease the said *Thomas* (the now plaintiff) namely, on the twenty-sixth day of *January*, in the thirty-second year of the reign of his said late majesty king *Charles* the second, prov'd the said testament, in due form of law, at the said parish of *St. Clements Danes*, and undertook the charge and execution of the said testament; and by virtue of the said bequest, on the said twenty sixth day of *Jan.* in the thirty-second year aforesaid, at the said parish of *St. Clements Danes*, claim'd the reversion of the said tenements, with the appurtenances, by virtue of which said bequest, the said *Thomas Dowse*, (the now plaintiff) was possessed of the reversion aforesaid, with the appurtenances, for the remainder of the said term of one thousand years; and being thus possessed thereof, he the said *Richard Cale*, being possessed of the tenements aforesaid, with the appurtenances, in the manner as above set forth, altho' the said *Thomas Dowse* (the now plaintiff) hath well and truly observ'd, perform'd, fulfill'd and kept, all and singular the covenants, grants, articles and agreements, specified in the first above-recited indenture of demise, on the part of the said *John Earl of Clare*, his heirs and assigns, to be observ'd, perform'd, fulfill'd and kept, according to the intent and purport of the said indenture, and suggesting, by way of *Protestation*, that the said *John Cale* hath not observ'd, perform'd, fulfill'd or kept any of the covenants, articles and agreements specified in the same indenture, on the part of the said *Richard Cale*, his executors, administrators and assigns, to be observ'd, perform'd, fulfill'd and kept, according to the form and effect of the indenture of demise aforesaid, the said *Thomas Dowse*, (the now plaintiff) declares, that in fact, the said *John Cale*, being possessed, as aforesaid, after the death of the said *Thomas Dowse*, the father, and before the end of the said term of forty-one years granted by the said indenture, (namely) on the thirteenth day of *September*, in the year of our Lord 1684, at the said parish of *St. Clements Danes*, in the county aforesaid, permitted an house of the value of two hundred pounds, built upon the said demised premises, by the said *Richard Cale*, in his life-time, after the said demise made to him, as aforesaid, and during the continuance of that demise, to be altogether thrown down and consumed, and totally destroyed in every part thereof, for want of supporting the same; and the said *John Cale*, being thus possessed, as aforesaid, lest the said house at the end of the said term of forty-one years, which ended at the feast of our Lord Christ, in the year of our Lord 1688, thus thrown down, consum'd, and totally destroy'd, contrary to the intent and purport of the said covenant, in that particular; and that the said *John Cale*, being possessed, as aforesaid, after the death of his said father, and during the said term of forty-one years, (namely) on the tenth day of *May*, in

Protesting that the Defendant did not perform the Covenants on his Part. (P* 55)

Breach assigned in permitting the Premises to be out of Repair. The Particulars.

Another Breach assigned for want of Repairs. Another Breach assigned for want of the Repairs.

Covenant.

the twenty-fourth year of the reign of his said late majesty, and continually afterwards, until the end of the said term of forty-one years, suffer'd the pavement of a yard, part of the above demised premisses, to be broken up, wasted and in great decay, for want of repairing thereof, whereby the rain and other water coming into the said yard, for want of repairing the said pavement, descended from the said yard, in and upon the walls, and an oaken floor of the cellar, part of the above demised premisses, so that the walls and oaken floor became putrified and rotten, by the water; and that the said *John Cale* left the said pavement so broken up and wasted, and in great decay, and the said walls and oaken floor so putrified and rotten, for want of repairs thereof, at the end of the said term of 41 years, contrary to the form and effect of the said covenant in that particular; and that the said *John Cale*, being thus possessed, as aforesaid, after the death of his said father, and during the said term of forty-one years, (namely) on the first day of *October*, in the year of our Lord 1688, suffer'd the tiles, laths, windows and plaister walls (that is to say) 10,000 tiles, 10,000 laths, 200 foot of window, and 100 rod of plaister walls of the said four other houses, built upon the demised premisses, by the said *Richard Cale*, in his life-time, after the said demise thereof made to him, as aforesaid, and during the continuance of that

(P^e 56)

And thus
the Cove-
nants were
broken.

Proser of
the Will.

The De-
fendant
pleads Per-
formance,
specially to
each
Breach as-
signed.

demise, to be broken down and in great decay, for * want of repairing thereof, and at the end of the said term of forty-one years, the said *John Cale* left the said tiles, laths, windows and walls thus broken down, wasted, and in great decay, for want of repairing thereof, contrary to the form and effect of the said covenant in that particular; and the said *Thomas Dowse*, (the now plaintiff) declares that the said *John Cale* hath not perform'd, but broken the covenant aforesaid, mention'd in the said first above indenture of demise in this particular; and hitherto hath, and still doth refuse to perform the same to the said *Thomas Dowse*; whereupon the said *Thomas Dowse*, (the now plaintiff) declares he is injur'd and endamag'd to the value of three hundred pounds; and therefore he brings his suit, &c. And the said *Thomas Dowse*, (the now plaintiff) brings into this court the letters testamentary of the said *Thomas Dowse*, the father, whereby it sufficiently appears to this court, that the said *Thomas*, (the now plaintiff) is executor of the said testament, and hath the administration thereof, &c.

And the said *John*, by *John White* his attorney, comes and defends the force and injury when, &c. and pleads that the said *Thomas Dowse*, the son, ought not to have his said action against him, because he avers that the said *Richard Cale*, in his lifetime, after making the indenture aforesaid, first above mentioned, pulled down all the said three houses, which at the said time of making the said indenture, were standing and being upon the said demised premisses; and made, erected

and

Covenant.

and built a-new three other houses upon the said foundation, in the same place where the said three houses so pulled down had been built of the same bigness as the said three houses had been; and that he the said *John Cale*, after the time of the death of the said *Richard Cale*, from time to time during the said term of 41 years, well and sufficiently repaired, upheld and maintained all the said three houses, with the appurtenances; and that at the end of forty-one years, he surrendered and left the said three houses newly built, and every of them thus well and sufficiently repaired, upheld and maintained, according to the form of the covenant aforesaid, in that behalf, and he thereof puts himself on the country; and as to not repairing the pavement of the said yard, the said *John* pleads that he the said *John* did not suffer the pavement of the yard aforesaid, to be ken-wasted or in decay, for want of repairing thereof, nor left the pavement and walls, and oaken floor aforesaid, or any part thereof, at the end of the said term of forty-one years, to be broken down, wasted or in decay, for want of repairing thereof, in such manner and form as the said *Thomas* above declares against him, and thereof he puts himself on the country; and the said *Thomas* does likewise the same. And as to his suffering the tiles, laths, windows and plaister walls, mentioned in the declaration aforesaid, to be broken down and wasted, for want of repairing thereof, the said *John* pleads that he the said *John Cale* did not suffer the tiles, laths, windows and plaister walls, or any part thereof, to be broken and wasted for want of repairing thereof; nor did he at the end of the said term of forty-one years * leave the said tiles, laths, windows and plaister walls, or any part thereof broken down, wasted or in decay, for want of repairing thereof, in such manner and form as the said *Thomas* above declares against him; and thereof he puts himself on the country; and the said *Thomas* does likewise the same.

An Issue tendered but not taken.

Another Issue tendered.

(* P 57)

A third Issue tendered.

And the said *Thomas Dowse*, the son, replies that the plea aforesaid, of the said *John Cale*, as to breaking the covenant aforesaid, in leaving one house built, as aforesaid, by the said *Richard Cale*, in his life-time, after the demise made to him, as aforesaid, and during the continuance of that demise, upon the said demised premisses, so thrown down, consumed and totally ruined, as the said *Thomas*, (the now plaintiff) declares thereupon; and the matter contained in the said plea are not sufficient in law to preclude the said *Thomas Dowse*, (the now plaintiff) from having his said action against him the said *John Cale*; and that he the said *Thomas Dowse* is under no necessity, nor any wise bound by the law of the land to make answer to the said plea in this particular, in the manner and form as the same is pleaded; and this he is ready to verify; whereupon he prays judgment for want of

Demurrer to first Part of the Plea.

Covenant.

The Case.
2 Vent.
126.

of a sufficient plea in this particular; and that his damages, occasioned by the breach of the said covenant in this particular may be awarded to him, &c.

To which there was a joinder in *Demurrer*, and upon the argument the sole *Question* was upon this covenant, whether the defendant being obliged only to build three houses; and having built one more, the covenant did not bind him to repair and deliver up that house well repaired, as well as those which were agreed to be built; and the court were of opinion that the covenant did extend to the other house as well as to the three which were agreed to be built; for in the last covenant, which is to deliver up well repaired, 'tis *Dicta præmissa ac Domos & Edificia superinde fore erecta*, which is general; and 'tis the rather so to be taken, because in the first covenant for keeping in repair, during the term, 'tis the houses agreed to be built, which words *agreed to be built*, are left out in the last covenant, which the court took to be a distinct covenant.

Rokey doubted, it seeming to him to be all as one covenant, and so all the subsequent matter concerning leaving the houses well repaired, should be restrained and understood of those agreed to be built; but judgment was given for the plaintiff upon the reasons aforesaid.

It was also objected on the part of the defendant, that *Dowse*, (the plaintiff) was not an assignee in this case to bring covenant; for that the term in the reversion was devised to him for life only; and if he died within the term, then to his first son, &c.

To this it was answered, that the devise of the term to him, passed the whole estate, and the remainder to the son was but a possibility and an executory devise.

(P* 38)

* TOVEY against PITCHER.

2 Vent.
228.
Covenant
against an
Assignee
of an Exe-
cutor.

That the
Plaintiff
was posses-
sed of a
Term of
Years yet
in Being.

Middlesex, ss. *Thomas Pitcher*, late of *Westminster*, in the county aforesaid, gent. assignee of *Susanna Gill*, executrix of the last will and testament of *Richard Gill*, lately named *Richard Gill*, of the parish of *St. Martin in the Fields*, aforesaid, vintner, was summoned to answer to *Christian Tovey*, in an action that he perform to her a covenant made between the said *Christian* and the said *Richard*, in his life-time, according to the force, form and effect of certain indentures executed between them, and thereupon the said *Christian*, by *Charles Draper*, her attorney, declares, that whereas she the said *Christian*, was on the fifteenth day of *July*, in the year of our Lord 1680, and ever since hath been, and now is possessed of two messuages, with the appurtenances, in the parish of *St. Martin in the Fields*, in the county of *Middlesex*, for a long term of years, then and yet to come, and being thus possessed thereof, she the said *Christian*, afterwards, (namely) on the fifteenth day of

July

Covenant.

July in the year of our lord 1680. at the said parish of *St. Martin in the Fields*, in the said county of *Middlesex*, by an indenture made and executed between the said *Christian*, by the name of *Christian Tovey*, of the parish of *St. Martin in the Fields*, of the one part, and the said *Richard Gill*, by the name of *Richard Gill*, of the parish of *St. Martin in the Fields*, vintner, of the other (which other part, seal'd with the seal of the said *Richard*, the said *Christian* brings here into this court, the date whereof is the same day and year,) for and in consideration of the annual rents and covenants therein after reserved, mentioned, and contained in the said indenture, on the tenants and lessees part and behalf to be paid, done and performed, demised, granted, and to farm let unto the said *Richard*, his executors, administrators and assigns, all that front-messuage or tenement, with the appurtenances, as the same then were in the occupation of the said *Richard*, called or known by the name or sign of the *Fleece*, situate, lying and being in *St. Martin's Lane*, in the parish of *St. Martin in the Fields*, with the room situate upon the gate-way, leading into *Moor's Yard*, which said messuage or tenement abuteth westward upon *St. Martin's Lane* aforesaid, eastward upon a back messuage or tenement thentofore demis'd, northward upon a messuage or tenement then in the occupation of *Ralph Mayor*, coach-maker, and on the south, upon a messuage or tenement in the occupation of *Dowdall Campbell*, taylor, and also all that back messuage or tenement, with the appurtenances; then also in the occupation of the said *Richard*, situate, lying and being on the east side of the said front messuage or tenement, and fronting *Moor's Yard* aforesaid; together with all ways, passages, lights, easements, waters, water-courses, profits, commodities and advantages whatsoever to the said messuages or tenements, or any of them belonging, or in any wise appertaining for him the said *Richard*, his executors, administrators and assigns, to have and occupy the said front messuage or tenement * and premisses, with the appurtenances thereto belonging, from the *Feast of the Annunciation of the Blessed Virgin Mary*, before the date of the said indenture, until the full end and term of twenty-one years, from thence next ensuing, and fully to be complete and ended; and also for him the said *Richard* his executors, administrators and assigns, to have and occupy the said back messuage or tenement, and premisses, with the appurtenances thereunto belonging, from and immediately after the end and expiration of a former lease thereof made to *James Supple*, which said lease would determine and expire on or before the year of our Lord (according to the computation used in *England*) 1681. unto the end and term of nineteen years, and a quarter of a year from thence next ensuing, and fully to be complete and ended; yielding and paying therefore yearly and every year, during so long time of the

And by an
Indenture
demised to
the Testa-
tor.

(P* 59)

The Ha-
bendum as
to Part.
The Term.

Habendum
for a fur-
ther Term,
as to the
other Part.

The Red-
dendum as
to Part.

Covenant.

first term of years, as the said lease made to the said *James Supple*, should continue to the said *Christian*, her executors, administrators and assigns, the annual rent or sum of thirty-five pounds, at the four most usual feasts or times of payment in the year, (to wit) the *Nativity of St. John the Baptist*, *St. Michael the Archangel*, the *Birth of our Lord God*, and the *Annunciation of the Blessed Virgin Mary*, by even and equal portions; and also yielding and paying therefore yearly, and every year, to the said *Christian*, her executors, administrators or assigns, during the last mention'd term, after the end and expiration of the said lease made to the said *James Supple*, the annual rent of forty pounds of lawful money of *England*, at the four most usual feasts or times of payment in the year, (to wit) the *Birth of our Lord God*, the *Annunciation of the Blessed Virgin Mary*, the *Feast of the Nativity of St. John the Baptist*, and *St. Michael the Archangel*, by even and equal portions; the first payment thereof to begin and be made on such of the said feasts as should first and next happen after the end and determination of the said lease made to the said *James Supple*. Provided always, that if it should happen that the said yearly rents of thirty-five pounds and forty pounds, or either of them, or any part of them or either of them, should be in arrear and unpaid, by the space of fourteen days next over or after any of the said feast days, in which the same ought to have been paid (being lawfully demanded) that then and from thenceforth it should and might be lawful to and for the said *Christian*, her executors administrators or assigns, into the said demised premises, with the appurtenances, and into every or any part of the same, in the name of the whole, wholly to re-enter, and the same to have again repossess and enjoy, as in her or their first or former estate or estates (any thing contain'd in the said indenture to the contrary thereof, in any wise notwithstanding). And the said *Richard*, for himself, his executors, administrators and assigns, and for every of them, by the said indenture, covenanted, promis'd and granted, to and with the said *Christian*, her executors, administrators and assigns, and every of them, that he the said *Richard*, his executors, administrators and assigns, from time to time, and at all times, from thenceforth, during the said several terms granted by the * indenture aforesaid, would well and truly pay, or cause to be paid, to the said *Christian*, her executors, administrators or assigns, upon the several feast-days or times in the year in which the same ought to have been paid, the several yearly rents, according to the true intent and purport of the said indenture, and the several reservations thereof, as in the same indenture it is before mention'd and specify'd, and by an indorsement on the indenture aforesaid, it was agreed by and between the said parties, at and before the sealing and delivery of the said indenture; and the said *Richard*, his executors, administrators and assigns, thereby covenanted, promised and granted, to and with

Reddendum
as to the
other Part.

Proviso.

Clause of
Re-entry.

Covenant
for the pay-
ment of the
Rent.

(P* 60)

Indorse-
ment on the
Back of the
Deed.

Covenant.

with the said *Christiane*, her executors, administrators and assigns, that he the said *Richard*, his executors, administrators, of assigns, some or one of them, upon the first day of *January*, yearly and every year, during the said term of twenty-one years, granted by the indenture aforesaid, would pay and deliver, or cause to be paid and delivered to the said *Christiane*, her executors, administrators or assigns, at or in the then dwelling-house of the said *Christiane*, situate in the said parish of *St. Martin in the Fields*, in the indenture aforesaid within written, twelve quart bottles full of canary, as by the said indenture, and endorsement thereupon, (amongst other things) it may and doth more fully and at large appear, by virtue of which lease the Entry and said *Richard*, in his life-time entered into the said demised pre-Possession, mises, and was possessed thereof; and being thereof thus possessed afterwards, (namely) on the seventeenth day of *July*, in the year of our Lord 1680. aforesaid, at the said parish and county, That the Lessee made his will, he the said *Richard* made his last will and testament in writing, and thereby constituted and appointed the said *Susanna* sole And made the Assignor his Executrix and died; executrix of his said testament; and afterwards, (namely) on the twenty-first day of *October*, in the same year, and at the place last above-mention'd, he the said *Richard* died possessed of the said demised premises, with the appurtenances, after whose decease the said *Susanna* undertook the charge and execution of the said testament, and proved the same in due form of law; and as Will, executrix of the testament aforesaid, enter'd into the said demised premises, and was thereof possessed, by reason of the execution of the said testament. And she the said *Susanna*, being thus possessed thereof, she the said *Susanna* afterwards, (to wit) on the fourth day of *June* 1685. assign'd all her estate, right, title, interest, and term of years, which she then had to come, of and in the said demised premises, with the appurtenances, to the aforesaid *Thomas*, by virtue of which assignment, he the said *Thomas*, afterwards, (to wit) the same day, year and place last above-mention'd, enter'd into the before demised premises, with the appurtenances, and was, and now is possessed thereof; And entered, Who entered, ed, and that is possessed and she the said *Christiane*, suggesting by way of *Protestation*, that she the said *Christiane*, from the time of making the indenture aforesaid, hath hitherto observ'd, perform'd and fulfill'd all and every of the covenants, promises and agreements above specified in the indenture aforesaid, on her part to be observ'd, perform'd and fulfill'd, according to the form and effect of the said indenture, the said *Christiane* declares, that in fact, after the assignment aforesaid was made to the said *Thomas*, (namely) on the first *day of *June*, in the first year of the reign of our sovereign Lord and Lady, the King and Queen, that now are, twenty-four bottles of Canary wine, reserved by the indorsement on the indenture aforesaid, for two years, ending on the said first day of *January*, in the first year aforesaid, was in arrear and unpaid to Rent. the said *Christiane*, and at the feast of the *Annunciation of the Blessed*

Covenant.

ed Virgin Mary, in the second year of the reign of their said present Majesties, sixty pounds of the said yearly rent of forty pounds for one whole year and an half, ending at the feast of the *Annunciation of the Blessed Virgin Mary*, were likewise in arrear and unpaid to the said *Christian*; and that the said *Thomas* did not upon the said first day of *January*, in the year aforesaid, pay or deliver the said twenty-four bottles of Canary wine; nor hath he paid to the said *Christian* the said sixty pounds or any part thereof, at the said feast of the *Annunciation of the Blessed Virgin Mary*, in the second year aforesaid, which he ought to have paid to her on the said day and feast, according to the intent and purport of the indenture aforesaid; and the said *Christian* declares, that the said *Thomas*, (altho' often requested) hath not perform'd, but hath thus broken his said covenant made with the said *Christian*, in this particular and hitherto hath and still doth refuse to perform the same to her; whereupon she declares she is injur'd and endamag'd, to the value of sixty pounds; and therefore she brings her suit, &c.

And the said *Thomas*, by *William Pocklington*, his Attorney, comes and defends the force and injury when, &c. And as to breaking the said covenant, in not paying twelve bottles of Canary, part of the said twenty-four bottles, above specify'd in the said declaration, for one year, ending at the first day of *January*, in the year of our Lord 1688. and as to twenty pounds, part of the said sixty pounds, which became in arrear and unpaid, for half a year, ending at the feast of the *Annunciation of the Blessed Virgin Mary*, in the said first year of the reign of their present majesties, the said *Thomas* pleads that he cannot deny the action of the said *Christian*, brought thereupon; nor but that he hath broken the covenant in that particular, as to the said twelve bottles of Canary, and as the said Twenty pounds, in such manner as the said *Christian* doth above suppose in her said declaration. And to the breaking the covenant aforesaid, in not paying twelve bottles of Canary, residue of the said twenty-four bottles of Canary; and also for not paying forty pounds residue of the said sixty pounds, specified in the declaration aforesaid, the said *Thomas* pleads that the said *Christian* ought not to have her said action thereupon against him, because he avers, that before the said twelve bottles of Canary, or any part thereof, or the said forty pounds for the rent of the said Tenement, with the appurtenances, or any part thereof, became in arrear or payable, (namely) on the fourteenth day of *June*, in the first year of the reign of their present Majesties, at the parish aforesaid, in the said county, he the said *Thomas* granted and assign'd to one *James Mott*, of *London*, Gent. all his estate, title, interest and term of years which the said

(P*62) **Thomas* then had to come of and in the tenements aforesaid, with the appurtenances; by virtue of which assignment, he the said

The Defendant pleads that he assigned over the Premises before any Rent due.

Covenant.

said *James Mott*, afterwards, (namely) on the same day and year, enter'd into the tenements aforesaid, with the appurtenances, and was, and now is possessed thereof, for the residue of the said term above specified in the declaration aforesaid; wherefore he prays judgment if the said *Christian* ought to have her said action thereupon against him.

And the said *Christian* replies that the plea of the said *Thomas*, as to breaking the covenant aforesaid, in not paying the twelve quart bottles of canary, residue of the said 24 quart bottles of canary; and also in not paying the said 40l. part of the said 60l. specified in the declaration aforesaid, above pleaded in bar, and the matter therein contain'd are not sufficient in law to preclude her the said *Christian* from having her said action thereupon against the said *Thomas*; and that she is, under no necessity, nor in any wise bound by the law of the land to make answer to the said plea, in such manner and form as the same is pleaded; and this she is ready to verify; whereupon for want of a sufficient answer, in this particular, she the said *Christian* prays judgment, and that her damages occasion'd by the breach of covenant aforesaid, may be awarded to her, &c.

And the said *Thomas* (inasmuch as he hath above alledg'd in his plea sufficient matter in law to preclude the said *Christian* from her action aforesaid, against the said *Thomas*, as to the breach of the covenant aforesaid, in not paying the said twelve bottles of canary, residue of the said twenty-four quart bottles of canary; and also for not paying the said forty pounds, residue of the said sixty pounds, specify'd in the declaration aforesaid, which the said *Thomas* is ready to verify; which said matter the said *Christian* doth not deny, nor in any wise make answer unto, but altogether refuses to admit the same to be verify'd) he prays judgment, and that the said *Christian* may be precluded from having her said action against the said *Thomas* thereupon, &c.

And for that the said *Christian* ought to have her damages, occasion'd by the breach of the covenant aforesaid, in not paying the twelve quart bottles of canary first above mention'd in the plea of the said *Thomas*, and the twenty pounds above acknowledged by the said *Thomas*, in the manner aforesaid; but because it is convenient there shou'd be but one taxation of damages for the whole premisses specify'd in the said writ, if judgment should happen to be given for the said *Christian* against the said *Thomas*, as to breaking the covenant aforesaid, in not paying the said twelve quart bottles of canary, residue of the said twenty-four quart-bottles of canary, and of the said forty pounds, residue of the said sixty pounds, whereof the said parties have submitted themselves to the judgment of the court; therefore let the writ of enquiry of damages, occasion'd by the breach of the covenant aforesaid, in not paying the

A Demurrer to Part.

Joinder in Demurrer

Judgment for the Part confessed.

One Taxation of Costs.

Covenant.

(P* 63) twelve quart bottles of canary, first above-mention'd in the plea of the said *Thomas*, * and of the said twenty pounds, above acknowledged in the same plea, by the said *Thomas*, in the manner aforesaid, be stay'd until the matter in law aforesaid, whereof the parties have submitted themselves to the judgment of the court, &c. and because the justices of this court are willing to advise themselves of and upon the premisses, whereof the parties have submitted themselves to the judgment of the court, before they give their judgment thereupon, a day is therefore given to the parties aforesaid, until, &c. to hear their judgment thereupon, inasmuch as the said justices here are not yet determin'd, &c.

Trin. 18 & 19 Car. 2. Roll 1692.

BARKEE against THOROLD.

1 Saund. 40.

2 Keb. 145.

S. C.

A Declaration against one that received the Profits of a Lunatick's Estate, and did not account, according to his Covenant.

Setting forth the Articles.

Reciting that Sir Bethel Wray was a Lunatick.

London, ff. Be it remember'd, that on *Monday* next after the morrow of the ascension of our Lord, in *Easter* term last past, *Richard Barker*, doctor in physick, and *Theodosia*, his wife, came before our sovereign lord the king at *Westminster*, by *Andrew Barker*, his attorney, and brought into this court of our said sovereign lord the king, then held there his bill against *Anthony Thorold*, esq; otherwise call'd (as in the deed) in the custody of the marshal, &c. in an action of covenant; and there are pledges for prosecuting, (namely) *John Doe* and *Richard Roe*, which said bill follows in these words, ff. *London*, ff. *Richard Barker*, doctor of physick, and *Theodosia* his wife, complain of *Anthony Thorold*, esq; otherwise called (naming him as in the deed) in the custody of the marshal of the marshalsea of our sovereign lord the king, before the king himself, in an action for a breach of covenant for this cause, (that is to say) that whereas by certain articles of agreement tripartite indented, had made and agreed on the twenty-ninth day of *April*, in the seventeenth year of the reign of his said present majesty, at *London*, in the parish of *St. Mary le Bow*, in *Cheap Ward*, between the said *Anthony*, by the name of *Anthony Thorold*, (as in the deed) of the first part, one *John Cowper*, esq; by the name of *John Cowper*, (as in the deed) of the second part, and then the said *Richard* and *Theodosia*, by the names of *Richard Barker*, &c. (as in the deed) of the third part; one part of which said articles, sealed with the seals of the said *Anthony* and *John Cowper*, they the said *Richard* and *Theodosia*, bring into this court, the date whereof is the same day and year, reciting that whereas *Bethel Wray*, gent. now *Sir Bethel Wray*, barr. by an inquisition, bearing date on the twenty-third day of *December*, in the fifteenth year of the reign of his said present majesty, had been found a lunatick, and not of sound memory; and the

custody

Covenant.

custody of the person and estate of the said lunatick, by a grant under the great seal of *England*, bearing date on the eighth day of *January*, in the said fifteenth year of the reign of his said present majesty, had been granted to the said *Richard Barker*, and *Theodosia*, his wife, one of the sisters of the said lunatick, as by the record thereof, plainly appeared. And whereas the said *John Cowper*, on the twentieth day of *December*, in * the sixteenth year of the reign of his said present majesty, had obtained a grant of the custody of the person and estate of the said lunatick likewise under the great seal of *England*; and several articles of agreement had been thereupon made and executed between the said *Anthony Thorold*, who married *Grisbilde* another sister of the said lunatick, and the said *John Cowper*, by reason whereof great disputes had arisen between the said *Richard Barker*, and *Theodosia* his wife, and the said *Anthony Thorold*, and *John Cowper*; and the receipt of the rents of the said estate had been obstructed, and divers suits were thereupon likely to arise; therefore to the intent that all questions, disputes and differences between the said parties might be composed and ended; and that a good understanding and friendship might be cultivated, established and continued between them, it was mutually covenanted, agreed and concluded between them as follows: *In the first place*, that the several articles of agreement, made between the said *Anthony Thorold*, and *John Cowper*, bearing date on the twenty-first day of *December*, then last past, a true copy whereof was annexed to the said articles brought into this court, and every clause and matter therein mentioned and contained, should be to all intents and purposes, and were by the said recited articles brought into this court, established, ratified and confirmed. *Secondly*, That in consideration of the labour and charges which the said *Anthony Thorold* should be put to in demising, letting and disposing of the estate of the said lunatick, so long as the said *Sir Betbel Wray* should continue a lunatick; and also in consideration of the charges which he would be put to in supporting the houses, and keeping up the fences of the Park; and likewise in keeping the house at *Glentworth*; together with the out-houses, gardens and orchards thereunto belonging, in good order and repair, and in discharging the duties and taxations which were or might be imposed and assessed thereupon; he the said *Anthony Thorold* should have the sole government and disposal of the said houses, gardens and orchards, and should have and received to his own use, during the lunacy of the said *Sir Betbel Wray*; and as to any thing which concerns the said *Richard* and *Theodosia Barker*, all the profits and emoluments, which in any manner howsoever should lawfully arise out of the Park belonging to the said house; and also out of the three closes of meadow or pasture, called *the Sands*, and *the upper and lower Badmoore*, thereto adjoining, and containing thirty-eight

(P* 64)

That the Custody of his Person and Estate was granted to J.C.

Covenant.

eight acres, or thereabouts. *Provided always*, that in case the repairs of the said houses should exceed yearly the sum of fifteen pounds, that all beyond and besides the said fifteen pounds a year, should be equally borne between the said *Anthony Thorold*, and *Richard and Theodosia Barker*. *Thirdly*, that all the profits and emoluments whatsoever, arising out of the estate of the said *Sir Bethel Wray*, (the said *John Cowper* being first satisfied and paid his allowance, according to the said articles, (annexed to the said articles brought into this court) the said houses, gardens, orchards, park and closes, likewise excepted, as aforesaid) should be equally divided between the said *Anthony Thorold* and the said *Richard and Theodosia Barker*,

(P* 65) * as soon as the manors, lands and tenements, out of which the said profits should arise, should be equally and differently valued and computed, the said *Anthony Thorold* should have to his own use and behoof, one full moiety thereof at his own particular disposal and management, and the other moiety thereof should be at the particular disposal and management of them the said *Richard and Theodosia Barker*, and to their own use and behoof. *Fourthly*, that the said *Richard and Theodosia Barker*, within the term next following, after ascertaining the profits of the moiety of the said estate allotted to him, as aforesaid, should give security to the Lord Chancellor, or to the keeper of the great seal of *England*, for the time being, for their accounting for so much of the profits of the said estate, as they should receive, with such condition as had been accustomed in cases of the like nature; and in the mean time the said *Anthony Thorold* should demise, let and dispose of all the said estate, rendering a just account to the said *Richard and Theodosia Barker*, as by the said articles it doth more fully appear. “ The tenor of

The Articles mentioned to be annexed to the Articles on which the Action is brought,

“ which said articles made between the said *John Cowper* and *Anthony Thorold*, and mention'd to be annex'd to the said articles brought into this court, followeth in these words; Articles of agreement, indented, had, made, concluded and agreed upon the 21st day of *December*, in the sixteenth year of the reign of our lord *Charles* the second, over *England*, &c. in the year of our Lord 1664. between *John Cowper*, of the parish of *St. Martin in the fields*, esq; of the one part, and *Anthony Thorold*, of *Marston*, in the county of *Lincoln*, esq; of the other part: Whereas the custody of the body and lands of *Sir Bethel Wray*, bart. a lunatick, is by his Majesty, granted unto the said *J. Cowper*, and whereas the said *J. Cowper* and *Anthony Thorold*, who married *Grisbilde*, one of the sisters of the said *Sir Bethel Wray*, are fully agreed that the said *Anthony Thorold*, shall have the letting, setting and disposing of the present estate of the said *Sir Bethel Wray*, so long as the said *John Cowper* shall have the custody, care and tuition of the body of the said *Sir Bethel Wray*; and it is agreed that the said *Anthony Thorold*, so long as the said *John Cowper* shall have

Covenant.

" the custody of the said Sir *Bethel Wray*, shall manage the said
 " estate, and shall and will well and truly pay unto the said
 " *John Cowper*, the sum of 400*l.* by the year, for the main-
 " nance and education of the said Sir *Bethel Wray*, in manner
 " following, that is to say, two hundred pounds upon the *feast*
 " of the *Annunciation of the Blessed Virgin Mary* next ensaing,
 " in the common dining-hall of the *Middle Temple London*,
 " and the rest by quarterly payments, at the *feasts of St. John*
 " *Baptist, St. Michael the Archangel, the Birth of our Lord, and*
 " *the Annunciation of the Blessed Virgin Mary*, at the place afore-
 " said, by even quarterly payments of 100*l.* at a time; and if
 " it shall happen that the said Sir *Bethel Wray* shall happen to
 " die before the quarter-day, or that the said custody shall
 " otherwise determine, that then the said *Anthony Thorold* shall
 " pay for so long a time as he shall keep the said Sir *Bethel*
 " *Wray*, after any of the quarter-days, so much *pro rata* for
 " that time, according to the rate of 400*l.* by the year. *Item*,
 " It is agreed that the said **Anthony Thorold* shall join with the (P* 66)
 " said *John Cowper*, as a security for the person and estate of
 " the said Sir *Bethel Wray*, and shall from time to time give
 " such other security concerning the said estate, as he shall be
 " ordered by the lord chancellor of *England*, or keeper of the
 " great seal of *England*, for the time being; and shall also
 " account for the estate of the said Sir *Bethel Wray*, and free
 " and discharge the said *John Cowper*, his heirs, executors
 " and administrators, of and from all sum and sums of money
 " that he shall receive out of the said estate, except the said
 " sum of 400*l.* And the said *Anthony Thorold* doth cove-
 " nant and agree, to and with the said *John Cowper*, that he
 " will manage the said estate for the best advantage, and that
 " no waite and destruction be done in the said houses, wood
 " and premisses, but that constant and due repairs be made;
 " and that he will keep up the said park stored with a con-
 " venient number of deer, at no time less than 150. And
 " further, that if it shall happen that *Anne*, the only daughter
 " and heir of Sir *Bethel Wray*, Bart. deceased, shall die du-
 " ring the said custody, whereby a greater addition of estate
 " will fall to the said Sir *Bethel Wray*, and the attendance
 " upon him will be the greater, that then the said *John Cowper*
 " shall have allowed unto him by the said *Anthony Thorold*, the
 " sum of three hundred pounds by the year, over and above
 " the said sum of four hundred pounds for the maintenance
 " and education of the said Sir *Bethel Wray*, to be paid at
 " such days, and in such manner as the said sum of 400*l.* by
 " the year, is by the said articles limited and appointed to be
 " paid. *In witness* whereof the said parties interchangeably
 " have set their hands and seals to these presents, the day
 " and year first above written". And they the said *Richard*
 " and *Theodosia*, suggesting by way of *Protestation*, that the said
Anthony

Covenant.

**Protesting
Perfor-
mance.**

The Breach

(P* 67)

Plea.

**That before
the Receipt
of the 1800l.
he laid out
1810l.**

Anthony hath not performed any thing contained in the articles aforesaid, brought into this court on his part to be performed and fulfilled, they the said *Richard* and *Theodosia* declare, that he the said *Anthony*, between the time of making the said articles, brought into this court, and the twentieth day of *May*, in the eighteenth year of the reign of his said present majesty, (namely) on the eighteenth day of *May*, in the said eighteenth year of the reign of his said present majesty, at *London* aforesaid, in the said parish and ward, had and received eighteen hundred pounds of lawful money of *England*, from the profits and emoluments arising out of the estate of the said Sir *Bethel Wray* (the said *John Cowper*, being first satisfied and paid the said allowance above specified in the articles aforesaid, of the twenty-first day of *December*, in the fixteenth year aforesaid, according to the said articles; and the houses, gardens, orchards, park and closes mentioned in the said articles, brought into this court, likewise excepted; and that the said *Anthony*, from the time of making the articles aforesaid, brought into this court, until the day of exhibiting this bill, (namely) on the twenty-eighth day of *May*, in the said eighteenth year of the reign of his present majesty, hath not rendered to the said *Richard* and *Theodosia*, or to either of them, any account of the rents, issues, and profits, or emoluments arising or accruing from the estate of the said Sir *Bethel Wray*, nor hath paid to the said * *Richard* or *Theodosia*, or to either of them, one moiety of the said eighteen hundred pounds, or of any of the profits, so, as aforesaid, had and received by the said *Anthony*, out of the said estate of the said Sir *Bethel Wray*, according to the intent and purport of the articles aforesaid, although the said *Anthony*, within that time, (namely) on the twenty-second day of *May*, in the said eighteenth year of his said present majesty, and often afterwards at *London* aforesaid, in the said parish and ward, was by the said *Richard* and *Theodosia* thereto required; and the said *Richard* and *Theodosia* declare, that he the said *Anthony*, altho' often requested, hath not performed his said covenant made with the said *Richard* and *Theodosia* in this particular, but hath altogether broken the same, in the manner above, and hitherto hath, and still doth refuse to perform the same; whereupon they the said *Richard* and *Theodosia* declare that they are injured and endamaged to the value of five hundred pounds; and thereupon they bring their suit, &c.

And now here at this day, (namely) on *Friday* next after the morrow of the *Holy Trinity*, this same term, (to which day the said *Anthony Thorold* had leave to imparl to the bill aforesaid, and then to answer, &c.) as well the said *Richard Barker* and *Theodosia* his wife, by their said Attorney, as the said *Anthony Thorold*, by *William Callowe*, his Attorney, appear; and the said *Anthony Thorold* defends the force and injury when, &c. and pleads

Covenant.

pleads that the said *Richard* and *Theodosia* ought not to have or maintain their said action against him, because he avers that right and true it is, that he the said *Anthony* received the said eighteen hundred pounds out of the profits and emoluments arising from the estate of the said Sir *Bethel Wray*; but the said *Anthony* doth further insist, that before the receipt of the said eighteen hundred pounds, (namely on the seventh day of *May*, in the said eighteenth year of the reign of his said present Majesty) he the said *Anthony* had expended and laid out the sum of 1810*l.* in and about repairing the said premises above-mentioned in the articles aforesaid, and other incident and necessary charges; and therefore he the said *Anthony* retained in his hands the said eighteen hundred pounds, by him received as aforesaid, towards satisfaction of the said eighteen hundred and ten pounds by him laid out and expended, as aforesaid; and for that reason he hath not rendered any account thereof to the said *Richard* and *Theodosia*; and this he is ready to verify; whereupon he prays judgment whether the said *Richard Barker* and *Theodosia* ought to have or maintain their said action against him thereon, &c.

And that he retained the 1800*l.* towards satisfaction.

And the said *Richard Barker*, and *Theodosia* his wife, reply that they, (notwithstanding any thing above alledged by the said *Anth. Thorold* in his plea,) ought not to be precluded from going on with their said action against the said *Anthony* thereupon, because they do alledge that the said plea, in the manner and form as the same is above pleaded by the said *Anthony Thorold*, and the matter therein contained are not sufficient in law to preclude them the said *Richard* and *Theodosia* from going on with their said action against the said *Anthony Thorold* thereon, to which said plea, and the matter therein contained, they the said *Richard Barker* and *Theodosia* are under no necessity, nor in any wise bound by the law of the land to answer; and this they are ready to verify; whereupon for want of a sufficient answer in this particular, they the said *Richard Barker* and *Theodosia*, pray judgment and their damages occasioned by the premises to be awarded to them, &c.

(P* 68)

And the said *Anthony Thorold* rejoins that the said plea above pleaded by the said *Anthony Thorold*, in the manner and form aforesaid, and the matter therein contained are good and sufficient in law to preclude the said *Richard Barker* and *Theodosia*, from going on with their said action against the said *Anthony Thorold* thereupon, which said Plea, and the matter therein contained, he the said *Anthony Thorold* is ready to verify and prove, in such manner as the court shall think fit; and because the said *Richard Barker* and *Theodosia* do not answer to the said plea, nor hitherto any wise deny the same, he the said *Anthony Thorold*, as before, prays judgment; and that the said *Richard Barker* and *Theodosia*, may be precluded from going on with her said action thereupon, against the said *Anthony*, &c. but because the court of our said an-
sovereign

Joinder in Demurrer.

Continu-

Covenant.

sovereign Lord the King, are not yet advised to give their judgment of and upon the premisses; a day therefore is given to the parties aforesaid, before our sovereign Lord the King, at *Westminster*, till *Tuesday* next after three weeks from *St. Michael*, to hear their judgment of and upon the premisses; for that the court of our said sovereign Lord the King, now here, are not yet determined, &c. at which day the said parties, by their said attornies, come before our said sovereign Lord the King, at *Westminster*; but because the court of our said sovereign Lord the King, are not yet advised to give their judgment of and upon the premisses, a further day therefore is given to the parties aforesaid, before our sovereign Lord the King, at *Westminster*, until *Monday* next after the morrow of the *Purification of the blessed Virgin Mary*, to hear their judgment of and upon the premisses, for that the court of our said sovereign Lord the King, are not yet, &c. at which day the said parties by their said attornies, appear before our sovereign Lord the King at *Westminster*; whereupon all and singular the premisses being viewed, and fully understood by the court of our said sovereign Lord the King, now here; and upon demure deliberation thereof had, forasmuch as it appears to our said sovereign Lord the King, now here, that the plea aforesaid, above pleaded by the said *Anthony Thorold*, in the manner and form aforesaid, and the matter therein contained are not sufficient in law to preclude the said *Richard Barker* and *Theodosia* from proceeding in their said action against the said *Anthony Thorold* thereupon, it is adjudged that the said *Richard Barker* and *Theodosia* ought to recover their said damages against the said *Anthony Thorold*, occasioned by his breaking his covenant aforesaid; but because it is not known to the court of our said sovereign Lord the King, now here, what damages the said *Richard* and *Theodosia* have sustained, by reason of the breach of covenant aforesaid, therefore the sheriffs of *London* are commanded that they diligently inquire, by the oath of twelve honest and lawful men of their Bailliwick, what damages the said *Richard* and *Theodosia* have sustained, as well by reason of the breach of covenant aforesaid, as for their expences and costs laid out by them about their suit, in this particular; and that they return to our sovereign Lord the King at *Westminster*, on *Wednesday* next after fifteen days of *Easter*, the inquisition which they shall take thereon, under their seals, and the seals of those by whose oath they shall take the inquisition; together with his Majesty's writ, directed to them for that purpose. The same day is given to the said *Richard* and *Theodosia*, there, &c. at which day the said *Richard* and *Theodosia* came before our sovereign Lord the King, by their said attorney; and the Sheriffs of *London*, (namely) *Sir Robert Viner*, Knt. and Bart. and *Sir Joseph Sheldon*, Knt. returned an inquisition taken before them at the *Guild-Hall* of the City of *London*, situate in the parish of *St. Lau-*

The like.

Judgment.

That the
Plea is
insufficient.

(P* 69)
Writ of En-
quiry
awarded.

Covenant.

rence, in the *Old-Jury*, in *Cheap Ward*, on the twenty-first day of *March*, in the nineteenth year of the reign of his present majesty, by the oath of twelve honest, &c. by virtue of his majesty's Writ, directed to them for that purpose; whereby it is found that the said *Richard* and *Theodosia* have sustained damages, occasioned by the breach of the covenant aforesaid, besides their expences and costs laid out by them in their suit in this particular to 31*l.* 9*s.* 9*d.* and for their expences and costs to 26*l.* 8*d.* therefore it is adjudged that the said *Richard Barker* and *Theodosia* his wife, do recover against the said *Anthony Thorold*, their said damages, found by the said inquisition, in the manner aforesaid; and also 20*l.* 13*s.* 4*d.* awarded by the court of our sovereign Lord the King, now here, to the said *Richard* and *Theodosia*, with their consent, by way of Increase for their expences and costs aforesaid, which said damages in the whole, amount to 339*l.* 9*s.* 9*d.* and be the said *Anthony* amerced, &c.

There was first an objection to the plea, that it was ill, for two reasons; First, That there was no clause in the articles which im- powers the defendant to expend more than 15*l.* a year in charges, and to pay Cowper his allowance, for if the charges were greater, the plaintiffs were to pay the moiety; and therefore the defendant is not bound to lay it out unless the plaintiff would pay the moiety; and secondly, upon which the counsel for the plaintiff, principally relied, that the plea was uncertain, because the defendant saith that he has expended 800*l.* about the repairs and other necessary charges, and it is not shewn what those necessary charges were, so that it might appear to the court whether they were necessary or not; and the court for that reason held the plea was ill; and the counsel for the defendant took an exception to the declaration, and said that there were two breaches assigned, (to wit) that he had not rendered an account, and that he had not paid the moiety of the 800*l.* And as to not rendering an account, Saunders would have it that the breach was not well assigned, because it did not appear that the plaintiffs had ever assigned any * auditors to audit the defendant's account. And as to the payment of the moiety of the said 800*l.* he said that the defendant was not bound to pay it before the lands were valued and ascertained, which was not averred to have been done; for by the articles plaintiffs were bound within one term after the ascertaining the lands, and not before, to give security to the Chancellor for so much of the profits as they should receive; and here the defendant shall be answerable for all the 800*l.* to the Lunatick, although he paid the moiety of it to the plaintiffs, and yet he had no remedy by the articles to compel the plaintiffs to give security for their part, because no ascertainment is made; for altho' the defendant is bound to pay immediately upon ascertaining the value of the lands, the moiety of the 800*l.* Profits, and the plaintiffs have liberty to give security till within the next term after the ascertainment, yet the defendant was not bound to pay the moiety of the profits before the ascertainment, after which he hath a remedy by the articles to compel the plaintiffs to give security,

1 Saund. 48,
The Case.
2 Keb. 145.
S. C.

(P* 70)

Covenant.

security, and so the ascertainment ought to precede the payment, and as it was not averred that there was any ascertainment, he concluded the declaration ill in that point; but it was resolved by the court, that the declaration was well enough; for as to the first point, if not giving an account, it was answered, that peradventure the defendant by law was not compellable to account before the plaintiffs themselves; but here it is not the law, but the defendant has obliged himself, by his own deed, to account before the plaintiffs themselves, to which he was not compellable by law: And it appears by the book that such account by the plaintiff would be good, and therefore as he hath not made such account with the plaintiff, he hath broken his covenant; and as to the second, in not paying the moiety of the 800l. it was answered that ascertainment was well enough, by the averment of the plaintiffs, that the defendant had received so much of the money for any other ascertainment of the 800l. could not be made; and the first clause of the covenant was, that the profits should be equally divided, without any ascertainment or valuemēt whatsoever; and the breach without question, was well assigned thereupon; and judgment was given for the plaintiff.

2 Vent. 25,
99.
Yelv. 277.
1 Leon. 47.
2 Lev. 26.
68, 124.

HODGES against NICHOLAS.

1 Lut. 865. In a writ of Error, returnable in the exchequer-chamber, upon
N. L. 268.
Comb. 33.
Skinn. 253.
2 Show.
493.
Placita.

a judgment in the king's bench.

Wearg.

Pleas in the exchequer-chamber, at *Westminster*, before *William Mountague*, chief baron of the exchequer, of our sovereign lord the king, and of the degree of the coife; and also *Sir Edward Atkins*, Knt. *Sir William Gregory*, Knt. and *Sir Thomas Streete*, Knt. the other barons of the exchequer of our said sovereign lord the king, and of the degree of the coife, on Saturday the twenty-fourth day of January, in the thirty-second year of the reign of our sovereign lord *Charles* the second (P* 71)* by the Grace of God, King of England, Scotland, France and Ireland, Defender of the Faith, &c.

The Writ
of Error

Our Sovereign Lord the King hath sent to his faithful and well beloved *Sir George Jefferyes*, Knt. and Bart. being the chief justice of our Sovereign Lord the King, assigned to hold Pleas, before the King himself, his writ inclosed in these words: *Charles* the second, by the Grace of God, King of England, Scotland, France and Ireland, Defender of the Faith, &c. to our faithful and well beloved *Sir George Jefferyes*, Knt. and Bart. assigned to hold Pleas before us, greeting: Whereas in a statute published in the Parliament of the lady *Elizabeth*, late Queen of England, held at *Westminster*, on the twenty-third day of November, in the twenty-seventh year of her reign, it was enacted by the authority of the same parliament, that where any judgment should then at any

time

Covenant.

time afterwards be given in the court of King's bench, in any suit or action of debt, detinue, covenant, account, or action upon the case, ejectment or trespass, first begun, or there to be begun, except only where we should be a party, the party, plaintiff or defendant, against whom any such judgment should be given, may, at his election, prosecute out of the court of chancery a special writ of *error*, to be devised in the said court of chancery, directed to the chief justice of the said court of King's Bench, for the time being, commanding him that the said record, and all things concerning the said judgment be transmitted before the justices of the common bench, and the barons of the exchequer, there to be examined, by the said justices of the common bench, and the barons aforesaid, which said justices of the common bench, and such of the barons of the exchequer, who are of the degree of the Coife, or six of them at least, by virtue of the same act, shall thereupon have full power and authority to examine all such errors as shall be assigned or found in or upon any such judgment, or thereupon to reverse or affirm the said judgment, as the law requires, except for errors assigned or found for or concerning the jurisdiction of the said court of King's Bench, or any defect of form in any writ, return, plaint, bill, declaration, or in any plea, process, verdict or proceeding whatsoever; and that after the said judgment shall be affirmed or reversed the said record, and all things concerning the same shall be removed and brought back again into the said court of King's bench, where there may be such further proceedings thereupon, as shall be proper, as well for the execution, as otherwise, as in the said statute it is more fully contained; and because in the record and proceedings; and also in giving judgment of a plaint in our court, before you, by a bill, between *Thomas Nicholas* and *Samuel Hodges*, in an action for a breach of covenant, there happens to be manifest error, as it is said, to the great damage of the said *Samuel*, as we have received information from his complaint, which error in no wise relates to us, or the jurisdiction of the said court of King's Bench, or to any defect of form in any writ, return, plaint, bill, declaration, or in any plea, process, verdict or proceeding whatsoever, as we are informed; we therefore willing that the errors, (if any there be) * according to the form of the statute aforesaid, be corrected, and full and speedy justice be done to the parties aforesaid, in this particular, we command you that if judgment be given thereupon, then do you cause the record and proceedings aforesaid, together with all things touching the same, to be brought before the justices of the common bench, and the barons of our exchequer aforesaid, in our said exchequer-chamber, on *Saturday* the twenty-fourth day of *January*, next coming, that the said justices and barons, viewing and examining the record and proceedings aforesaid, may further cause to be done, what

Covenant.

of right, and according to the statute aforesaid, shall be to be done thereupon. *Witness our self at Westminster, on the third day of December, in the thirty-sixth year of our reign.*

The return. *The record and proceedings aforesaid, together with all things touching the same, whereof mention is made in the within writ, following in these words, ff. Pleas before our sovereign Lord the King at Westminster, of Easter term, in the thirty-fourth year of the reign of our sovereign Lord Charles, now King of England, &c. Roll 379.*

The Declaration. *Middlesex, ff. Be it remembered, that heretofore, (to wit) in Easter term last past, Thomas Nicholas, by Henry Doughty, his attorney, came before our sovereign Lord the King, at Westminster, and brought here into this court of our said sovereign Lord the King, then there, his bill against Samuel Hodges, in the custody of the marshal, &c. in an action for a breach of covenant, and there are pledges for the prosecution, (namely) John Doe and*

In an Action of Covenant upon Articles of Copartnership. *Richard Roe, which said bill followeth in these words : Middlesex, ff. Thomas Nicholas complains of Samuel Hodges, being in the custody of the Marshal of the Marshalsea of our sovereign Lord the King, before the King himself, for this cause, (to wit) that whereas by certain written articles of agreement, intended, made, concluded and agreed, on the twenty ninth day of January, in the twenty-eighth year of the reign of his said present Majesty, at the parish of St. Paul, Covent-Garden, in the county aforesaid, and mentioned to be made between the said Thomas Nicholas, by the name of Thomas Nicholas, (as in the articles) of the one part, and the said Samuel Hodges, and Mary his wife, by the names of, &c. likewise, (as in the articles) of the other part, which other part of the written articles of agreement, sealed with the seal of the said Samuel, bearing date the same day and year, he the said Thomas brings into this court, it is testified, that it was by the said written articles of agreement, covenanted, articulated and agreed between the said parties, to the articles aforesaid, in the manner and form following, (that is to say) That by the permission of GOD, a joint trade and partnership should be carried on and managed between the said Thomas Nicholas and Mary Hodges, in the trade, art and mystery of a man's Taylor, for and during the full time and space of four years, to be computed from the twenty-fifth day of December, then last past, before the date of the writing of articles of agreement aforesaid, in the house, then in the possession * of the said Samuel and Mary Hodges, situate in Bedford-street, in the parish of St. Paul, Covent-Garden, if the said Thomas Nicholas and Mary Hodges should so long live ; and that they the said Thomas Nicholas and Mary Hodges should use their utmost endeavours in managing and following their said joint-trade, and should have the shop, the cutting room and the parlour, with the closets in the same rooms, being part of the house aforesaid, for carrying on the said joint-trade, for the use of them the said Thomas Nicholas and Mary Hodges, in their trade*

Covenant.

trade of a man's taylor, as the same had thentofore lately been used, and not otherwise. And the said *Samuel Hodges*, and *Mary* his wife, by their writing of articles of agreement aforesaid, covenanted, granted and agreed to and with the said *Thomas Nicholas*, that he the said *Thomas* should have, hold and enjoy, to his own use, all the rooms and chambers then in the possession of one *Dr. Ballou*, (*that is to say*) all the rooms of The Plaintiff to have such Rooms, &c. the first floor, to the entry, as well to the fore-door as the back-door, and the kitchen and cellar below stairs, being another part of the said house, during the four years aforesaid, if she the said *Mary* should so long live, at and for the yearly rent of a pepper corn to be paid to the said *Samuel Hodges* and *Mary* his wife, upon the twenty-fifth day of *December*, in every year, if the same should be demanded; and that they the said *Samuel Hodges*, and *Mary* his wife, at the end of the said term of four years, or other sooner determination aforesaid, at the request, costs and charges of him the said *Thomas Nicholas*, should assign the lease of the said dwelling house of them the said *Samuel* and *Mary*, and all the right, title, interest and term of years then to come, claim and demand of them the said *Samuel* and *Mary*, and of either of them, of, in and to the said house, to the said *Thomas Nicholas*, his executors, administrators and assigns, which said assignment of the lease of the said House, he the said *Thomas Nicholas*, his executors or assigns, should take and accept of, and should then likewise seal a counter-part of the said assignment, or some other writing to them the said *Samuel Hodges*, and *Mary* his wife, or to the survivor of them, to indemnify them the said *Samuel* and *Mary*, their executors and administrators, and their goods and estates of and from the rents and covenants reserved and contained in the said lease. And the said *Samuel Hodges* and *Mary* his wife, did by the said written articles of agreement, for themselves, further covenant, promise and agree, to and with the said *Thomas Nicholas*, that from and after the expiration of the said term of the Articles aforesaid, they the said *Samuel Hodges*, and *Mary* his wife, or either of them, would not at any time or times, directly or indirectly, intercede or ask any person or persons, who then should be, or during the said copartnership had been customers to the said *Thomas Nicholas* and *Mary Hodges*, in the said occupation of a man's taylor, for their work or custom, nor would work or make to or for them, or any or either of them, or for their or either of their servants, any apparel or wearing garments, nor by their or either of their means or contrivance, would procure any person or persons to do any work, to or for any of their said customers, * or their servants, but should do to the utmost that they or any of them could or might, to turn over the said joint-trade, and all the customers which then were, or at any time during the said partnership should be customers to the partners aforesaid, to him the said *Thomas Nicholas* only; and further it was agreed by the said written articles of agreement, by and between the said parties thereto, that he the said *Thomas Nicholas*, being the only person capable of carrying on and exercising the said joint-trade, should have, take and receive, to his own use, the full

The Defendant or his Wife not to ask for the Work of their Customers after the Term. Or to work for them.

(P* 74)

The Plaintiff to have sol. a Year.

Covenant.

and just sum of fifty pounds a year, out of the clear profits which should arise from the said trade, without giving any account for the same to the said *Samuel Hodges* and *Mary* his wife, or either of them, and that the rest of the clear profits arising from the said trade, and also all the disbursements belonging and appertaining thereto, should be had and received, borne and paid by them the said *Thomas Nicholas* and *Mary Hodges*, equally share and share alike; and that they should once every half-year, (namely) on the 24th day of *June*, commonly called *Midsummer*, and the twenty-fifth day of *December*, commonly called *Christmas*, in every year, during the said term, cast up their shop-books, and make up and adjust the accounts of all their receipts, debts and disbursements, that neither the said parties should detain or keep the said book or books of account to him or herself, from each other, after the said book or books should be required by either party, or his or her executors, administrators or assigns, to obstruct or hinder the said account, but that the said books and receipts, at all times during the said partnership, should be produced and used in common by either of the said parties, their executors, administrators and assigns; and if it should please GOD that the said *Thomas Nicholas*, or the said *Mary Hodges* should happen to die, during the time of their said partnership, that then the survivor of them should, within one month next following such decease, as aforesaid, make a true and just account to the executors or administrators of him or her so dying (if the same should be demanded) of all their receipts, debts or disbursements, (such executors or administrators first giving security for the payment of the moiety of the debts which should be contracted relating to the trade and partnership of the said *Thomas* and *Mary*.) And it was further covenanted and agreed, by the said written articles of agreement, by and between all the said parties to the articles aforesaid, that he the said *Thomas Nicholas*, when ever he pleased, should take and receive into his service, or discharge or put away from his service any servant or servants, journeyman or journeymen, without the consent of the said *Mary Hodges*, except the apprentices and domestick servants which then were at yearly wages; and that neither of the said parties, during the partnership aforesaid, should have, take, keep or maintain any covenant servant or apprentice to work or serve in the said partnership, other than such as they, or one of them then had, without the consent and good liking of the other. And moreover it was covenanted and agreed, by the said written articles of agreement, by and between the said parties to the articles aforesaid, that neither the said *Thomas Nicholas*, nor the said *Samuel Hodges*, or *Mary* his wife, should at any time, during the time of their partnership, become indebted, or bound, or bail or security to, with or for any person or persons whatsoever, either by any obligation, bill or word of mouth, or otherwise howsoever, for any debt, cause, matter or thing whatsoever, over and above the value of five pounds sterling in the whole, without the special licence or agreement of the other of them, under his, her, or their hands, first had and obtained in writing. And it was further covenanted

That if either party died, the Survivor, within one Month, should account with the Executors or Administrators of the Party dying.

That *Thomas Nicholas* should take or turn away the Servants.

That neither of the Parties should take other Servants, without the consent of the other.

(P* 75) That neither party should owe or be bound or bail for above 5l.

Covenant.

venanted, granted, concluded and fully agreed, by the said written articles of agreement, by and between the parties aforesaid, that they the said parties, their executors and administrators, at the end of the said term of four years, or other sooner determination of the said partnership, which should first and next happen, should make a full, clear, perfect and final account and reckoning between them, either with the other, of and for all their debts, wares, profits, and all other things whatsoever, concerning the trade and partnership aforesaid, and should then make a full and equal partition and division of all monies, wares and commodities then of and belonging to their said partnership; and should likewise then make a true, equal partition and division of the debts due to them by their books, as partners upon bonds, bills or otherwise, as they should be able to do; and after such partition or division of the debts, as aforesaid, they the said parties, (to wit) the said *Thomas Nicholas* and *Mary Hodges*, or the said *Samuel Hodges*, for and on the behalf of the said *Mary*, or the executors or administrators of the said *Thomas Nicholas* and *Mary Hodges*, should cast a dye for his or their choice of such divided share; and the party or parties to whom the highest dye should happen to be, should have his, her or their choice therein according, without any other claim or further pretence of any other person whatsoever; and after such division and choice so made, they the said parties, their executors and administrators should authorize the other of them to sue for and recover the aforesaid debts, due by the several persons from whom the same should be due, by such writing or writings as counsel learned in the law should advise; and by the written articles aforesaid, it was farther agreed by the said parties thereto; and the said *Samuel Hodges*, for himself, his executors and administrators, did by the said written articles, covenant and agree to and with the said *Thomas Nicholas*, that he the said *Samuel Hodges*, during the time of the partnership aforesaid, would not intermeddle, or in any manner howsoever, concern himself with the management of the said trade of a man's taylor, otherwise than to be present at the making even their accounts, and likewise to satisfy one moiety of the loss, or to receive one moiety of the profits arising or proceeding therefrom; and lastly by the said written articles of agreement, it was agreed by and between the said parties thereto, at and before the sealing and delivery thereof, that no other person or persons whatsoever, but only the said *Thomas Nicholas*, should make use of the said cutting room, during the time of the partnership aforesaid, unless such person or persons as the said *T. N.* and *M. H.* should agree and consent to, * as by the written articles of agreement aforesaid it doth and may more fully appear; and the said *Thomas Nicholas* declares, that altho' the said *Mary* lived out the whole four years above specified in the said written articles of agreement, and is now alive, (to wit) at the said parish of *St. Paul's Covent-Garden*, and altho the said *Thomas*, from the time of making the said written articles of agreement hath well and truly observed, performed, fulfilled and kept all

A Covenant to make up an account at the End of the Term. And divide the profit and Loss.

And after such Division each Party to cast a Dye for the Choice.

And he or she that had the highest Dye should choose.

Each of the said Parties should authorize the other to sue.

And that Samuel Hodges would not meddle or concern himself with the Partnership trade.

That Thomas Nicholas, and no other Person, should have the use of the Cutting Room, (P* 76)

Averment that she has lived out the time of the Partnership and is now alive.

Covenant.

Perfor-
mance by
the Plain-
tiff,

First
Breach, af-
signed for
not permit-
ting the
Plaintiff
to carry on
the Trade
in the house.

But hin-
dered the
Plaintiff
therefrom.

Second
Breach. And
denied the
Plaintiff
the use of
the Cutting
Room, &c.
Third
Breach, that
the defend-
ant solicited
the Lord
Herbert and
Sir William
Mannock
two custom-
ers, after
the end of
the partner-
ship.

(1* 77)
Upon which
a Bill was
brought out.

and singular the covenants, grants and agreements above specified in the said written articles of agreement, on his part to be observed, performed, fulfilled and kept, according to the force, form and effect of the articles aforesaid, and suggesting, by way of protestation, that the said *Samuel* and *Mary* have not, nor either of them hath observed, performed, fulfilled and kept any of the covenants, grants or agreements above specified in the said written articles of agreement, on the part of him the said *Samuel*, or them the said *Samuel* and *Mary*, to be observed, performed, fulfilled and kept, according to the form and effect of the said written articles of agreement, the said *Thomas* avers, that in fact the said *Thomas* and *Mary*, after the said written articles, and before the expiration of the said four years specified therein, (namely) on the thirtieth day of *July*, in the twenty-ninth year of the reign of his present majesty, at the parish of *St. Paul, Covent-Garden*, would not, nor would either of them permit the said *Thomas* to exercise and carry on the said trade of a man's taylor in partnership between the said *Thomas* and *Mary*, in the house aforesaid, which, from the time of making the said written articles of agreement, was in the occupation of them the said *Samuel* and *Mary*; but they the said *Samuel* and *Mary*, and each of them, altogether hindered the said *Thomas* from exercising and carrying on the trade aforesaid, in the partnership between the said *Thomas* and *Mary*, in the trade of a man's taylor in the aforesaid house, within the four, years above mentioned in the said written articles of agreement (namely) on the thirtieth day of *July*, in the twenty-ninth year of the reign of his said present majesty, and at divers days and times between the said thirtieth day of *July*, in the said twenty-ninth year of the reign of his said present majesty, and the 24th day of *June*, in the thirty-second year of the reign of his said present majesty, (to wit) at the said parish of *St. Paul, Covent-Garden*; and the said *Samuel* and *Mary*, from the said thirtieth day of *July* in the twenty-ninth year of the reign of his said present majesty, until the said twenty-fourth of *June*, in the 32d year of the reign of his said present majesty, refused and denied to permit the said *Thomas* to have the sole use, together with the said *Mary*, of the cutting room and the parlour, with the closets therein, part of the house aforesaid, for the use of the said *Thomas* and *Mary*, in their trade of a man's taylor, as the same had then lately been used before the making of the said written articles of agreement; and the said *Thomas* further declares, that in fact the said *Thomas* and *Mary*, and each of them, after making the said written articles of agreement, and after the expiration of the said four years therein mentioned, (to wit) on the first day of *January*, in the thirty-third year of the reign of his present majesty, at the said parish of *St. Paul, Covent-Garden*, in the county aforesaid, applied to and solicited the Right Honourable Charles lord Herbert, son and heir apparent of Henry marquis of Worcester, and Sir William Mannock, Bart. and several other persons who had been customers to the said *Thomas* and *Mary*, in their said trade of a man's taylor, during these

Covenant.

their said partnership, for their work and custom in the said trade
 of a man's taylor; and the said *Thomas* further declares, that
 in fact the said *Samuel* and *Mary*, after making the said written
 articles of agreement, and after the expiration of the said four ^{Fourth}
 years therein mentioned, (namely) on the first day of *January*, ^{Breach.}
 in the said thirty-third year of the reign of his present majesty, ^{That they}
 and at divers days and times between the said first day of ^{made sever-}
January and the first day of *April*, in the thirty-fourth year ^{al Suits}
 of ^{of Cloa hes,}
 the reign of his said present majesty, (to wit) at the said ^{&c. for}
 parish of *St. Paul, Covent-Garden*, in the county aforesaid, ^{them.}
 wrought for and made several suits of men's cloaths and gar-
 ments for the said Right Hon. *Charles* lord *Herbert*, and Sir
William Mannock, and for their servants, and to and for sever- ^{Fifth}
 al other persons who had been customers to the said *Thomas* and ^{Breach.}
Mary, in their said trade of a man's taylor, during the time of ^{That they}
 their partnership aforesaid; and that they the said *Samuel* and ^{did not do}
Mary, after the expiration of the said four years, in the writ- ^{their ut-}
 ten articles of agreement above-mentioned, and after the deter- ^{most to}
 mination of the said partnership between the said *Thomas* and ^{turn over}
Mary, did not do their utmost to turn over to the said *Thomas* ^{the Partner-}
 their said joint trade, and all the customers which were at the ^{ship Trade}
 time of making the said written articles of agreement, and ^{to the said}
 at other times afterwards, and within the said four years men- ^{Thomas,}
 tioned in the said written articles of agreement, had been cus- ^{but}
 tomers to the said *Thomas* and *Mary* in their said partnership ^{That they}
 trade; but they the said *Samuel* and *Mary*, after the expiration ^{the defend-}
 of the said four years mentioned in the said articles of agree- ^{ants, by In-}
 ment, and after the determination of the said partnership of the ^{stigations,}
 said *Thomas* and *Mary*, (namely) on the twenty-fifth day of ^{Solicitations}
March, in the twenty third year of the reign of his said present ^{&c. drew}
 majesty, at the said parish of *St. Paul, Covent Garden*, in the ^{away and}
 county aforesaid, by their instigations, insinuations, solicitations, ^{prevailed}
 upon ^{upon People}
 endeavours and procurements prevailed upon and drew, away as ^{not to em-}
 well the said *Charles* lord *Herbert*, and Sir *William Mannock*, as ^{ploy the}
 Plaintiff.
 several others of his majesty's subjects, which before that time,
 and during the time of the said partnership, had been customers
 to the said *Thomas* and *Mary* in their said partnership trade of
 a man's taylor, from making use of and employing the said
Thomas in the said trade of a man's taylor, (to wit) at the said
 parish of *St. Paul Covent-Garden*, in the county aforesaid; and
 that the said *Mary*, after making the said written articles of
 agreement, and within the four years therein mentioned (to
 wit) on the tenth day of *August*, in the twenty-ninth year of ^{Sixth}
 the reign of his present majesty, at the said parish *St. Paul Co* ^{Breach.}
vent-Garden, in the county aforesaid, took from the possession of ^{That the de-}
 the said *Thomas*, several books relating to the said partnership ^{fendant kept}
 trade of a man's taylor, between the said *Thomas* and *Mary*, ^{the Partner-}
 (to wit) a cash-book, a day-book, and another cash-book; and ^{ship-Books}
 altho' afterwards, (namely) on the twentieth day of *August*, in ^{from the}
 the twenty-ninth year aforesaid, at the said parish of *St. Paul*, ^{Plaintiff.}
Covent-Garden, the said *Mary* was requested by the said *Thomas* ^(P* 78)
 to deliver to him the books aforesaid, and to permit the said
Thomas

Covenant.

Thomas to inspect and peruse the said books, she the said *Mary* altogether refused to deliver to the said *Thomas*, the above-mentioned books, or to permit the said *Thomas* to inspect and peruse the same (to wit) at the said parish of *St. Paul, Covent-Garden*, in the county aforesaid; and she the said *Mary*, from the said twentieth day of *August*, in the twenty-ninth year of the reign of his said present majesty, until the twenty-second day of *September*, in the twenty ninth year aforesaid, at the said parish of *St. Paul, Covent-Garden*, in the county aforesaid, kept the said books in her possession from the possession of the said *Thomas*, and against his will and consent, so that the said *Thomas* during all that time, could not have the inspection and perusal of the said books, and of the several accounts relating to the said partnership trade of a man's taylor, between the said *Thomas* and *Mary*, as aforesaid; and that the said *Mary* afterwards, and before the determination of the said partnership (and so there are two other breaches assigned in the same manner for keeping the books at other times, which to avoid a needless repetition, is here omitted: and we therefore proceed to the following breach, viz. And that the said *Samuel Hodges*, during the time of the said partnership between the said *Thomas* and *Mary* (namely) on the twentieth day of *October*, in the thirty-second year of the reign of his said present majesty, at the said parish of *St. Paul, Covent-Garden*, in the county aforesaid, without the leave, consent or agreement of the said *Thomas* first had and obtained, became indebted to one *Peter Humes*, of the parish of *St. Martin in the Fields*, in the county aforesaid, in a sum of money exceeding the sum of five pounds sterling, (to wit) in the sum of one hundred pounds sterling, of lawful money of *England*, for the like sum before that time borrowed by the said *Samuel* of the said *Peter*, for the recovery of which last mentioned sum the said *Peter*, afterwards, (namely) in *Michaelmas* term, in the 33d year of the reign of his said present majesty, exhibited his bill against the said *Samuel*, by the name of *Samuel Hodges*, &c. in this court of our sovereign lord the king, before the king himself, (the same court being then held at *Westminster*, in the county aforesaid) whereupon the said *Samuel*, without the leave, consent or agreement of the said *Thomas*, then and there acknowledged and confessed the action aforesaid, of the said *Peter*, for the debt aforesaid; and thereupon it was by the said court then and there adjudged that the said *Peter* recover against the said *Samuel* the said debt of 100*l.* and also 26*s.* and 8*d.* for his damages which he had sustained, as well by reason of detaining the said debt, as also for his expences and costs laid out by him in that cause, as by the record of that judgment remaining in the said court it doth and may more fully appear; upon which judgment afterwards, (namely) on the twenty-ninth day of *November*, in the aforesaid thirty second year of the reign of his said present majesty at *Westminster* aforesaid, (P* 79) * in the county aforesaid, his majesty's writ was prosecuted and sued out of this court, directed to the then sheriff of *Middlesex*, whereby our said sovereign lord the king commanded the then sheriff

Several other Breaches of the same Nature at several Times.

That the Defendant, Samuel, became indebted to Peter Humes, in more than the Sum of 5*l.*

And confessed a Judgment.

Covenant.

sheriff of his said county of *Middlesex*, that of the goods and chattels of the said *Samuel Hodges*, in the bailiwick of the said sheriff, he should cause to be levied the said 100*l.* which the said *Peter* had recovered against him in the manner aforesaid; and also of the said 26*s.* 8*d.* which were adjudged to the said *Peter*, in the manner aforesaid, for his damages, expences and costs, whereof the said *Samuel* was convicted, and that he should have those monies before our said sovereign lord the king at *Westminster*, on Monday next after the *Obave* of *St. Hillary*, to render to the said *Peter*, for his said debt and damages, recovered as aforesaid, by virtue of which writ *Slingsby Betbel*, esq; and *Henry Cornish*, esq; then sheriffs of the said county of *Middlesex* afterwards, and during the time of the said partnership between the said *Thomas* and *Mary*, and before the return of the writ (namely) on the tenth day of *January*, in the thirty-second year of the reign of his said present majesty, at the said parish of *St. Paul, Covent-Garden*, in the county aforesaid, by the procurement of the said *Samuel* and *Mary*, entered into the said then dwelling-house of the said *Thomas* in the said parish of *St. Paul, Covent-Garden*, in the county aforesaid, and levied and took in execution the goods and chattels of the said *Thomas*, then being in that house, to the value of one hundred pounds, and detained and kept the said goods and chattels for a long time, (to wit) for the space of twelve days next following, in th ehands and custody of them the said *Slingsby Betbel*, and *Henry Cornish*, (they then being the sheriff of the said county of *Middlesex*) to wit, at the said parish of *St. Paul, Covent-Garden*, in the county aforesaid; and the said *Thomas* declares that the said *Samuel*, (altho' often requested) hath not performed the covenant to the said *Thomas* made to the said *Samuel*, in the manner aforesaid, but the said *Samuel* and *Mary* have, and each of them hath unjustly broken the same; and the said *Samuel* hitherto altogether hath, and still doth refuse to perform the same; whereupon the said *Thomas* declares he is injured and endamaged to the value of 2000*l.* and therefore he brings his suit, &c.

And now at this day, (to wit) in 15 days from the Feast-day of *Easter*, this same term, (to which day the said *Samuel* had leave to imparl to the said bill, and then to answer, &c.) as well the said *Thomas Nicholas*, by his attorney, as the said *Samuel*, by *Francis Woodward*, his attorney, came before our sovereign lord the king at *Westminster*, and the said *Samuel* defends the force and injury when, &c. and pleads that the said *Thomas Nicholas* ought not to have or maintain his said action against him, because as to breaking the said covenant, in not permitting the said *Thomas* to exercise and carry on the said trade of a man's taylor in partnership between the said *Thomas* and *Mary*, in the said house, which at the time of making the said writ-ten articles of agreement, was in the occupation of the said *Samuel* and *Mary*, he the said *Samuel* pleads that they the said *Samuel* and *Mary*, or either of them, did not hinder the said *Thomas Nicholas* from exercising and carrying on the said partnership

That the Sheriff, by virtue thereof entered into the Houle, and took the Plaintiff's Goods in Execution.

And thus the Defendant broke the Covenant.

Plea. As to the first Breach in not permitting the Plaintiff to carry on the Trade in the House.

(P* 80)

Covenant.

nership trade between the said *Thomas* and *Mary*, in their said trade of a man's taylor, during the time above specified in the said declaration, or during any part thereof, as the said *Thomas Nicholas* doth above alledge in his said declaration, in that particular; and thereof he puts himself on the country; and the said *Thomas Nicholas* doth likewise the same: And as to breaking the said covenant, in denying and refusing the said *T. N.* to have the use of the said cutting room and parlour, with the closets therein, being parcel of the house aforesaid, for the use of the said *T. and M.* in their said partnership trade of a man's taylor, above supposed, he the said *Samuel* pleads that they the said *Samuel* and *Mary*, or either of them, did not deny or refuse to permit the said *Thomas Nicholas* to have the sole use, together with the said *Mary*, of the said shop, cutting room and parlour, with the closets, part of the said house, for the use of them the said *Thomas* and *Mary*, in their trade of a man's taylor, for the time aforesaid, in the said declaration above specified in that particular, or for any part of the said time, in such manner and form as the said *Thomas Nicholas* doth likewise above suppose in his declaration, in that particular, and therefore he puts himself on the country; and the said *Thomas* thereof doth likewise the same. And as to breaking the covenant aforesaid, in interceding and soliciting the said several persons, being customers of the said *Thomas* and *Mary*, during their partnership in their said trade of a man's taylor, for their work and business in their said trade of a man's taylor above supposed by the declaration aforesaid, to be done by the said *Samuel* and *Mary*, he the said *Samuel* pleads that neither he the said *Samuel*, or the said *Mary*, did at any time after the expiration of the said partnership, between the said *Thomas* and *Mary*, intercede or sollicite the said *Charles* lord *Herbert*, or Sir *William Mannoek*, or either of them, or any other person or persons whatsoever, which had been customers to the said *Thomas* and *Mary*, during their said partnership, for their or any of their work or business in their said trade of a man's taylor, nor have they wrought or done business in their said trade, for any such customers or their servants, through the insinuation or solicitation of them the said *Samuel* and *Mary*, or either of them, in making any garments or cloaths for any such customers or their servants, in such manner and form as the said *Thomas Nicholas* doth likewise above suppose by his said declaration in that particular, and thereof he likewise puts himself on the country; and as to breaking the covenant aforesaid, by the said *Samuel* and *Mary*'s not doing their utmost after the expiration of the said partnership to turn over to the said *Thomas* the trade of them the said *Thomas* and *Mary* in their said partnership, and the customers which they had at the time of making the said written articles of agreement, or at any time, during the said partnership above supposed to have been neglected, he the said *Samuel* pleads that they the said *Samuel* and *Mary*, or either of them, were not at any time after the expiration of the said partnership, even to this time, requested to execute the said premisses last above specified; and this the said

Samuel

And Issue
joined there
on,

To the third
Breach the
Defendant
denies it,
andt ends
in Issue.
and there is
a Demurrer
to that.

To the
fourth
Breach, the
Defendant
pleads that
neither he
or his wife
were ever
requested,
&c.

Covenant.

* *Samuel* is ready to verify; whereupon he prays judgment (P* 81) whether the said *Thomas Nicholas* ought to have or maintain his said action thereon against him, &c. And as to breaking the covenant aforesaid, in diverting and drawing away the said customers of them the said *Thomas and Mary*, or either of them, from making use of and employing the said *Thomas*, in the trade of a man's taylor, after the determination of the partnership, by any instigations insinuations, solicitations, endeavours or procurement above supposed to be done by them, he the said *Samuel* pleads that they the said *Samuel and Mary*, or either of them, did not in any manner howsoever, divert or draw away any of the said customers of the said *Thomas and Mary*, from making use of, or employing the said *Thomas* in the said trade of a man's taylor, after the determination of the copartnership between the said *Thomas and Mary*, in such manner and form as the said *Thomas* doth likewise above suppose in his declaration in that particular, and thereof he likewise puts himself on the country, and the said *Thomas* doth likewise the same; and as to breaking the covenant aforesaid, as to taking from the said *Thomas* the books above specified in the said declaration, relating and belonging to the partnership aforesaid; and also detaining them from the said *Thomas*, for the several times above respectively specified in the said declaration in that particular above likewise supposed to be done, he the said *Samuel* pleads that the said *Thomas Nicholas*, from time to time, at the said several times above respectively specified in the said declaration in that particular had and might have had the inspection and perusal of the said several books, and every of them, relating and belonging to the said partnership, in any manner howsoever, either by himself or by one *Thomas Foster*, servant to the said *Thomas and Mary*, chosen and appointed by the said *Thomas and Mary*, for that purpose; and the said books, or either of them were never detained by the said *Mary* from the said *Thomas*, during the said several times, or any part thereof, above likewise respectively supposed in the said declaration in that particular, in such manner and form as the said *Thomas* hath likewise above respectively suggested in his said declaration; and thereof he likewise puts himself on the country; and as to breaking the covenant aforesaid, as to the said judgment above suggested to be had and obtained against the said *Samuel*, at the suit of the said *Peter Humes*, contrary to the intent and purport of the said written articles of agreement in that particular; and also as to the execution prosecuted and sued out thereupon, above specified in the said declaration in that particular, he the said *Samuel* pleads that the said sheriff of *Middlesex*, by virtue of the said execution, did not enter into any part of the said dwelling house of the said *Thomas Nicholas*, nor levy, or take in execution any of the goods and chattles of the said *Thomas*, being in that house, or detain or keep them in his hands or custody, for any space of time whatsoever, nor was the said *Thomas*, by reason of the premisses last above specified in any manner howsoever damaged, contrary to the tenor and purport of the said written articles

To the 5th
issue, that
they never
diverted
or drew
away any
Customers.
and an issue
thereon.

To the 6th,
7th and 8th
Breaches,
from that the
Plaintiff
from time to
time might
have had
the Inspection,
&c.

As to the
9th Breach,
that the
Sheriff of
Middlesex
did not enter
and take the
Plaintiff's
Goods.

Covenant.

(P* 82) articles of agreement, in such manner and form as the said *Thomas Nicholas* doth likewise above suggest in his said declaration, in that particular; and thereof he likewise puts himself on the country, and the said *Thomas* doth likewise the same, &c.

Demurrer
to the fe-
veral Pleas
in Bar,
pleaded to
the several
Breaches
assigned.

This here
seems, to be
Tautology,
and might
be expressed
much shorter
as was usual
in Latin,
by the word
Inde.

And the said *Thomas Nicholas* replies that the said *Samuel's* plea, as to breaking the covenant aforesaid, in interceding and soliciting the said several persons that were customers to the said *Thomas* and *Mary*, during their partnership in their said trade of a man's taylor, for their work and business therein above specified in the declaration aforesaid; and as to breaking the covenant aforesaid, by the said *Samuel* and *Mary*, in not doing their utmost after the expiration of the said partnership, to turn over to the said *Thomas Nicholas*, the trade of them the said *Thomas* and *Mary*, in their said partnership, and the customers which were at the time of making the said written articles of agreement, or which at any time, during the said partnership, had been customers to the said *Thomas* and *Mary*, above specified in the said *Samuel's* plea, and as to breaking the covenant aforesaid, as to the taking from the said *Thomas* the books above specified in the declaration aforesaid, relating and belonging to the said partnership; and also detaining them from the said *Thomas*, during the several times respectively specified in the declaration aforesaid, in that particular above likewise mentioned in the said *Samuel's* plea, as to breaking the covenant aforesaid, by taking from the said *Thomas* the books above specified in the declaration aforesaid, relating and belonging to the said partnership, and as to breaking the covenant aforesaid, in interceding and soliciting the said several persons that were customers to the said *Thomas* and *Mary*, during their partnership in their said trade of a man's taylor for their work and business in the said declaration above specified; and as to breaking the covenant aforesaid, in the said *Samuel* and *Mary's* not doing their utmost after the expiration of the said partnership, to turn over to the said *T. Nicholas*, the trade of them the said *Thomas* and *Mary* in their said partnership, and the customers which were at the time of making the said written articles of agreement, or at any time during the said partnership had been customers to the said *Thomas* and *Mary*, above specified in the said *Samuel's* plea; and as to breaking the covenant aforesaid, as to taking from the said *Thomas* the books above specified in the declaration aforesaid, relating and belonging to the said partnership; and also detaining them from the said *Thomas*, during the several times above respectively specified in the declaration aforesaid, in that particular above likewise mentioned in the said *Samuel's* plea to his the said *Thomas's* action, the said *Thomas* saith that the said plea of the said *Samuel*, as to the breach of covenant aforesaid, in interceding and soliciting the said several persons, being customers to the said *Thomas* and *Mary*, during their said partnership, in the said trade of a man's taylor, for their work and custom, in the said trade of a man's taylor, above specified in the said declaration; and as to breaking the covenant aforesaid, in the said *Samuel* and *Mary's* not doing their utmost

Covenant.

utmost after the expiration of the said partnership, to turn over to the said *Thomas* the said partnership trade of the said *Thomas* and *Mary*, * and their customers which they had at the time (P* 83) of making the said written articles of agreement, or at any time during the said partnership above specified in the said *Samuel's* plea; and as to breaking the covenant aforesaid, as to taking the said books above specified in the said declaration, from the said *Thomas*, relating or belonging to the said partnership, and detaining them from the said *Thomas*, during the several times above respectively specified in the declaration aforesaid, in that particular likewise above supposed to have been done, and the matter therein contained are not sufficient in law to preclude the said *Thomas* from his said action, as to breaking the covenant aforesaid of the said *Samuel* and *Mary*, by interceding and soliciting the said Lord *Herbert* and Sir *William Mannock*, and other persons, who during their said partnership, in the said trade of a man's taylor, had been customers to the said *Thomas* and *Mary*, in their said trade for their work and custom therein; and also as to the said *Samuel* and *Mary's* working and doing business in their said trade of a man's taylor, and working and making several suits of men's cloaths for the said *Charles Lord Herbert*, and Sir *William Mannock*, and to and for several other persons who, during the said time of partnership between the said *Thomas* and *Mary*, in their said trade of a man's taylor, after the expiration of the four years above mentioned in the said written articles of agreement at several days and times above specified in the said declaration; and as to breaking the covenant aforesaid, by the said *Samuel* and *Mary's* not doing their utmost after the expiration of the said partnership, to turn over the trade of the said *Thomas* and *Mary*, in their said partnership; and all those who were at the time of making the said written articles of agreement, or at any time during the said partnership, had been customers to the said *Thomas* and *Mary*, in their said partnership trade; and as to breaking the covenant aforesaid, as to taking the several books relating and belonging to the said partnership, above specified in the said declaration; and also detaining them from the said *Thomas*, during the several times above respectively specified in the said declaration in that particular, to which said plea, as to the said several matters therein mentioned in this replication, in the manner and form as the same is above pleaded by the said *Samuel*, he the said *Thomas* is under no necessity, nor in any wise bound by the law of the land to answer; and this he is ready to verify; whereupon, for want of a sufficient answer of the said *Samuel*, to the several matters specified in the said declaration, the said *Thomas* prays Judgment, and that his damages occasioned by the said several breaches of covenant of the said *Samuel* above particularly mentioned in this replication may be awarded to him, &c.

And the said *Samuel* rejoins, that the several pleas of the said Joinder in *Samuel*, as to breaking the covenant aforesaid, in interceding and Demurrer. soliciting the said several persons, being customers to the said *Thomas* and *Mary*, during the said copartnership in their said trade

Covenant.

(P* 84)

trade of a man's taylor, for their work and custom in the said trade above specified in the said declaration; and as to breaking the covenant * aforesaid, in them the said *Samuel* and *Mary's* not doing their utmost after the expiration of the said partnership, to turn over to the said *Thomas Nicholas* the trade of the said *Thomas* and *Mary*, in their said partnership, and their customers which they had at the time of making the said written articles of agreement, or at any time, during the said partnership above specified in the plea of the said *Samuel*; and as to breaking the covenant aforesaid, as to taking the said books above specified in the said declaration, relating and belonging to the said partnership, and also detaining them from the said *Thomas*, during the said several times above respectively mentioned in the said declaration as to that particular likewise above supposed to be done in the manner and form as the same is above pleaded in bar to the said *Thomas's* action against the said *Samuel*, are good and sufficient in law to preclude the said *Thomas* from his said action against the said *Samuel*, as to breaking the said Covenant of the said *Samuel* and *Mary*, in interceding and soliciting the said *Charles Lord Herbert*, and Sir *William Mannock*, and other persons, who during the said Partnership trade of a man's taylor, between the said *Thomas* and *Mary*, had been customers to the said *Thomas* and *Mary*, in their said trade of a man's taylor; and as to the said *Samuel* and *Mary's* working and doing business in the said trade of a man's taylor, after the expiration of the said four years, and working and making several mens garments of divers kinds for the said *Charles Lord Herbert*, and Sir *William Mannock*, Bart. and to and for several other persons, who during the time of the said partnership between the said *Thomas* and *Mary*, had been customers to the said *Thomas* and *Mary*, in their said trade of a man's taylor, after the expiration of the said four years above-mentioned in the said written articles of agreement, at the several times above-mentioned in the said declaration; and as to breaking the said covenant as to them the said *Samuel* and *Mary's* not doing their utmost, after the expiration of the said partnership, to turn over the partnership trade of them the said *Thomas* and *Mary* to the said *Thomas Nicholas* only, and all the customers, which at the time of making the said written articles of agreement, and within the four years mentioned in the said written articles of agreement, had been customers to the said *Thomas* and *Mary* in their said partnership trade; and as to breaking the said covenant, as to taking the said several books relating and belonging to the said partnership trade above specified in the said declaration from the said *Thomas*, and also detaining them from the said *Thomas*, at the several times above respectively specified in the said declaration, as to that particular; which said plea, and the several matters contained in the same, and above mentioned in this rejoinder, the said *Samuel* is ready to verify and prove in such manner as the court shall think fit; and because the said *Thomas* hath not answered the said plea, as to the said several matters mentioned in this rejoinder, nor hath hitherto in any manner denied the same, the said *Samuel*, as before, prays
judgment

Covenant.

judgment; and that the said *Thomas* may be precluded from his said action, as to the said several matters above specified in the same plea, and in this rejoinder, &c. But because the court of our (P* 85) * said sovereign Lord the King, now here, are not yet advised to give their judgment of and upon the premisses, whereof the Parties have submitted themselves to the judgment of this court, a day therefore is given to the said Parties, before our said sovereign Lord the King at *Westminster*, until *Friday* next after the morrow of the *Holy Trinity*, for hearing their judgment of and concerning the premisses, inasmuch as the said court of our said sovereign Lord the King thereof are not yet, &c. and as well to try the said several issues, above severally joined between the said Parties; as also to enquire what damages the said *Thomas* hath sustained by reason of the said *Samuel* breaking his said covenant, as to the said *Samuel* and *Mary*'s interceding and soliciting the said *Charles* Lord *Herbert*, and the said Sir *William Mannoek*, bart. and other persons, who during the said partnership in the said trade of a man's taylor, between the said *Thomas* and *Mary*, had been customers to the said *Thomas* and *Mary* in their said trade of a man's taylor, by reason of the said *Samuel*'s breaking the said covenant, as to the said *Samuel* and *Mary*'s working and doing business in the said trade of a man's taylor, after the expiration of the said four years, in working and making several mens garments and clothes of divers kinds for the said *Charles* Lord *Herbert*, and the said Sir *William Mannoek*, and to and for several other persons, who, during the time of the said partnership between the said *Thomas* and *Mary*, had been customers to the said *Samuel* and *Mary* in their said partnership trade of a man's taylor, after the expiration of the said four years above-mentioned in the said written articles of agreement at the several days and times above specified in the said declaration; and as to breaking the covenant aforesaid, in the said *Samuel* and *Mary*'s not doing their utmost after the expiration of the said partnership, to turn over to the said *Thomas Nicholas* only, the said partnership trade of the said *Thomas* and *Mary*, and all the customers, who at the time of making the said written articles of agreement, and within the said four years mentioned in the said written articles of agreement had been so to the said *Thomas* and *Mary* in their said partnership trade; and as to breaking the covenant aforesaid, as to taking the said several books relating and belonging to the said partnership above specified in the said declaration, from the said *Thomas*, and detaining them from him during the several times above respectively specified in the said declaration, as to that particular, in the manner and form above mentioned to have been done by the said *Samuel* and *Mary*, whereof the Parties aforesaid have submitted themselves to the judgment of the court, if judgment should happen to be given thereupon for the said *Thomas*, against the said *Samuel*; therefore let a jury come before our sovereign Lord the King at *Westminster*, on *Saturday* next after the morrow of the *Ascension* of our Lord; and

Chris advi-
fare vult,
as to the
Demurrer.

Venire fa-
cias award-
ed, as well
to try the
Issues as
to assess
Damages,
if Judg-
ment should
be given on
the Demur-
rers.

Covenant.

and who neither, &c. To recognizce, &c. because as well, &c. the same day is given to the said parties there, &c.

Nisi prius,
&c.

(P* 86)

Afterwards the proceedings in the said action, between the said Parties being continued thereon, the jury are thereon respited between them, before our sovereign Lord the King at *Westminster*, till Friday next after the Morrow of the Holy Trinity next ensuing, unless Sir *Thomas Raymond*, Knt. and Sir *Francis Wythens*, Knt. justices assigned to hold pleas in the court of our said sovereign Lord the King, before the King himself, should come before, on Tuesday the twenty-second day of May, at *Westminster* aforesaid, in the great hall of pleas there, according to the form of the Statute, &c. through the default of the jurors, &c. at which day, as well the said *Thomas Nicholas*, as the said *Samuel* came by their said attornies, before our sovereign Lord the King at *Westminster*, and the said justices before whom, &c. sent hither their record, tried before them in these words, ff.

The Postea.

Afterwards at the day and place within contained, as well the within named *Thomas Nicholas*, as the within written *Samuel Hodges*, by their attornies within contained, came before the said *Thomas Raymond* and Sir *Francis Wythens*, two of his said majesty's justices, assign'd to hold pleas in the court of our said sovereign Lord the King, before the King himself, (the within written *Edmond Watts*, gent. being associated to them, by virtue of the statute, &c.) and the jurors of the jury whereof mention is within made, being summoned, some of them, (to wit) *H. S. esq;* *N. A. esq;* *J. S. T. P. J. M. J. B. J. C. J. B. R. B.* and *T. C.* come and are sworn upon the jury; and because the rest of the same jury have not appeared, therefore others of the by-standers, chosen by the Sheriff of the said county, at the request of the said *Thomas*, and by the command of the said justices, are put on a-new, whose names are affiled in the within written panel, according to the form of the statute in that case lately made and provided, which said jurors, so put on a-new, (namely) *R. M.* and *R. C.* being called, came likewise, who, being sworn together with the said other jurors before impanelled and sworn to declare the truth of the within contents, being chosen, tried and sworn, as to the first issue within joined, between the said Parties, to be tried by the country, declare, upon their oath, that the said *Samuel*, and the within written *Mary*, and each of them, did hinder the said *Thomas Nicholas* from exercising and carrying on the within mentioned trade of a man's taylor, in partnership between the said *Thomas* and *Mary*, in the within mentioned house, in the manner and form as the said *Thomas* doth within alledge in his declaration, as to that particular, and they assels the damages of the said *Thomas Nicholas*, by reason thereof, besides his expences and costs laid out by him, about his suit in this cause to one hundred pounds; and as to the second issue within likewise joined to be tried by the country, the said jury likewise, upon their oath aforesaid, declare, that the said *Samuel* and *Mary*, and each of them, did refuse and deny to suffer the said *Thomas Nicholas*, to have the sole use, together with the within written *Mary*, of the shop,

The first
Issue found
for the
plaintiff.

The second
Issue also
found for
the plain-
tiff.

Covenant.

shop, cutting-room and parlour, with the closets therein, being part of the within mentioned house, for the use of the said *Samuel* and *Mary*, in their said partnership trade of a man's taylor, as the said *Thomas* doth likewise suppose in his declaration within written, as to that particular; * and they assess (P* 87) the damages of the said *Thomas Nicholas*, by reason thereof, besides his expences and costs laid out by him about his suit, in this particular, to fifty pounds; and as to the third issue with-
in likewise joined, to be tried by the country, the said jurors declare upon their said oath, that they the said *Samuel* and *Mary*, or either of them, did not in any manner howsoever, divert or draw away any customers of the said *Thomas* and *Mary*, from employing or making use of the said *Thomas*, in the said trade of a man's taylor, after the determination of the partnership between the said *Thomas* and *Mary*, in such manner and form as the said *Thomas* doth likewise suppose in his within written declaration; And as to the fourth issue within likewise joined, to be tried by the country, the said jurors declare, upon their said oath, that the within specified Sheriff of *Middlesex*, by the procurement of the said *Samuel* and *Mary*, by virtue of the execution within specified, did enter into the within mentioned dwelling-house of the said *Thomas*, and levied and took in execution divers goods and chattels of the said *Thomas*, being in that house, and kept and detained the said goods and chattels in his hands, in such manner and form as the said *Thomas* doth likewise alledge in his within written declaration; and the said *Thomas* was damnified by reason thereof; and they assess the damages of the said *Thomas*, by reason thereof, besides his expences and costs laid out by him, about his suit, as to this particular, to two hundred pounds; and as to the within specified breach of the within specified covenant of the said *Samuel*, as to the said *Samuel* and *Mary*, their interceding and soliciting the within named *Charles Lord Herbert*, and *Sir William Mannoek*, Bart. and other persons, who during the said partnership in the said trade of a man's taylor, between the said *Thomas* and *Mary*, had been customers to the said *Thomas* and *Mary*, in their said trade of a man's taylor; and as to the said *Samuel* and *Mary*'s working and doing business in the said trade of a man's taylor, after the expiration of the said four years, in working and making several men's garments of several kinds, for the said *Lord Charles Herbert*, and the said *Sir William Mannoek*, and to and for several other persons, who, during the time of the said partnership between the said *Thomas* and *Mary*, had been customers to the said *Thomas* and *Mary*, in their said trade of a man's taylor, at the times within specified, as to that particular, whereof the said Parties have submitted themselves to the judgment of this court; If it shall appear to the court of our said sovereign Lord the King, before the King himself, that the plea of the said *Samuel*, within pleaded, as to that particular, and the matter therein contained, are not sufficient in law to preclude the said *Thomas* from his said action thereupon, against the said *Samuel*, and judgment shall happen to be given for the said

The third
Issue found
for the De-
fendant.

The fourth
Issue found
for the
plaintiff.

Conditional
Damages
found on
the Demur-
rer.

Covenant.

(P*88) said *Thomas*, against the said *Samuel* in this cause, as to that particular, then the said jurors, upon their said oath, do assess the damages of the said *Thomas*, by reason of the breach of the said covenant, to one penny; and as to the within specified breach of the covenant aforesaid, in the said *Samuel* and *Mary*'s not doing their utmost, after the expiration of the said partnership, to turn over to the said *Thomas Nicholas* only, the trade of the said *Thomas* and *Mary*, in their partnership, and all the customers who at the time of making the said written articles of agreement, and within the said four years mentioned in the said written articles of agreement, had been customers to the said *Thomas* and *Mary*, in their said partnership trade, whereof the within written Parties have likewise submitted themselves to the judgment of the court, if it shall appear to the court of our said sovereign Lord the King, before the King himself, that the plea of the said *Samuel* above pleaded, as to that particular, and the matter therein contained, are not sufficient in law to preclude the said *Thomas* from the said action thereupon, against the said *Samuel*, and judgment shall happen to be given against the said *Samuel*, in that particular, then the said jurors, upon their said oath, do assess the damages of the said *Thomas*, by reason of the breach of that covenant, to five hundred pounds; and as to the within specified breach of the within specified covenant, as to taking from the said *Thomas* the several books within mentioned, relating and belonging to the within mentioned partnership, in the declaration within specified, and detaining the same from the said *Thomas*, at the several times within respectively specified in the within written declaration, as to that particular within mentioned to have been done by the said *Samuel* and *Mary*, whereof the Parties within written have likewise submitted themselves to the judgment of the court, if it shall appear to the court of our said sovereign Lord the King, before the King himself, that the said plea of the said *Samuel*, within pleaded, as to that particular, and the matter therein contained are not sufficient in law to preclude the said *Thomas* from his said action against the said *Samuel* thereupon, and judgment shall happen to be given against the said *Samuel*, as to that particular, then the said jurors, upon their said oath, do assess the damages of the said *Thomas*, by reason of the breach of that covenant, to one hundred and fifty pounds, besides his expences and costs laid out in this cause, and for his expences aforesaid, to twenty shillings. And because the court of our said sovereign Lord the King, now here, are not yet advised to give their judgment of and upon the premises; a day therefore is given to the said *Thomas* and *Samuel*, before our sovereign Lord the King at *Westminster*, 'till *Tuesday next after three weeks of St. Michael*, to hear their judgment of and concerning the premises, because the court of our said sovereign lord the King is not yet, &c. (*with other Continuances*) at which day, as well the said *Thomas* as the said *Samuel*, by their attornies, came before our sovereign lord the King

Covenant.

King at *Westminster*; whereupon all and singular the premisses, being viewed, and fully understood, by the court of our said sovereign Lord the King, before the King himself, and upon mature deliberation thereupon had, inasmuch as it appears to this court of our said sovereign Lord the King, before the King himself, that as well the plea of the said *Samuel*, as to breaking the covenant aforesaid, in the said *Samuel* and *Mary's* not doing their * utmost to turn over to the said *Thomas* the said partnership trade of them the said *Thomas* and *Mary*, and all the customers, who had been so at the time of making the said written articles of agreement, and within the said four years mentioned in the said within specified written articles of agreement; as also the plea aforesaid of the said *Samuel*, as to taking from the said *Thomas* the said several books relating and belonging to the said partnership specified in the declaration aforesaid; and also detaining the same from the said *Thomas*, at the several times within respectively specified in the said declaration, as to that particular, to be done by the said *Samuel* and *Mary*, and the matters therein contained, are not sufficient in law to preclude the said *Thomas* from his said action against the said *Samuel* thereupon; therefore it is adjudged that the said *Thomas Nicholas* do recover against the said *Samuel Hodges* 1000*l.* part of the damages aforesaid above assessed by the said jurors on that occasion, in form aforesaid; and the said twenty shillings likewise above assessed by the said jurors, for his expences and costs aforesaid; and also eighty pounds awarded by the court of our said sovereign Lord the King, before the King himself, to the said *Thomas*, for his expences and costs, by way of increase, which said damages amount in the whole to 1081*l.* and be the said *Samuel* amerced, &c. And because it appears to this court, that the plea of the said *Samuel*, pleaded as to that particular, and the matter therein contained, are not sufficient in law to preclude the said *Thomas* from his said action, upon the covenant of the said *Samuel*, as to the said *Samuel* and *Mary's* interceding and soliciting the said *Charles Lord Herbert*, and Sir *William Mannoek*, Bart. and other persons, who during the said partnership trade of a man's tailor, between them the said *Thomas* and *Mary*, had been customers to the said *Thomas* and *Mary* for their work and custom in the said trade of a man's tailor; and as to the said *Samuel* and *Mary's* working and doing business in the said trade of a man's tailor, after the expiration of the said four years, and working and making several men's garments of several kinds, for the said *Charles Lord Herbert*, and Sir *William Mannoek*, and to and for several other persons, who during the time of the said partnership, had been customers to the said *Thomas* and *Mary*, in their said trade of a man's tailor, at the times above specified in that particular, whereof the said parties have submitted themselves to the judgment of the court; and as to that it is found

Judgment
for the
plaintiff for
part upon
the demur-
rer.

Covenant.

that the said *Samuel* and *Mary*, or either of them, did not in any manner howsoever, divert or draw away any of the customers of the said *Thomas* and *Mary*, from employing or making use of the said *Thomas*, in the said trade of a man's tailor, after the determination of the said partnership, between the said *Thomas* and *Mary*, in such manner as the said *Thomas* doth suppose in his said declaration, as to that particular; and whereas the said *Samuel* is thereof above acquitted by the said jurors, it is adjudged by the court of our said sovereign Lord the King, that the said *Thomas* take no benefit by his said bill in that particular, but that (P* 90) he be amerced for his * groundless application to this court, as to that particular; and the said *Samuel* be therefrom for ever dismissed, &c.

Ca'e.
1 Lut. 877. Two exceptions were taken by *Levinz*, of counsel with the plaintiff in error.

1. That there was no averment that the articles were made between the parties therein named, because it is said only in the beginning of the declaration, That by the articles *mentioned to be made testatum existit*. The declaration is not sufficient, it not being before alledged that the articles were made between the parties.

2. That the defendant and his wife covenanted, and the breaches are assigned in some of the covenants in which the wife covenanted, and there the covenant is void.

3. That the breach is that the defendant had hindered the plaintiff from using his trade in the house, without shewing how he was hindered, which they would have not to be sufficient, but that the plaintiff ought to have shown how he was hindered.

4. That upon the covenant that they would not contract debts without the mutual consent, the breach is assigned, that *Hodges* had contracted a debt of 100*l.* with *Humes*, and that *Humes* had judgment and execution thereupon, and that the sheriff, by virtue thereof, and at the instance of *Hodges*, entered the plaintiff's house, and levied and took several of his own goods, and joint damages are given for that breach with others, whereas no damages ought to have been given for that, because it is not a breach within the intent of the covenant, for the plaintiff hath for that his remedy by an action of trespass, and then to have a remedy upon that covenant, for a matter so remote would be hard and unreasonable: But all the exceptions were overruled, and the judgment was affirmed.

Notte.

Covenant.

Note, That by the articles, the copartnership was to continue for four years, if *Mary* should so long live; and it is not expressly averred that *Mary* did live so long; but then there are other things which are a plain indication that she must be alive at the end of the term, and it cured that defect after a verdict, as for the purpose alledged in the fourth breach, that *Samuel* and *Mary*, after the term wrought for several persons that had been customers to *Thomas* and *Mary*, after the expiration of the partnership, which is impossible, if *Mary* was not alive after the said partnership.

Readings

Readings and Observations on Actions of Covenant,
with an abridgment of the Cases in the Reports.

(P* 91)* **A** Covenant is the instrumental declaration which the parties make, that they will stand to and perform an agreement that has been made between them, relating either to lands, or other things to be performed, or things not to be done or suffered; and this covenant is erected by a solemn deed in writing, sealed and executed between the parties, or otherwise it may be raised by construction of law, as consequentially incident to, and naturally implied in some agreement; and if the parties thereto do not perform their covenants, this action is the remedy to have a satisfaction in damages for the breach thereof.

1 Bac. Ab.
526.
3 Bl. Com.
155.

From what has been said before, it may be understood that covenants are to be considered as *real* or *personal*.

3 Bl. Com.
156.

A *covenant real* is that whereby a man binds himself to pass a real thing; as lands or tenements; as a covenant to levy a fine of lands; in which case the lands are to be recovered, or when it favours in the realty, and sticks so fast to the lands, that he who hath the lands hath, or is subject to the covenant, and in that sense a warranty is called a real covenant.

And what covenants are real, and run with the land, may be seen hereafter; and also in 1 *Roll's Abr. Fol. 531. Letter K. Danvers's Abr. 236. 2 Lev. 92.*

There is this difference taken in the case of *Atborne v. Hening*, in 1 *Roll's Rep. 81.* between a covenant *real*, and a covenant *Personal*. For feoffee with warranty making a lease, the lessee cannot vouch, 39 *E. 3.* so he who comes in the post cannot vouch but in a covenant *personal*, 43 *E. 3.* One coparcener, upon equality of partition, covenanting to pay a rent to the other that covenant goes with the lands.

1 Eq. ab.
260. 1. S.C.

Where lands are subject to the payment of a rent, the owner sells part, and covenants with the purchaser, that they shall be discharged of the rent, and then sells the residue; whether this be a covenant *real* which runs with the land, see *Hard. 87. Cook v. the Earl of Arundel.*

1 Bac. Ab.
533.
2 Com.
Dig. 559.

A *personal covenant* is such a one that is annexed to the person only, and not to the lands; and some person in particular has some benefit by it, or is chargeable therewith; as when a man

covenants

Readings and Observations, &c.

covenants to do any personal thing, as to build or repair a house, or to serve the covenantor, or such like.

And these personal covenants are either relating to the land itself, as that the land shall be quietly enjoyed, shall be kept in repair, shall not be aliened, or to pay the rent, or not to cut down timber-trees, or not to do waste, to make further assurance and such like, and are properly called inherent; or covenants are likewise *collateral*; that is, when they do not immediately relate to the land; as to pay a sum of money in gross, to do or perform somewhat to the covenantor, that relates not to the land passed to the covenantee.

From what has been said before, it may be likewise observed, that covenants are in the *affirmative*, or in the *negative*; when they are in the *affirmative*, somewhat is to be done and performed; when they are in the *negative*, somewhat is to be omitted and left undone.

• And covenants may be made as well by *deed poll*, as by a *deed* (P* 92) *indented*; and though a man may have an action of debt, for the non-payment of money covenanted to be paid, yet he may have this action of covenant. 1 *Roll's Abr.* 518. Letter *B. pl. 2.* As if *A.* grants a rent to *B.* payable at a certain feast yearly, and covenants to pay the rent at the feasts, an action of covenant lies for non-payment, though he might have an action of debt. *Ib. pl. 2.* 1 *Brownl.* 19.

If one man covenants with another to pay him 20*l.* at a day, though he may have an action of debt for the 20*l.* yet he may likewise have this action of covenant. *Ib. pl. 3.*

If *A.* covenants with *B.* to pay him so much as he shall expend in the repairing and building a ship for him, and *B.* expends 300*l.* accordingly an action of debt or covenant lies for the money expended. *Stile* 31. *Cro. Eliz.* 797, 1 *Lev.* 208. 2 *Jones* 184.

And the several cases in the books relating to this action of covenant, I shall distribute under the following particulars.

First, Of Covenants by deed, and of the proper construction of Covenants, and of Covenants in law.

Secondly, Who shall have advantage of a Covenant, and by whom this action is to be brought.

Thirdly, Who shall be obliged to the performance of the Covenant, and against whom this action shall be brought.

Fourthly, When a covenant shall be said to be duly performed, extinguished, or otherwise discharged.

Fifthly, When a covenant shall be construed to be broken.

Sixthly,

Readings and Observations

Sixthly, *Of the action where it lies, and where it has been adjudged well and ill brought, with regard to the manner, time and place.*

Seventhly, *Of the declaration.*

Eighthly, *Of the pleadings in this action.*

Ninthly, *Of the issue, trial, evidence and damages.*

Tenthly, *Of the judgment and execution.*

And Lastly, *What relief the parties have in a Court of Equity.*

First, *Of Covenants by deed, and of their proper construction, and of Covenants in law.*

And for the better understanding the nature of Covenants, it is proper to have these few things under our consideration.

First, That no formal set of words are essentially necessary to make a covenant, but that in some cases an agreement, and in others a recital have been held to amount to a covenant.

Secondly, That in some instances a covenant hath been construed to amount to a condition only, and so *vice versa* words of a condition, or conditionally expressed, have been construed to amount to a covenant.

Thirdly, Words of covenant and agreement have been construed to amount to a lease, and sometimes to a release.

Fourthly, Express covenants qualify the general, and a particular covenant hath been held to restrain a general covenant.

(P^{re} 93) *Fifthly, Covenants have been construed to extend farther than the words, for the sake of making the performance agreeable to the intent.

Sixthly, Covenants have sometimes been construed to be distinct and separate, and in other instances they are so blended together, that one depends upon another; all which may be observed in the following cases.

1. The words *covenant, promise*, and the like, are not essentially necessary to make a covenant, on which to ground an action of covenant; for a covenant may be had by any other words, and upon any agreement in writing under hand and seal in whatsoever part it be set down for any to be or not to be done to the party; and he to, or with whom the promise or agreement is made, may have this action upon the breach of the agreement. 2 Mod. 91. Co. 2. 70, 71, 72. Lord Cromwell's case, Dyer 57, 150. 21 H. 7. 73. 40 E. 3. 5. And therefore if these words be inserted in a deed amongst other covenants, that the *lessee* shall repair, provided always that the *lessor* do carry away the earth, these are good covenants on both sides. And if a lease be made of

On Actions of Covenant.

of houses by *patent* to J. L. for twenty-one years, and therein is inserted this clause; (*And that he the said J. S. and his assigns shall repair the houses when they shall be decayed*;) this is a good covenant. Adjudged Pasch. 14 Jac. B. R. *Bret v. Cumberland* Cro. Jac. 399, 521.

2. And so it is where these or the like words be inserted amongst other covenants, (*that the lessee shall pay ten shillings a year rent, or that the lessee shall not alien*;) these shall be said to be covenants, unless it be in such cases where there is some other means to enforce the doing of the thing; as if in case of a rent, there be a clause of distress, re-entry, or *nomine pænæ*. Bro. Cov. 21, 26, & Co. & Dyer *ut supra*.
Popham 156.
 Bullst. 163.
 Godb. 276.
 1 Ro. R. 359.
 2 R. Rep. 63.

3. And in all cases regularly where words that do begin a sentence be *conditional*, and have the effect of a *condition*, and do give another a remedy, there they shall not be construed to make a *covenant*, as in the cases of a *condition* before; and yet if words of *condition*, and words of *covenant* be coupled together in the same sentence; as (*Provided always and it is covenanted or the like*) in such cases the words may be construed to make a *covenant* and a *condition* both, and covenant with two severally is good March 103. pl. 176. 2 Co. *ut supra*.

4. If a man makes a lease for life by indenture, and therein are inserted these words, (*It is provided, that if the lessee die within sixty years, that then his executors and assigns shall have the land until the sixty years are ended, to be accounted from the date of the indenture*); this, although it be not a good lease, yet it is a good covenant. Dyer 149. 1 Roll's Abr. 518. pl. 6.

5. If a man makes a lease for years, and warrants it to the lessee, his heirs and assigns, during the term, or he who hath right to the land, confirms the estate of the lessee for years with warranty, yet it shall be construed a good covenant in law, for the quiet enjoying of the thing. Bro. Cov. 25, 38. 21 H. 7. 32

6. If the Lord grants to his *tenant*, that he will not distrain him in such a part of his *land* for his rent, this shall be taken to be a good covenant by this word *Grant*. Perk. Sect. 69.

7. Where the words in a deed or lease are, *and the lessee shall repair the mills* (being the thing leased) *as often as need shall require, and shall leave them sufficiently repaired at the end of the term*, they do make a covenant, because it is a clear agreement of the parties; for otherwise the words *leave, &c.* would be of no effect. 1 Roll's Rep. 359.

8. So if A. by indenture agrees to give B. 70l for an house, if B. executes the indenture to A. A. may bring an action of covenant for this house. Pordage v. Cole. 1 Lev 274. (P * 94)
Raym 183.
 1 Sed. 423.

* 9. If a lessee for years covenants to repair, *Provided always, and it is agreed that the lessor shall find great timber, &c. this makes a covenant* 1 Saunders 319.
 2 Keb. 533, 542.

Readings and Observations

a covenant on the part of the lessor to find great timber, because of the word *agreed*; and it shall not be construed a qualification of the covenant of the lessee. *Holder v. Taylor.* 1 Brownl. 23. Hob. 12. 1 Sid. 423. Co. 2. Rep 72.

But if the lessee covenants to repair, *Proviso* always that the lessor shall find great timber, in that case the proviso shall not make any covenant on the part of the lessor; but it shall be only a qualification of the covenant of the lessee, for want of the words it is *agreed.* *Holder v. Taylor.* 1 Roll's Abr. 518. pl 3

10. If *A* leases to *B* for years, upon condition that he shall acquit the lessor of ordinary and extraordinary charges, and shall keep and leave the houses at the end of the term, in as good plight as he found them; if he does not leave them well repaired at the end of the term, an action of covenant lies. Cro. Car. 128, 129.

11. There is this difference in penning a covenant; as suppose it to be made between *A* and *B.* If *A.* covenants with *B.* that *B.* shall have sufficient hedge-boot by assignment of *A.*'s bailiff; by this *B.* is not restrained from the liberty which the law allows him, and therefore he may take it without assignment; but if the words be negative, that he shall not take without assignment, then it is otherwise.* *Dyer* 19. b. 1 Leon. 251. And there is this diversity between a negative covenant, which is only in affirmation of an affirmative covenant, and a negative covenant, which is additional to an affirmative covenant. For in the first case, to say that he hath performed the covenant generally is a good defence, but in the last not; for he ought to plead specially. 1 Sid. 87. *Langhill v. Palmer.*

12. If the covenant of the one part be negative, and the affirmative covenant of the other part be in consideration of the performance thereof, though the negative covenant be broken, yet the affirmative covenant ought to be performed. 2 Saund. 155, 156. 1 Mod 64. 2 Keb. 674.

13. An action of covenant was brought upon a demise of a coalmine, whereby it is recited, that before the sealing of the indenture, It was agreed that the plaintiff should have the third part digged, &c. On a demurrer to the declaration there was an exception taken, that here is no covenant to pay the third part, but only a recital of an agreement to have it. But *Hale* said, that though it were but a recital, that before the indenture they were agreed, it is a covenant; and so to say, whereas it was agreed to pay 20l. for the indenture itself confirms the agreement, and the intent precedent, though it be relative to the former act in *pais*, when it is declared by a deed, it is now a covenant by the indenture. 3 Keb. 465. *Barefoot v. Picard.*

14. Where the defendant covenanted by articles, reciting that a marriage was intended between the defendant, and one *R.* widow, who had seven sons; the defendant covenanted in the
said

On Actions of Covenant.

said articles, having recited that *R. M.* deceased, father of the said seven sons, had by his will bequeathed *cuiuslibet ipsorum prædictorum Josephi, Jacob, &c.* only leaving out *Nathaniel*, the sum of 50*l.* a piece, covenants with the plaintiff, to pay to the said seven sons, naming *Nathaniel, prædictas separales legationes vel summam 50l.* And the defendant pleads further, he paid to the six sons 50*l.* a piece, and sheweth performance of the other articles. The plaintiff demurs, because he doth not make it appear that he paid 50*l.* to *Nathaniel*, and he expressly covenanted to pay to the said *Nathaniel* and the rest, the said several legacies, or sums of 50*l.* Here the court held, that as in the recital of the said will, nothing is mentioned to have been bequeathed to *Nathaniel* as well as the rest; though he covenants to pay *Nathaniel* as well as the rest, yet it is *legationes summas prædictas*, and there being no legacy to *Nathaniel*; and that appearing by (P* 95) the recital of the will, the defendant's covenant shall not bind him to pay. 2 Ventr. 140. *George v. Butcher.*

15 A grant was made by the Earl of *Pembroke*, of the lieutenancy or deputyship of the west-part of the forest of *Selwood*, to Sir *Maurice Berkley*, and the heirs males of his body. *Provided always*, and the said Sir *Maurice* covenanted and granted, &c. that it shall be lawful for the said Earl, heirs, and assigns, to have all the pre-eminence and commandment of the said game and hunting there, as if the grant had not been made. *Provided also*, and the said Sir *Maurice* covenanted for, &c. to and with the said Earl, &c. that the said Sir *Maurice*, and the heirs male of his body, would preserve the game as it hath been used, and that they should not cut any wood, &c. Sir *Henry Berkley*, son of Sir *Maurice*, cut down four timber-trees; *Qu.* if this was a condition, and so gave entry to the Earl or a covenant.

Per. cur. The first proviso, is not a condition but a covenant; either because by this he is not to do more than he may do by his superior custody, in which case he ought to do it by his own authority; or if it be taken the game at his pleasure, it is void because against his office.

2. The second proviso is but a bare covenant, it shall be entirely the words of the grantee himself, as the covenant is, and without the words of the grantor, a condition cannot be; and therefore suppose it had been on the other part, *provided always*, and the grantor covenants, that the grantee shall have the refuse of the browse, &c. this is a meer covenant. *Pop.* 116. *Earl of Pembroke v. Sir Henry Berkley.* A case there put by serjeant *Bendlow* was this,

16. Where the words were; *Provided always, and it was covenanted, granted and agreed between the parties, if the lessee sell, or alien the term, that the lessor shall have the preferment*; this they agreed to be a good condition, because they are the words

Moore 776.

Cro. Eliz.

384, 560

2 *And.* 20.

Goldf. 130.

5 *Co.* 76.

as *Jenk.* 266.

2 *Co.* 716.

Readings and Observations

as well of the lessor as of the lessee; but in the case of *Harrington and Pepull*, 17 Eliz. B. R. *Pepull* made a lease for years to *Harrington* of a farm, except the wood, and covenanted with the lessee, that he shall take all manner of underwood. *Provided always* and the lessee covenants that he will not cut any manner of timber-trees; and it was adjudged no condition. *Pop. ibid.* 117.

17. Words making reciprocal covenants are not a condition. *T. Jones* 205. *Warren v. Alters*.

18. Where a proviso to pay was held to amount to a covenant to pay, *Clapham v. Moyle*.

19. *A* makes a lease to *B.* for years, rendering rent, with the covenant, that the lessee should repair the house, with other covenants, and then devises the same land to the lessee for several years more, yielding the like rent, and under such covenants, as in the first lease, the remainder over in fee, and dies; and then the first lease expires, and the lessee continues in by force of the second lease, by virtue of the devise, and repairs not the houses; so that if the first lease had been in being he had broke the covenant. The question was, whether this shall be construed a covenant or a condition; and all the Court held, that the will expressing that the first lessee should have the land, observing the first covenants, it shall be now taken not to be a condition by any intent that can be collected out of the will; for a covenant and condition are of several natures, the one giving an action, the other an entry; and here the intent of the will was, that though the covenants were not performed, yet the lessee should not forfeit his term, but is only bound * as was at the beginning, and that was to render damages in an action of covenant. *Mitchell v. Dunton*, *Owen* 54.

20. Whether a covenant made by a lessee, that he will not alien but in such a manner, shall have the force of a condition or a covenant. 2 *Bullst.* 290, 291, 292, 293, 294. *Fore v. Whichcock*

21. Where a proviso shall amount to a condition or covenant. *Owen* 151. *Dennis v. Henning*, 1 *And.* 267. *Sympson v. Tylterell*. 2 *Co.* 71, 72.

22. *A* demised to *B.* certain rooms for a term for 6l. 13s. 4d. *Proviso* that *B.* shall gather the rents reserved of the plaintiff's other tenements, and pay the same within twenty days after every quarter day; and it is agreed that *B.* shall retain the rest of the benefit of the rooms, over and above the 6l. 13s. 4d. for his pains; and a breach assigned that *B.* had not paid the several rents; and it was held that this was not a covenant, but a bare condition annexed to the estate, which determines it by not collecting and paying the rent. 2 *Cro.* 128, 129. *Geery v. Reason*.

Other

On Actions of Covenant.

Other Cases where a Covenant hath been construed
to amount to a Condition, and where not.

2 Mod. 35.	Godb' 98, 99.
1 Sid. 266.	2 Leon. fol. 33. pl. 40. Machel.
280.	v. Dunton.
4 Leon. 50.	1 Leon. 245.
1 Roll's Abr. 407, 408.	Cro Jac. 389.
Cro Eliz. 604.	2 Bulst. 290.
2 Leon 128.	Cro. Eliz. 73.
T. Jones 205.	Moor 174.
4 Leon. 147. The Earl of Hun-	1 Mod. 64.
tingdon and Mountjoy.	2. Saund. 155.
Vaughan 32.	2 Keb. 674.

Other Cases where a Condition hath been construed
to amount to a Covenant, and where not.

Cro. Car. 128.	1 Leon. 245. Thomas v. Ward.
1 Leon. 47.	Popham 14. Fulcher v. Griffin.
Dyer. 150.	Cro. Eliz. 486. Harrington v.
1 Rep. 155. The Rector of Che-	Wife.
dington's case.	Moor 859. Noy. 57. The same
Hard. 178. Norris's Case.	case.
2 Mod. 80.	1 Lev. 155.
2 Inst. 203. b.	1 Keb 842, 860, 892.
3 Keb. 188.	

1. *A.* seised in fee, *covenants* with *B.* to convey by *fine* to the use of *B.* and his heirs, with a *proviso*, that if *A.* paid to *B.* 100l. at the end of thirteen years, that then he might re-enter, and covenanted and granted that *B.* shall enjoy the land for the thirteen years, and afterwards for ever, if the 100l. was not paid; and *B.* *covenants* during the term, to pay annually two capons, and would not commit waste. *It was held* that this *covenant* did not amount to a *lease*, but only a *mortgage*; and a difference was made by *Tanfield*, that if one grants to another, that the *grantee* shall have and hold his lands for so many years, it is a good and absolute lease; but if *A.* *covenants* that *B.* shall enjoy his lands for ten years, that is not a *lease*; but a bare *covenant*. 2 Cro. 172. Evans v. Thomas.

2. Where

Readings and Observations

(P* 97) * 2. Where a *covenant* was, that *A.* shall enjoy the lands for six years, it was held to amount to a lease, and shall bind the *heir*; so where the words of a *covenant* were, that the *lessee* shall pay such a rent annually, it amounts to a *reservation*; if it were adjudged to be barely a *covenant*, then it goes to the *executor*, if a *reservation* then to the *heir*, and follows the reversion. 3 Cro. 207 Drake v. Munday, 1 Roll's Abr. 847. Moor 661. Cro. 92, 172, 439.

3 See the different constructions upon a *covenant* to acknowledge a *fine*, and a *covenant* to levy a *fine*. Latch 186. Tindall's case.

2 Dan. 36. P. 13. 4. *M.* and *C.* joint tenants for life, *M.* covenanteth, conditioneth, and agreeth with *B.* to have the one *moiety* of the lands after the death of *E.* for sixty years (if *M.* so long live) and likewise *M.* demises, grants, and to farm lets the other *moiety* to *B.* after the decease of *M.* for sixty years; and it was adjudged that the first *moiety* passeth by the *covenant*, &c. as the lease of that part which appertains to *M.* and that then the lease of the other *moiety* of the companion was void. See Br. leafes 6. 10. E. 4. 48. 20. H. 7. 26. Dyer. 150. That a *covenant* shall amount to a lease. Parton's and Habins's case, 37 & 38 Eliz. B. R. that a joint-tenant may lease his *moiety* for years, to commence after his death, or the death of his companion; and that it was adjudged, that if a joint-tenant covenants to stand seised to the use, &c. of the *moiety* of his companion, that no use shall arise, because it is but a bare possibility. Noy. 14.

5. In an action of *covenant* upon articles of agreement, &c. wherein the plaintiff covenanted with the defendant *facere dimissionem* to him of a mill, paying 20l. rent per annum, for so many years, and the defendant covenanted to pay the rent during the term; the plaintiff brought this action for non-payment of rent, in which he set forth, that the defendant entered and enjoyed the mill, &c. The defendant pleaded, that the plaintiff did not make any lease to him, and upon a demurrer to this plea, it was adjudged, that these articles did not amount to a lease, being only a *covenant facere dimissionem*; and Holt chief justice held, that the making the lease was a matter precedent, and that the plaintiff could not be entitled to the rent, till a lease was made; by Eyres, Dalben, and Gregory justices, contra; because these are mutual covenants, and equal remedies are on both sides, and it is alledged that the defendant entered; but upon the other point the defendant had judgment upon arguing the demurrer. Mich. 2 Will. 3. 3 Salk. 108.

6. In an indenture, the word *covenant* is the word both of the lessor and lessee; as if the lessee covenants to pay the rent, this is a reservation. 1 Roll's Rep 80, 81. Athoe v Heming.

7. Whether

On Actions of Covenant.

7. Whether or no a covenant that the lands shall not be charged shall be construed a release of the rent. Vide Noy 5. Butler v Mannings.

What other words of covenant or agreement shall amount to a lease, and what shall be a covenant only.

1 Roll's Abr. 859. Tooker v. Squier.	Cro. Eliz. 173. Perry v. Allen.
Cro. Jac. 291. Purfrey v Grimes	Cro. Eliz. 486. Harrington v. Wife.
Cro. Jac. 207.	Moor 459.
Cro. Jac. 172. Eyans v Thomas.	2 Keb. 258.
1 Leon. 36, 118 Littleton v Pern	3 Keb. 304.

1. Where *A.* covenants by an indenture, and grants a fee-farm rent to *B.* and covenants, that he was seised in fee, and had good right to sell, and a breach is assigned, that he had not a good right; the defendant pleads, that it was agreed by the same indenture, that all the *covenants* therein should extend no farther than to *A.* and his heirs; it was adjudged that this qualified the force of the former *covenant*, and restrained it to acts done by *A.* 1 Lev. 57. Brown v. Brown.

• 2. Where a *covenant* is, that a ship shall go to *Cadiz* with the first wind, and there is a *covenant*, that if the ship goes the intended voyage, he shall pay so much; as to the last *covenant*, it is not material whether the ship went with the first wind or no. Palmer 397. (P* 98)

3. The difference between a *covenant* by one who is owner of the land, and by a *stranger* who hath nothing in the land. 3 Bulst. 204.

4. Where the defendant by indenture granted a fee-farm rent to the plaintiff, which he had purchased of the King's lands, and covenanted that he was seised in fee, and had a good right to sell, and a breach was assigned that he had not a good right. The defendant pleads, that it was further agreed in the same indenture, that the covenants in the said indenture shall not extend to any acts further than acts done by the vendor and his heirs; the plaintiff demurs, and the Court held, that though this be a remote agreement at the end of the deed, and far distant from the other covenant, yet this hath qualified the first covenant, and restrains it to any acts done by the covenantor himself only. 4 Rep. Nokes's case, 1 Lev. 57. Brown v. Brown, 1 Keb. 234.

Other

Readings and Observations

Other Cases where an exprefs Covenant hath been
held to qualify the General Covenant.

2 Keb. 717, 721. Lee & al' v. Scurre.	2. Brownl. 212.
Yelv 175.	Winch. 93, 94. Sir George Trenchard's case.
2 Cro. 233.	4 Rep. Noke's case.
Litt. 206.	1 Lev. 57. Brown v. Brown 1
1 Bulst. 3. 4.	Keb. 234.

1. *A.* seised of lands lets it for years, and covenants and grants, to and with the lessee, his executors and assigns, that it shall be lawful for him to take and carry away to his own use such grain that shall be growing on the land at the end of the term, though the word covenant be joined with the word grant; and though the words are not by way of gift of the grain, but that it shall be lawful for him, &c. yet this shall be a grant, and shall transfer the property of the grain that shall be growing at the end of the term, for the intent of such words in common use, amount to so much, as the clause without impeachment of waste, transfers a property in the trees. Hob. 132. Grantham v. Hawley.

2. If *A.* covenants with *B.* to enter into a bond for the quiet enjoyment of such lands, and do not exprefs what sum shall be mentioned in the bond, it shall be intended in such a sum, which amount to the value of the land; so if a man grants an annuity to another of 10l. till he is promoted to an agreeable benefice, the law shall intend it to be a benefice equal to, or of more value than 10l. a year. 5 Co. 78.

3. Where a lessee covenants to build three houses on the premises, and to keep them in repair, and it is also covenanted to deliver up *dicta præmissa & domus edificia superinde fore erecta*, and the lessee builds four houses, and lets one fall to the ground, this covenant extends to the four. 2 Ventris 126. Dowse v. Cale, 3 Lev. 264.

4. Whereas the testator covenanted with the plaintiff, that the manor of *Ridgway*, which he assured unto the plaintiff upon his marriage, was of the value of 300l. yearly; he saith that in truth it is but of the yearly value of 250l. the defendant pleaded, that the said manor was of the value of 300l. yearly at the time of making the said indenture, *secundum formam & effectum indenturæ prædictæ*; and upon this they were at issue, and the Jury find a special verdict, *viz.* the indenture *verbatim*, as the plaintiff declares, whereas the testator covenanted to stand seised of that manor,

On Actions of Covenant.

manor, in consideration of the marriage to the use *of the plaintiff and the heirs of his body; and covenants that he was seised of the said manor at the date of the said indenture, of a lawful estate in fee. notwithstanding any act done by him, or any of his ancestors; and that no reversion or remainder was in the King, or any other; and that the said manor was then of the annual value of 300*l.* per annum, and that the plaintiff and his heirs shall enjoy it according to the limitations, discharged, and saved harmless from all incumbrances made by him, or any of his ancestors: and further they found, that this manor was but of the value of 260*l.* per ann. at the time of the said indenture, and no more, and that the testator had not done any act to impair the said value; and if *super totam materiam, &c.* so the sole question was, whether this covenant for the value depends upon the first part of the covenant, notwithstanding any act made by the testator, or his ancestors, or if it were an absolute and distinct covenant of itself. And upon the first argument, the court resolved that it was an absolute and distinct covenant, and had no dependence on the first part of the covenant. Vide 27 H. 8. 29. 7 Eliz. Dyer 240.

5. Where covenants in deeds shall be said to be distinct by themselves, and where they shall be construed to relate to precedent covenants. 3 Cro. 107, 494.

6. Where *A* tenant for life of a park, lets it to *B.* with the profits of the deer for five years, and *B.* covenants with *A.* that he yearly, and every year during the life of the lessor, for and in every of the said years, would deliver to the lessor a certain number of does; and it was assigned for a breach of this covenant, that *B.* had not delivered the does after the five years expired; it was adjudged, that clearly this covenant was not broken; for the words, *for and in every of the said years*, shall not have relation to the life of the lessor, but to the five years. 2 Roll's Rep. 38. Talbot v. Levison.

7 Note. The difference between covenants in gross, and covenants grounded upon a lease for covenants upon a lease, their foundation is within the statute of 13 Eliz. but not these in gross. 2 Roll's Rep. 401. Ascue v. Butts.

8. Where covenants have been construed dependant upon one another, and where they have been held to be distinct. Vide Winch 74. Napper's case.

And

Readings and Observations

And for other Cafes where Covenants have been
construed to be diftinct, and where not.

Cro Car. 495. Hughes v. Ben-	2 Keb. 76, 201. Gainsford, v.
nett.	Griffith.
Jones 403.	1 Saund, 58.
Cro. Car. 107.	1 Sid. 328.
2 Roll's Abr. 249.	2 Roll's Abr. 250.
3 Lev 46 Nervin & al execu-	1 Mod. 101. Norman v. Fof-
tors of Finery.	ter.
Cro. Car. 425. Byrt v. Manning.	1 Keb. 234. Brownlow's cafe.
2 Keb. 505, 543, 569. Pom-	1 Lev. 57.
fret v. Rycroft.	2 Roll's Abr. 250. Sir George
1 Sid. 429	Trenchard v. Hofkins.
1 Saund. 321.	3 Keb. 352.
Dyer 240. pl. 43.	T. Jones 150. Kingdon v.
3 Keb. 352. Johnson v. Pal-	Viscount Ranelagh, & al.
grave.	Raym 459.

Other Cafes concerning the Conftruction that hath
been put upon Covenants.

1. Where tenant for life makes a lease for twenty years, and covenants, that the lessee shall enjoy during the term, that shall be construed during his life, for the term ended by the death of (P* 100) the lessor; * but otherwise had it been, if the lessor had covenanted during the term of twenty years. 1 Brownl. 22.
2. One covenants to make a lease of all his lands in *D* and in *D*, the lessor hath as well copyhold as freehold lands. *Q*, if he is bound to make a lease of his copyhold lands, for that he cannot do without license. Moor 294. Croebek v. White.
3. A man seised in fee of a parcel of land called *P*. containing sixty acres, and divides it into three parts, and lets one part of it to *A*. for years; and after, during the term, makes a lease for years to *B* by these words (*two parcels of land of P.*) containing in itself sixty acres. Though all the three parts do not exceed sixty acres, yet but two parts shall pass by the grant; for the intent of the grant appears to be such, and so the lessee shall not have an action of covenant for the other third part. 2 Roll's Abr. 50. Floyd v. Petty.

For

On Actions of Covenant.

For other Cases concerning the Construction of
Covenants, see

- | | |
|---|---|
| <p>1 Leon. 117. <u>Cage v. Paxlin.</u>
179. <u>Kensam v. Reding.</u>
4 Leon. 50. Anonymus.
Winch 91. <u>Trenchard v. Hof-</u>
<u>kins.</u>
1 Leon. 277. <u>Bishop v. Red-</u>
<u>man.</u>
251. 4 Leon. 187.
3 Lev. 264.</p> | <p>Stile 132. <u>Pickering v. Barkley.</u>
T. Jones 191. Ray. 464. <u>Griffith</u>
<u>v. Goodhand.</u>
3 Leon. 123. <u>Mason's Case.</u>
1 Rep. 144. <u>Dyer 19 b.</u>
1 Leon. 52. <u>Leigh v. Hanmer.</u>
<u>Godb. 335.</u>
Owen 139. 1 Leon. 42. <u>Wood</u>
<u>v. Ash.</u></p> |
|---|---|

Of Covenants in Law.

1. In what cases the law will create a covenant by implication, and of the incidents thereto, see 1 *Roll's Abr.* 520. Letter G. *Dunw's Abr.* 2 Vol. 234.

2. Where the breach is alledged in the entry of a stranger, there he ought to set forth the title of the stranger, otherwise where it is the entry of the lessor himself; and this difference was taken between a covenant expressed, and a covenant implied; as in the words demise, &c. where without any more there is an implied covenant by law for quiet enjoyment; and in an express covenant to save harmless, and that the lessee shall enjoy the land; for in the one case the covenant is not broken by the entry of a stranger, unless that such entry be by title, which amounts to an eviction of the term; but upon a covenant express, the lessor is bound to guard the land against the entry of any man. Moor 861. Tisdale v. Essex.

3. What have been held express covenants, and what created by implication of law. See Stile 406, 407, 431.

4. There is a diversity taken between covenants in deed, and covenants in law. 1 *Roll's* 81. in the case of Athowe and Heming.

5. A covenant in law shall not be extended to make a man do more than he can do. 1 *Brownl.* 22. Bragg v. Wiseman.

6. On a covenant in law, no action will lie against executors. 2 *Brownl.* 204.

7. Where an express covenant is said to qualify a covenant in law. 2 *Brownl.* 212, 213. 1 *Bulst.* 4. 4 *Co.* 80.

Of void Covenants.

1. Covenants may be void in their fabrick by being made,
1. For the doing of a thing, or not doing a thing, each whereof is inconsistent with the nature of his estate, *ex vi termini*, that he should be compelled to the one, or be restrained from doing
Vol. II. I the

Readings and Observations

the other. 2. For the doing of a thing which is *malum in se*, or *malum prohibitum*; or 3. That which is impossible at the time of making the covenant, that it could be done.

P* 101 * 2. As to the first of these, if tenant in fee-simple covenants, that he will not alien, it hath been said to be a void covenant, but the law is otherwise. Hob. 13. Cro. Eliz. 757.

3. But if a tradesman covenants, that he will not exercise his trade, if it be absolute, it is void. Cro. Eliz. 872.

4. And yet a man may restrain himself where the law doth not restrain him; as where the tenant covenants that he will not cut any fuel without the assignment of the lessor; for in such cases *modus & conventio vincunt legem*.

5. But if a man be a tradesman, and he covenants that he will not use or exercise his trade for some time, or in some particular place, this is good. 3. Lev. 242.

6. If a man seised of lands in fee, covenants to stand seised of it to such uses, as no estate will arise by the covenant, yet it may be good by way of covenant, and give remedy to the covenantee, in an action of covenant, but with this difference, if the covenant be future; as where one man doth covenant with another, that in consideration of a marriage, his lands shall descend, remain, or revert to his son and heir apparent, and to the heirs of the body of his wife; in this case the covenantee may have a writ of covenant; for if the covenant be present, as that a man and his heirs shall from henceforth stand, and be seised to such and such uses, and the uses will not arise by law, in this case no action of covenant will lie for the covenantee in this case; for an action of covenant will not lie, but where it is covenanted that a thing shall be done hereafter, or hath been done heretofore, and not for a thing present; as when A. doth covenant with B. that his black horse shall be for ever the horse of B. this is no good covenant; and albeit he keep the horse, still B. can have no remedy. Plo. 307, 308. 27 H. 8. 16. Finch Ley 49.

7. Secondly, a covenant to do a thing that is *malum in se*; as to kill a man, rob an house, or to break the peace, such covenant is void.

8. Thirdly, a covenant to do that, which is impossible in the nature of the thing to be done, is void. 2 Brownl. 281.

9. Fourthly, a covenant to go from St. Peter's church in Westminster, to St. Peter's church in Rome in three hours is void, because impossible. 1 Inst. 206. b.

10. If a man covenants to do a certain thing, before a certain time, although it becomes impossible by the act of God, yet this shall not excuse him. 1 Roll's Abr. 450.

11. Where there is a covenant for quiet enjoyment of lands under a lease which is void, the covenant is also void, but otherwise is it of a lease only voidable. Moor 875.

12. Where

On Actions of Covenant.

12. Where a thing is lawful at the time of the covenant made, and the matter covenanted to be done, is afterwards prohibited by law, yet the covenant is binding; as a covenant to carry goods, which afterwards become prohibited. *Brafon v. Dean*, 3 Mod.

39. 1 Ven. 175. *Lucy v. Levington*.

13. Breaking the seal of one of the covenantors shall avoid the deed only against himself, otherwise if the deed be rased in a clause which concerns them all, or in the date. *Cro. Eliz.* 546. *Mathewson v. Lydiate*.

14. Upon issue in an action of covenant, it was found that the plaintiff had not sealed his part, but the defendant had sealed his part; and it was held to be good, and that an action might be brought upon it. *Foster and Wilson v. Mapes*. *Cro. Eliz.* 212.

15. What have been adjudged to be mutual covenants, and not a condition precedent. *Stile* 186. *Ware v. Chappell*.

* 16. What hath been adjudged a covenant collateral, and that the covenant was broken by an assignment of the remainder of a term, though the lesser entered into part of the land. *Stile* 265 *Collins v. Sillye*. P* 102

17. Where *A.* covenants with *B.* to let a ship to *C.* and that the ship with the first fair wind should sail out of the *Isle of Line*, to such a place; and *B.* covenants with *A.* for *C.* that *C.* should pay for the freight the sum of 184^l. Here it was held that the plaintiff ought to have shewn that he performed the covenant on his part, and how; because the words *for the freight* make a condition precedent, which ought to be alledged to have been performed; but if one covenants to transport goods to such a place, and the other covenants to pay so much money, these are mutual covenants, and the parties are intitled to mutual remedies; and for want of performance being specially averred, the judgment was reversed. 1 Bul. 168. *Clarke v Gurnell*.

Other Cases concerning mutual and reciprocal Covenants.

1 Roll's Abr. 416. *Bragg v. Nightingale*.

Stile 140.

3 Lev. 41. *Cole v. Shallett*.

T. Jones 216. *Shower v. Cudmore*.

2 Saund. 156.

Dyer 16. *Colt Ughthred's Case*.

2 Mod 33. *Smith v. Shelberry*.

Cro. Eliz. 292.

Hob. 67.

2 *Cro.* 503.

3 H 6. 8. *Dyer* 297.

2 Saund. 352.

4 Mod. 188.

2 Mod. 75.

Stile's Rep. 186.

1 Roll's Abr. 414.

Gurnell v Clarke.

1 Roll's Abr. 415. *Vivian v.*

Shippings.

5 Rep. 78. *Gray's case*.

Cro. Jac. 645. *Slater v. Stone*.

Stile 140.

Readings and Observations,

Raym. 183. Pordage v. Cole, 1 Saund. 319. 2 Keb. 674. 1 Mod. 64. 1 Sid. 464. 2 Saund. 155. Humlock v. Blacklow. 2 Keb. 811, 837. Peter v. Opill. 2 Lev. 23. 2 Saund. 350. 1 Ven. 177. 3 Leon. 219. 2 Leon. 11.	Brocas's case. 2 Mod. 73. Dr. Samways v. Eldsby. Hob 88. Nicholls v. Rainbred. 1 Ven. 147. Lacy v. Cheshire. 1 Cro. 433. 2 Mod. 33. Smith v. Shel- den.
---	--

Secondly, *Who shall have advantage of a Covenant, and by whom the action may be brought.*

By the Heir.

1. *Covenants real* run with the land, and in some cases none shall take advantage thereof, but the party or his heirs. 42 E. 3. 4. 1 Roll's Abr. fol. 520. Letter. H. pl. 1.

2. *Covenants of inheritance* shall descend to the heir, and that in respect of the land. 1 Roll's Abr. fol. 520. Letter H. pl. 2.

3. And in some cases, though the lands do not descend to the heir, but a covenant is made by *A.* and *B.* that *A.* will do any act; as to seal a deed, and thereby convey the inheritance of a third part of the manor of *C.* here though no inheritance descended to the heir, because the father was never seised, yet the heir shall have the advantage of this covenant, inasmuch as it was to convey the inheritance to the heir; and if the covenant had been performed, the heir would have received the benefit thereof, and by the same reason he ought to have damages for the non-performance of that covenant. 1 And. 55. *Wotton v. Cook.*

P* 103 4. But where a lease is made to one, and his heirs for a term of years, the heir shall not have the advantage of this covenant, because *as a chattel he cannot have a chattel to descend to him, and therefore he shall not have this action. 1 And. 55.

But then it must be known, that in this case the father of the plaintiff *Wotton*, and the defendant, and one *Mary Dennet*, where they had jointly the lands, which the said defendant had covenanted to execute a conveyance of, as to a third part to the plaintiff's father, and his heirs; for in the case of *Eaton and Butter*, in *Palmer* 558. it is there said, that if *J.* covenant with *J. S.* and his heirs, to make a conveyance to him and his heirs, his heirs shall not bring an action of covenant, because it is a covenant in gross; but otherwise it is where the covenant is in the same conveyance, whereby the ancestor takes an estate, for then it goes with the land. *Palm.* 558.

On Actions of Covenant.

5. And it hath been held, that tho' a covenant be made by *A.* only to *J. S.* his heirs and assigns, that the covenantor had an indefeazable title to convey; and it were an estate of inheritance to be conveyed, yet if the breach be in the life of *J. S.* his executors may bring an action for the breach of that covenant. 1 Vent. 176.

6. But if a lessee for years covenants with the lessor, his executors, and administrators to repair, and the lessor dies, his heir shall have the action, though he be not named. 2 Lev. 92. Longher v. Williams.

7. If a feoffment be made in fee, and the feoffor doth covenant to warrant the land, or otherwise to the feoffee, and heirs, in this case the heir of the feoffee shall have the advantage of this covenant; as if *A.* covenants with *B.* and his heirs to infeoff *B.* and his heirs of land, and *B.* dies before it be done, in this case the heir shall have the benefit of this covenant. Dyer 338.

By Executors.

1. By the common law, an executor, tho' he was not named, might have an action of covenant, because he is privy; and after some sort, a party, inasmuch as he represents the person of the testator. 1 Inst. 208. b. and more than the heir. 209. a.

2. And that as well upon a covenant inherent that concerns the land, as upon a collateral covenant, and upon a personal covenant, executors shall have this action for a breach committed against the testator. Bro. Tit. Executor 161.

3. Executors shall have this action on a covenant to pay *A.* 1000l. at Michaelmas, though no mention is made of the executors in the covenant. Dyer 112. b.

4. Executors of an assignee shall have this action, for the same right which was in the testator, comes to the executors. 5 Rep. 17. b.

5. If *A.* covenants with *B.* and *C.* jointly to perform a certain act to *B.* only; if *A.* breaks the covenant, and then *B.* dies, and *C.* survives, the executors or administrators of *B.* cannot sue *A.* on the covenant; nor shall they have any benefit by it, though the act was to be done and performed to *B.* only; for the action survives to *C.* only, and after his death, his executors or administrators are entitled to the action. 2 Brown. 207. Dyer 350. pl. 20.

6. Where *A.* enfeoffed *B.* and covenanted for him and his heirs, that he was seised of a good estate in fee; it was held by *Hobart* then only present in court, that the covenant being made with the heir, the executor shall not have the action, but the heir, because it was annexed to the land. Winch 19. Bull v. Frankester.

7. If *A. B.* and *C.* have lands in parcenary, and purchase other lands in fee, and they covenant each to the other, his heirs and assigns,

Readings and Observations

assigns, to make such conveyance to the heirs of him who shall die first, of a third part, as counsel shall advise, the executor shall not, but the heir may have an action. 5 Rep. 17.

P* 104

* 8. This action was brought by *A.* as executor to *B.* for that the defendant covenanted with *B.* his heirs and assigns, that they should enjoy the estate, and it was an estate of inheritance; yet the breach being in the testator's life-time, the action was adjudged to be well brought by the executors for damages. 1 Vent. 176. *Lucy v. Levington.* 2 Lev. 26. 2 Keb. 831.

By Baron and Feme.

1. If a covenant be made to baron and feme, the husband alone may bring the action. 2 Mod. 217. *Beaver v. Laine.*

2. If a reversion is granted to baron and feme, and to the heirs of the husband, and after a covenant is broken by the lessee, the baron sole may bring the action where damages sole are to be recovered, there the husband only shall have the action. 1 Roll's Rep. 359. *Brett v. Cumberland.* 1 Roll's Abr. 348. 2 Mod. 217.

3. If a lease for years be made to baron and feme, and the lessor ousts them of their term, they may join in the action; because after the death of the husband she shall have the term, if he grants it not over. 1 Roll's Abr. 348. pl. 41. 1 Co. 17. *Dyer* 257.

4. See where the husband and wife must join in the action as assignees. *Jones* 406. *Middlemore v. Goodale.* Cro. Car 505.

5. If a man demise lands to a woman for years, and the lessor covenants with the lessee to repair the houses during the term, and the wife takes a husband, and dies, the husband shall have an action of covenant, as well upon the covenant in law, on the words (*demise and grant*) as if it had been upon an express covenant. 5 Rep. 17. a.

Against Baron and Feme.

1. An action lies against a feme, after the husband's death, upon a warranty by her and her husband, annexed to an estate for years, by a fine; and when a warranty is annexed to an estate for years in a fine, it is only a covenant for damages in the personal lien. 2 Saund. 180.

2. Covenant, for that queen *Elizabeth* by her letters patent, let an house to the said *William Cumberland*, wherein were these words; *and the said lessee, his executors, and his assigns* reparable domum prædictam, *and shall leave the said house so repaired,* &c. The queen afterwards granted the reversion to the plaintiff, and to his feme, and to the heir of the baron in fee; and for not repairing, the plaintiff brings an action of Covenant; upon this declaration the defendant demurred, 1. Because the action

was

On Actions of Covenant.

was brought by the baron sole, where by his now shewing, the same hath an estate therein, as well as the baron. 2. Because they are not the words of the covenant of the lessee, nor is it the deed of the lessee, but the court without argument resolved for the plaintiff; for the action being personal, and damages only to be recovered, the baron may have the action solely, or join the same with him, if he please. 3. They held that these words in the queen's patent amount to a covenant on the part of the lessee, and he by accepting the lease is bound by that covenant; wherefore it was adjudged for the plaintiff. 2 Cro. 399.

3. Where a lease is made to the husband and wife, and the husband dies, and the wife accepts of the land, she shall not be bound to perform collateral covenants, though she agrees to the lease. 2 Brownl. 136. Bagnal v. Tucker.

4. If *A.* makes a lease to the husband and wife, and they covenant to do no waste, or to repair houses, and the husband dies, and the wife surviving holds the land, and commits waste, or neglects to repair, * no action lies against the wife; but upon such a lease the wife is bound to pay the rent, or to perform a condition made on the part of the lessor, but not to observe or perform the covenants of the lessee. 1 Brown. 3. 31. P* 105

5. The action is to be brought against husband and wife, upon a deed of demise to the wife, (*dum sola*) whereby she covenanted, that she would every year, during the term, plant so many oaken plants on the premises; and the breach was assigned, that neither they, or either of them, had set or planted, &c. and it was held to be good. 6 Mod. 239. Anonymous.

By Lessor and Lessee.

1. If a man lets land for a term of years, and ejects the lessee, he shall have an action of covenant against the lessor, though there is no express covenant in the deed. 1 Roll's Abr. 519. letter F. pl. 1.

2. If a man lets certain goods to another by indenture which are evicted within the term, he shall not have a writ of covenant for that eviction; for the law does not create any covenant upon such a thing. Ib. pl. 2.

3. If a man makes a lease for years of land, by the words (*grant or demise*) those words import a covenant; and if the lessee, or his assignee are evicted, they may bring an action thereupon. 5 Co. 17. a. 18. a.

4. If one by deed grants a water-course, and afterwards stops it, an action of covenant lies against him. 1 Saund. 322.

And there is this difference between a covenant upon an indenture which works by estoppel, and a covenant upon a deed poll.

5. If *A.* lets the land of *J. S.* by indenture to *B.* and *B.* enters, upon whom *J. S.* re-enters, *B.* shall have a writ of covenant on this

Readings and Observations

this indenture, though *B.* was not in possession of the land by the lease, but by estoppel; for the lessor is estopped to say that *B.* was not in by his lease. 1 Roll's Abr. 520. letter G pl. 1. Cro. Jac. 73. 1 Roll's Abr. 871. pl. 1.

6. So if *A.* lets to *B.* *B.*'s own land by indenture, if *B.* is ousted by another that has right. 1 Roll. 520. letter G. pl. 2. Cro. Jac. 73.

7. When *A.* lets to *B.* the lands of *J. S.* *B.* shall have an action of covenant before a re-entry on *J. S.* and a re-entry by him, for *B.* need not alledge an eviction; for this is a covenant in law, which is broke when *A.* is not seised at the time of the demise; for the word *demise* imports the power of letting; and it is not reasonable to enforce the lessee to enter into the land, and so to commit a trespass. 1b. pl. 3. 2 Brow. 22. Hob. 12.

8. All covenants between a lessor and his lessee, are either covenants expressly mentioned, or covenants in law; an express covenant by deed may restrain a general covenant in law.

For a demise of lands generally is a covenant in law, for the quiet enjoyment of the lessee against all legal interruptions. Vaugh. 126. but not against tortious entries, evictions or interruptions; because against tortious interruptions, the lessee hath a proper remedy against the wrong-doer. Vaugh. 119.

9. If the lessee be by express covenant to enjoy his term, (or enjoy it against all men, which is the same) he shall not have an action of covenant, unless he be legally ousted or evicted, for if he be ousted tortiously, he hath his remedy.

Yet if the lessor covenants expressly, that the lessee shall hold and enjoy his term without the entry or interruption of any person, whether such entry or interruption be legal or tortious; there the lessor shall be charged with an action of covenant for the tortious entry of a stranger, because no other meaning can be given to this covenant. Vaugh. 119.

P* 106 * 10. When a man covenants, that his lessee shall enjoy his term against all men, he doth neither expressly covenant for his enjoyment against tortious acts, nor doth the law so interpret his covenant.

11. So where the covenant is, that the lessee shall enjoy against the assigns of the lessor, the lessor doth not covenant expressly against their tortious acts, nor ought the law to interpret that he doth any more than in the other case. Vaugh. 123.

And though it was objected, That if the lessor shall not be charged upon this covenant for the tortious entry of his assignee, by this express covenant, then is the covenant useless; for by a covenant in law upon the lease itself, he was to be charged for a legal entry made by his assignee, if this covenant had not been at all.

My Lord Vaughan's answer thereto was this.

It

On Actions of Covenant.

It is not necessary the lessor and lessee should understand what are covenants in law; and therefore they might impertinently make an express covenant, which they understood not. Vaughan 126. And my Lord *Vaughan* takes notice of the following inconveniences that would arise, if the laws should construe a covenant for quiet enjoyment from interruption to extend to tortious acts, viz.

1. A man's covenant, without necessary words to make it such, is strained to be unreasonable, and therefore improbable to be so intended; for it is unreasonable that a man should covenant against the tortious acts of strangers, is possible for him to prevent, or probably to attempt preventing.
2. The covenantor who is innocent shall be charged when the lessee hath his natural remedy against the wrong-doer, and the covenantor made to defend a man from that from which the law defends every man, that is from wrong.
3. A man shall have double remedy for the same injury, viz. against the covenantor, and also against the wrong-doer.
4. A way is opened to damage a third person (*that is the covenantor*) by undiscoverable practice between the lessee and a stranger; for there is no difficulty for the lessee secretly to procure a stranger to make a tortious entry, that he may therefore charge the covenantor with an action. *Vaugh.* 122.

12. This difference hath been taken relating to eviction, where the entire estate for life is evicted, and where only the possession for a time; for if a stranger enters without a title, whether it be a term or a freehold no action of covenant will lie, by the 26 H. 8. cap. 3 and 32 H. 8. cap. 6. But if all the estate for life be evicted under the title of the lessor, the lessee shall not have an action of covenant; for thereby he is not to recover any thing but damages, which are personal, and cannot be a recompence for the loss of the freehold; but in the principal case, where there was but a term for 21 years evicted, and the lessee, who was the plaintiff, though he continued seised of the freehold in that case, yet because nothing is evicted but a chattel, this action may be brought to have satisfaction in damages. *Yelv.* 139. *Pinchcombe v. Rudge.*

By Grantees and Assignees.

1. As there are some covenants, of which the party or his heirs only shall take advantage, so are there others which stick close to the inheritance of the land, and run with it into whose hands soever it comes.
2. If the lessor grants to the lessee so many estovers as will repair the house, or that he shall burn within this house, during

Readings and Observations

during the term, these as things appurtenant shall go with the land. 5 Co. 17. b.

P* 107 • 3. But before we consider further of the action to be brought by and against grantees and assignees, it will be very proper to mention the following statute, that hath made a very considerable alteration to the common law therein.

The statute of 32 of H. 8. cap. 34. hath altered the common law in a great measure, by giving relief in this action to grantees and assignees against grantees and assignees, by which statute it is enacted, "That all persons bodies politick, their heirs, successors and assigns, which have, or shall have any grant of our said lord the king, of any lordship, &c. rents, tithes, portions, or other hereditaments, or any reversion thereof which belonged to the monasteries, &c. or which belonged to any other person, &c. and also other persons being grantees or assignees, to, and by our said lord the king, or to, or by any other person or persons, and the heirs, executors, successors and assigns, of every of them, shall and may have the like advantage by entry for non-payment of rent, or for doing waste or other forfeiture; and the same remedy by action, for not performing other conditions, covenants and agreements contained in the said leases, against the lessees and grantees, their executors, administrators and assigns, as the lessors and grantors, their heirs or successors ought, should, or might have had at any time or times," &c.

To explain which act I shall here insert the following cases, and the several parts of this act by which they are governed.

1. Persons. &c. which have any Grant of the King.

It hath been held, that though the successors of the king be not named, yet the statute extends to grants made by the successors of the king, though only the king be named in the act. Co. Lit. 215.

2. And also all other Persons being Grantees or Assignees, to, or by our said Lord the King, or to, or by any other Person or Persons, &c.

1. It was adjudged, that this statute did not extend to grantees by fine till attornment (when attornment was necessary) for that it must be intended of such only as had all the ceremonies requisite by law; for otherwise it might be mischievous to the lessee. Mallory's case, 5 Co. 112. b. Co. Lit. 215. a.

2. It lies for the assignee of the grantee of the reversion after the breach committed, though before the action brought, the estate of the assignee be determined. Athoe v. Henning, 1 Roll's Rep. 24. Owen 151. but there reported by the name of Alfo and Dennis v. Henning, 2 Bulst. 281.

3. It extends to grantees of part of the estate in reversion, but not to grantees of the reversion of part of the lands; as where

A.

On Actions of Covenant.

A. is seised in fee, and by indenture demises to *B.* rendering rent, and after grants the reversion to *M.* for life; and after attornment *M.* makes a lease of the reversion for forty years, if *M.* should so long live, to whom *S.* attorns and devises his term to his wife who marries the defendant; this action lies by this assignee of the reversion for the forty years, against the husband of the devisee of the lessee of the term, though here the reversion of the term of forty years is but part of the reversion of the estate, dependant upon the determination of the lease made to *B.* 1 Roll's Rep. 80. Owen 151, 152. 2 Bulst 181.

4. But where a lease is made of three acres, reserving a rent upon condition, and the reversion is granted of two acres, the rent shall here be apportioned by the act of the parties; but the condition is destroyed, it being an entire thing, and cannot be divided without defeating the condition annexed to it. Co. Lit. 215. Moor 93. Anonymus.

* Or to, or by any other Person or Persons, &c.

P* 108

1. If the lessor bargains and sells the reversion by deed indented and enrolled, the bargainee is not in the *per* by the bargainor, and yet he is an assignee within this statute.

2. So if the lessor grants the reversion in fee to the use of *A.* *A.* is a sufficient assignee within this statute, because he comes in the act and limitation of the party; though in truth he is in the *post*, and the words of the statute are *to, or by*, yet they be assignees to him, though not by him; though such as come in merely by act of law, as the lord by escheat, the lord that enters for a forfeiture, are not assignees within this statute. Co. Lit. 215. b.

3. If a lessee for twenty years, makes a lease for ten years upon any condition, and afterwards the lessee for twenty years surrenders to him in reversion, he in reversion shall have no benefit of this condition, because he has not the same estate to which the condition was annexed; but is in by a title paramount, as the term of twenty years is merged in his reversion. Moor 876. Chaworth v. Phillips.

4. If a lessee for twenty years, leases for ten years, and his lessee covenants, &c. and the first lessee grants, this grantee of the reversion is a sufficient assignee within that statute. Moor 525. Davy v. Matthews, 527. Matlin v. Westroray, Cro. Eliz. 599. Shall and may have like Advantage by Entry for Non-payment of Rent, or for doing Waste, or for other Forfeiture, &c.

1. The grantee of the reversion is not obliged to give the tenant notice that the reversion is conveyed to him. Godbolt 162. Bristow v Bristow. Co. Lit. 113.

2. What is meant in this statute by the word *forfeiture*, is not upon a condition to pay a sum of money in gross, or to deliver somewhat, or perform any thing not upon the land; but it must be a condition incident to the reversion, or which tends to the benefit

Readings and Observations

benefit of the estate; as for non-payment of rent, committing waste, not repairing the premises, and such like. Co. Lit. 215. b. 5 Co. 18. Moor 159. Anonymus 243. Purfey's case, Owen 41. 1 And. 82, 83. Ray. 250.

And the same Remedy by Action, &c. against the Lessees and Grantees, &c. as the Lessors and Grantors, &c.

1. By this it may be understood that the privity of the action is transferred, and therefore it may be brought in the county where the covenant is alledged to be made, though the lands lie in another. Thursby v. Plant. 1 Saund. 237.

2. If *A.* devises to *B.* for years, rendering rent, upon condition to re-enter for non-payment, and after devises the reversion in fee to another and dies; the devisee may take advantage of the condition, though there never was any reversion in the devisor. 2 Leon. 33. Machel v. Dunton.

3. By the same act, lessees and grantees for years, life and lives, their executors, administrators and assigns, are to have the like remedy against grantees or assignees of the reversion, as the first lessees might have against the grantors or assignors.

4. But if the lessee for 20 years, make a lease to another for ten years, the lessee is no assignee within the statute, for he is not tenant to the first lessor, as his lessor was before. Moor 93. Anonymus.

P* 109

* By Grantees and Assignees.

1. An action lies by the assignee of the reversion against the lessee, and against *B.* where *A.* and *B.* are joint lessees, and *A.* assigns to *B.* all his part. 2 Show. 133. Ashurst v. Mingay.

2. Where an infant, and one of full age covenant together, it seems that the covenant shall bind the party of full age, though not the infant, so as to be liable to an action. 1 Sid. 446. Farnham v. Atkins. Dyer 262. b. 130. Moor. 25. 2 Keb. 623. Cro. Jac. 494. 2 Sid. 109.

3. Where it was held, that an assignee of part of the reversion may have an action, or advantage of a condition or covenant, so that he hath part of the reversion of all the thing demised. Owen 152. Dennis v. Henning.

4. Whether an assignee of the remainder of a term, shall have an action of covenant against the assignee of the lessee, the covenant being collateral to the land. Godb. 120.

5. Where it was adjudged, that the devisee of the reversion, might bring an action of covenant against the assignee of a term. Godb. 162. Bristow v. Bristow.

6. The lessee covenants to repair upon notice, and the lessor grants the reversion, the grantee shall have an action of covenant, although the breach was before his time, and although the covenant was not with the lessor, and his assigns. Moor 242.

7. Whether the grantee of the reversion shall have an action of covenant upon a covenant made by the lessee with the lessor, and

On Actions of Covenant.

and his assigns, to give an account monthly for the wine that he should sell, and to pay 30s. *per tun*, to the lessor or his assigns. Moor 243.

8. Where there is a covenant for the quiet enjoyment of lands during the term, the assignee by parol shall have an advantage of the covenant, and not the assignee by estoppel. Moor 419.

9. Where a lessee for years makes an under-lease with a covenant on the part of the lessee, to depart peaceably at the end of the term, the grantee of the reversion shall take advantage of this covenant. Moor 527.

10. Though a covenant be made only to a man, and his heirs and assigns, yet if a breach be in his life-time, his executor may bring an action for damages. 1 Ven. 176.

11. The executor of a bishop may bring the action for not repairing, although the covenant was made with the testator, and his successors, notwithstanding the case cited, that where a parcener after partition covenants to acquit the other parcener of a suit, and the covenantee assigns, the assignee shall not bring an action of covenant. 1 Institutes 384, 385. 2 Ven. 56. Morly v. Polhill.

12. A feme sole delivers a certain sum to J. S. and the defendant covenants to pay to A. B. 100l. a year, so long as the money should continue in the hands of J. S. the feme takes a husband, the 100l. is in arrear; the husband dies; it was adjudged the executor of the husband might bring the action. Stile 140. Popham v. Hunt.

13. In covenant the plaintiff declared, that the defendant by deed did grant, bargain and sell to the plaintiff, and his heirs, provided, that if the grantor paid so much money, it should be lawful for him to re-enter; and that he covenanted to pay the said money to the plaintiff; and a breach was assigned in non-payment of the money; after a judgment by default, and a writ of enquiry executed, Mr. *Cartwright* objected, that nothing passed by the deed for want of enrollment *quod fuit concessum*; and from thence he inferred, that the covenants were void like the case in Raymond 37. where H. grants all the residue of his term, which should be unexpired at the time of his death, and covenants for quiet enjoyment, and gives a bond to perform that covenant, and it was held, that the bond and covenant were void: *et hoc fuit concessum*, per Holt chief justice, because that was a relative, and dependant covenant, it refers to an estate, and is to wait upon it; and if there be no estate granted, the covenant fails; but in this case the covenant to pay the money is a distinct, separate, and independant covenant, and it is not material whether any estate passed; and the plaintiff need not shew it, nor say, *quod defendens concessit*, but the best way is to declare with a *quod cum testatum existit*, &c. and judgment was given for the plaintiff. 1 Salk. 199. Northcote v. Underhil.

P* 110

Readings and Observations

14. *A* infeoffs *B* and covenants to make further assurances, *B* conveys to *C* and *C* brings an action, for that *A* refused to levy a fine upon request; *A* the defendant pleads a release from *B*. and it was dated after the commencement of the suit; and all the court held,

First, That the covenant goes with the land, and that the assignee at the common law, or at leastwise by the statute, shall have the benefit thereof Secondly, They held, that although the breach was in the time of the assignee, yet if the release had been by the covenantee, (who is a party to the deed, and from whom the plaintiff derives) before any breach, or before the suit commenced, it had been a good bar to the assignee from bringing this writ of covenant; but the breach of the covenant being in the time of the assignee, for not levying a fine, and the action brought by him, and so attached in his person, the covenantee cannot release this action wherein the assignee is interested; whereupon a rule was given, that judgment should be entered for the plaintiff, 3 Cro. 503. *Middlemore v. Goodale*.

15. Who shall take advantage of a covenant or condition, and who not, whether an assignee, or grantee of part of an estate may so do or not. 2 Brownl. 282. *Attoe against Hemings*.

16. An action lies for the grantee of the reversion, against him who covenanted to repair upon warning, though the house became out of repair before the grantee's title accrued to him. 1 Leon. 62. *Mascall's case*.

17. Where the covenant does not mention the payment of the money to the assignee, if the assignee can maintain an action of covenant, see *Skinner* 6.

Who are to join in the Action.

1. *A* covenants with *B*. and *C*. and every of them, that the land which he had aliened to *B*. was discharged of all incumbrances; and he to whom the estate was limited, brought an action for the breach of this covenant; but it was held, that the action ought to have been brought by both. 1 Leon. 47.

2. An action of covenant was brought by the *herald painters*, *Et pro quolibet Et singulis eorum, that they should bring their work to such a place, and that there such work shall be done, &c.* and because one of the covenantors did not bring his work to the place aforesaid there to be worked, the others brought this action, &c. and the action was adjudged to be well brought, for the action is founded upon the work's not being brought to the place appointed for it; and in this part the covenant is joint, and the interest joint. *Skinner* 401.

3. A covenant with two for the performance of a matter, wherein they have a joint interest; and where the words are *omnibus Et cuilibet eorum obligat'* in 20l. for performance, this is a joint covenant, and both must join in the action. 1 Show. 8. *Spencer v. Durant*.

On Actions of Covenant.

4. A lease for years is made to *D* and *D.* covenants to repair, afterwards *C.* the lessor sells the reversion of part to *A.* and of another part to *B.* It was resolved that they might well join in this action of * covenant. 1 Sid. 157. Co. Lit. 197. 2 H. 1. fol. P* 111
6. 7. Mod. 201. 28 E. 3. 10. Bend. 89. 5 H. 7, 8. 2 Sid. 9. Raym. 80. 1 Keb 572. Moor 452. Dyer 326. Godb. 283. Bro. joinder in action, 104.

5. In the case of *Kitchin & al' v. Buckley*, the case was, whether tenants in common ought to join in an action against lessee for years, for not repairing the demised premises. In all actions real tenants in common shall not join, but in personal actions, wherein damages only are to be recovered, there they shall join. In mixed actions they may either join or sever, as in a *parco fracto*, and in account, and if two tenants in common make a lease for years rendering rent, and one of them dies, the executor, and the survivor shall join, or they may sever; but if a lease for life be made, there they ought to sever. Raym. 81. *Kitchin and Knight v. Buckley*.

6. Where there is a covenant between joint farmers of the revenue being *separatim & respective*, and not *conjunctim*, 2. if an action of covenant may be brought by one against the rest jointly. *Skinner*, fol. 6. *Kingdon v. Jones*.

7. *Tippet* the elder and his son covenanted with *John H.* to sell and convey lands to him in fee. Item, it is agreed between the said parties, that the said *J. H.* shall pay to *Tippet* the younger so much money; it was held that this is a duty vested in *Tippet* the younger, and he only ought to have brought the action. 3 Mod. 263. *Tippet v. Hawkey*.

8. Where there is a covenant made to two jointly, the action must be brought by the survivor, and not by the administrator of the deceased. 2 Brownl. 207. *Yates v. Rolls*.

9. Where the indenture was; it is covenanted and agreed between *A.* and *B.* and *C.* that *A.* and *B.* shall levy a fine to *C.* and that *C.* shall pay so much, or do any other act; this is a joint covenant, and *A.* and *B.* must join in an action against *C.* and see what makes a separate covenant. 1 Bulst. 25.

10. The plaintiff declared in covenant, that the defendant, and *J. S.* did agree for them, and each of them, that they, or either of them would load such a ship, at such a place; and it was agreed by all, that *obligamus nos et utrumque nostrum* was joint and several, though it is said, that the Lord Chief Justice *Holt* thought there might be a diversity between the words *A.* and *B. conveniunt & quilibet eorum convenit*, and *A.* and *B. conveniunt pro se & quolibet eorum*; for in the first instance *quilibet eorum convenit* expressly makes the lien separate; but *pro quolibet eorum* seems to go only to the thing to be done, and is joint, as to their being charged; but the rest of the court held, it was not unlike the case

Readings and Observations

case of a bond, where the words are *obligamus nos et utrumque nostrum*. Farresley 154. Robinson v. Walker.

What other cases there are wherein it was adjudged the assignee may bring this action.

Bayly v Offord, Cro. Car. 137. Athowe v. Hemings, 1 Roll's Rep. 80.

Baly v. Hughes, 1 Jones 242.

Moor 52. pl. 669. Matures v. Moor 242 pl. 38.

Westwood.

1 Lev. 51. 2 Ven. 278.

For other Cases by whom this Action should be brought.

3 Bulst. 163. Brett v. Cumberland.

164. —————

Godb 270. —————

3 Leon. 160. Beckwith's case.

P* 112

* Other Cases concerning Persons joining in this Action.

2 Mod. 82. Wilkinson v. Floyd.

3 Keb. 638.

Litt. Sect. 311. Raym. 80. Kit-
chin v. Knight.

1 Lev. 109. 1 Keb. 565, 572. 1

Sid 157. 2 Leon. 47. 3 Leon.

Thirdly, Who are bound by the Covenant, and against whom the Action to be brought.

Against the Heir.

1. If a man covenants for him and his heirs to do any thing, hereby his heirs are bound; but otherwise except an heir be mentioned in the deed, by express name, generally he is not bound. And therefore, if the lessee for years be ousted by any other but the heir himself, no action of covenant will lie against the heir, unless there be an express covenant wherein he is bound; but if he be ousted by the heir himself, it seems this action will lie against him; (*but this I apprehend must be meant of a covenant that runs with the land*) but if he be ousted by an elder title from the lessor, there the heir shall not be charged. 5 Rep. 17. Bro. Cov. 38. 32 H. 6. 32. Dyer 257. Fitz. Cov. 31.

Against Executors.

1. If a man doth covenant for himself only to pay money, to build an house, or for quiet enjoyment and the like, and doth not say in the covenant his executors or administrators, yet his executors or administrators hereby shall be bound and charged. Cro. Eliz. 553. 2 Mod. 268.

2. A. covenanted with B. to put the son of A. apprentice to B. or otherwise, that the executor of A. shall pay to B. 20l. (*no saying A. himself, or his executors shall pay 20l.*) if A. dies, not having performed the covenant, his executors are not chargeable; for it cannot be a debt in the executor, which was none in the testator. Cro. Eliz. 232. Perrot v. Austin. But if

A. co-

on Actions on the Case.

30. Where *A.* and *B.* agree upon a price for goods which are marked, and *A.* promises to deliver them to *B.* paying so much money for them; *B.* tenders the money, and *A.* refuses to deliver the goods; it was adjudged by *Holt* chief justice, that it was a bargain for the goods; and the plaintiff, upon a tender of the money, might have brought a trover for the goods. *Comb.* 381. *Anonymus.*

31. It was a question in the case of *Darlington v. Hanson*, in *Com.* 333. Whether an action of trover might be joined with an action against a carrier, upon the custom of the kingdom, for his negligence in losing goods; there was no judgment given, but the court inclined for the plaintiff; and the cases cited by *Darnel* and *Northy* for the plaintiff, was a case in *Trin.* 24 *Car.* 2. *B. R. Owen v. Lewis*, where trover, and an action upon an *assumpsit* were joined; and upon infancy being pleaded, it was said to be adjudged, that these actions might be joined. 3 *H.* 4. 13. *Bro.* Joinder in Actions, 97. *Syd.* 223. *Wright v. Berle.*

32. This action lies not for a negro, *Salk.* 666. but it lies *de uno scripto obligatorio.* *Salk.* 654.

33. It is said in *Salkeld* 655. in an *anonymus* case, that an action of trover lies not against a carrier for negligence, as for losing a box; but it must be where there is an actual wrong; as if he breaks it open, and takes goods, or sells the box.

34. It lies not for six tuns, without describing what they contain; for if it is meant of empty tuns, they ought to be called six wooden vessels, each containing a tun measure. *Stile* 482.

35. See in what case the property shall be said to be altered by a sale in *market overt*; so that trover may, or may not be brought against him who hath the property by such sale. *W. Jones* 163, 4. *Barker v. Reading.*

36. Where it was held, that trover will lie for money delivered by the plaintiff to the defendant to keep, though not in bags. *Popham* 91. **Davies v. Dyos*, *Godb.* 210 — *Noy* 12, *Anonymus*, the P * 359. same point. And it is reported in the last case, that where a master delivers corn to his servant to sell, and does so, and converts the money, the master may bring an action of trover against the servant. *Allen* 91. *Moor.* 841. 2 *Bulst.* 307. 1 *Roll's Rep.* 59, 126.

37. It was said in the case of *Sir John Waltrond v. Jacob Senior Henricus Van Moses*, that the Lord Chief Justice *Holt* was of an opinion, an action of trover would lie in *England* for a conversion in *Ireland.* *Mod. Cases in Law and Equity* 322.

38. See in the case of *Monk v. Graham*, in *Modern Cases in Law and Equity*: where trover was brought for 750 l. *Sou'h Sea* stock, sold to the defendant by one *Rosse*, who got one to personate the plaintiff in the transfer, and the plaintiff had a verdict.

39. It was said in the case of *Jones and Thurloe*, by the chief justice, as reported in *Modern Cases in Law and Equity* 172. That an innkeeper might detain a horse for his meat for one night; yet

Readings and Observations

that he could not sell the horse and pay himself; if he did, it was a conversion; and the court held that if a man lies in an inn one night, the innkeeper may detain his horse, till he is paid the expences; but if he lets him depart without payment, he gives him credit, and hath waved the benefit of the custom; and if he seizes the horse for the expences of several nights, having let him thus depart, an action of trover will lie, and it is evidence of a conversion.

40. Where the defendant comes to the possession by finding, in such case a denial is a conversion; but where a man hath goods by a delivery, there a denial is no conversion, 1 *Salk.* 635. but only evidence of a conversion; now in both cases the defendant had a lawful possession, *viz.* either by finding, or delivery; and where the possession is lawful, the plaintiff must shew a demand, and a refusal to make a conversion. 3 *Salk.* 365.

41. But if the possession was tortious; as if the defendant takes away the plaintiff's hat, there the very taking is a sufficient proof of the conversion. 3 *Salk.* 365.

42. Trover will lie for 290 pieces of silver, and likewise for plate. 1 *Salk.* 219. *Stile* 224.

43. Trover and conversion will lie for letters patent. *Hard.* 111.

44. Likewise for a bill of exchange. 1 *Salk.* 136. *Lucas v. Haynes.*

45. In an action of trover upon a special verdict, the case was, the goods in the declaration were the plaintiff's, and by him delivered in *London*, to one *Richardson*, to carry down to *Birmingham*. This *Richardson* was not a common carrier, but for some small time, last past, had brought cheese to *London*; and in his return took such goods as he could get, to carry back in his waggon into the country for a reasonable price. When he returned home, he put the waggon, with the cheese, into the barn, where it continued two nights and a day, and then the landlord came and distrained the cheese for rent due for the house, which was not an inn, but a private house: and it was agreed *per Cur'*, that goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed in the way of his trade or employ, are for that time under a legal protection, and privileged from a distress for rent; but this being a private undertaking, required a further consideration; and it was resolved, that any man undertaking for hire to carry the goods of all persons indifferently, as in this case, is, as to this privilege, a common carrier; for the law has given the privilege in respect of the trader, and not in respect of the carrier. And the case in *Cro. El.* 596. is stronger: two tradesmen brought their wool to a neighbour's barn, which he kept for his private use; and it was held, that could not be distrained. 1 *Salk.* 249. *Giffbourn v. Hurst.*

on Actions on the Case.

*46. In an action for trover and conversion, brought for two P *360
hundred and fifty pounds of hops, upon Not guilty pleaded, the
case appeared to be, that a feme, tenant for life, takes to husband
the plaintiff, 5 Car. the remainder being to the defendant for his
life. These hops were growing out of antient roots, being within
the lands in question: the feme dies 19 Aug. 9 Car. the hops then
growing, and not severed, &c. and whether these hops appertained
to the baron, or to him in remainder? was the question; because
she died so shortly before the gathering of them; and as they are
such things as grow by manurance and industry of the owner, by
the making of hills, and setting poles. And the court, upon the
motion of *Grimston*, who was of counsel with the plaintiff, held,
that they are like emblements, which shall go to the baron or exe-
cutor of the tenant for life, and not to him in remainder; and are
not to be compared with apples or nuts, which grow of themselves;
wherefore it was adjudged for the plaintiff. 3 Cro. 515. *Latham*
v. *Atwood*.

47. In an action on the case for a trover and conversion of cer-
tain timber-trees: the case and question was, as touching the power
of a copyholder for life, for the cutting down timber-trees; and
whether such a copyholder may prescribe by the law for to cut
down timber-trees, growing upon his copyhold land, or not? *Noy*,
for the plaintiff, argued that he cannot. *Williams* justice, such a
copyholder for life cannot prescribe for to cut down timber-trees
growing upon his copyhold-land; and to this purpose, in *Luttrell*
and *Wood's* case in the C. B. it was adjudged in point, that a copy-
holder for life cannot prescribe to cut down timber-trees, but by
way of usage he may for reparations. And as touching usage and
custom, it appeareth, in 21 E. 4. fo. 28. b. that usage and custom
to turn their plow upon the headland not sowed with corn, is good;
but there it is said by *Littleton*, that a prescription against reason is
not good; as if a custom be alledged, that none shall put his cattle
into his land before the lord do put his cattle in; this is held to be
a void custom, because it is against reason; for if the lord will
never put in his cattle, the tenants by this will lose the profit of
their soil: but otherwise it is where a day is limited; and to this
purpose, 22 E. 4. fol. 8. A. B. pla. 24. And that a prescription
which is against reason is void, and shall not be allowed by law.
See for this *Littleton*, fol. 46. pla. 209. and pla. 212. and 5 Hen. 7.
fol. 96. and 10 a. In this principal case here the clear opinion of
the court was, that this prescription here for a copyholder for life
to cut down timber-trees, was a prescription against reason, and so
void in law; and so was the opinion of the whole court; but no
judgment was then given. 1 Bulst. 158. The Earl of *Northum-*
berland plaintiff, against *Wheeler* and others, defendants.

48. In an action of trover for 100 loads of wood, upon a special
verdict the case was, this copyhold-land was surrendered to the use

Readings and Observations

of J. S. for years, remainder to the brother of the plaintiff's wife, who died before the term expired; and so was not admitted any otherwife, than by the admission of the tenant for years; and it was resolved.

First, That the admittance of him that had the estate for years, was not an admittance for him in the remainder. 4 Co. 23. A. 3 Cro. 504. Fine *sur* grant and render to A. for life, remainder to B. execution sued by A. serves for B. So an attornment to tenant for life serves for him in remainder, and this brings no prejudice to the lord; for a fine is not due until after admittance; and the lord may assess one fine for the particular estate, and another fine for the remainder. But *Wylde* said, he need not pay it until his estate comes in possession. After a surrender the estate remains in the surrenderer before admittance of the *cestuy que use*: yet where *Borough-English* was surrendered to the use of J. S. and his heirs, P *361. and he *died before admittance, it was held, that the younger son should have it.

Secondly, It was resolved, that the possession of the tenant for years was so the possession of him in remainder, as to make a *possessio fratris*. But then it was moved, that the conversion was laid after the marriage; and so the feme ought not to have joined with her husband in the action. But the court held, that in regard the trover was laid to be before the marriage, which was the inception of the cause of action, the wife might be joined; as if one has the custody of a woman's goods, and afterwards marries her, she may join in detinue with her husband; for in case of bailment the proprietor is to some purposes in possession, and to some out of possession. *Hale* said in this case, the husband might bring the action alone, or jointly with his wife; and so judgment was given for the plaintiff. 1 Vent 260. *Batmore & Ux. v. Graves*. S. C. 1 Mod. 102.

48. In trover for twenty loads of hay; upon Not guilty a special verdict was found, that this hay was parcel of the tithes, severed from the nine parts, pertaining to the rectory of *Hackley*, and demised and demiseable time, &c. *secund. Consuetud. Manerii de Hackley*, and the prior of *Newbery* was seized in fee of the manor and rectory of *H.* and in 27 H. 8. demised those tithes by copy to *H.* under whom the defendant claimed; and afterwards, by the dissolution, &c. the manor came to king *H. 8.* who conveyed it to the archbishop of *York*, who let the rectory to the plaintiff, who claimed those tithes; and the defendant, under pretence of that copy, carried them away. *Et si &c.* The sole question was, whether those tithes were grantable by copy, &c. And it was moved for the plaintiff, that they were not; first, in respect of the nature of tithes, wherein none could have propriety before the council of *Lateran*, which was in the time of King *John*; for before that time every one might have paid them to whom he pleased; but

on Actions on the Case.

but by those constitutions, they are annexed to the rectory; it is then impossible that there should be any custom to demise them by copy, from time, &c. whereas none had interest in them but within time of memory. Tithes also cannot pass but by deed; and therefore to grant them by copy of court-roll, cannot be good. There cannot also any thing pass by copy, but that which is parcel of the manor, wherefore, &c. And of that opinion was *Popham*, for the first and last reasons; for although common, and *prima vestitura prati*, may be granted by copy, because they be parcel of the manor; yet tithes cannot be so, because they cannot be parcel of a manor; for a manor and tithes are of several natures, although they be united in one man's hand; and then it is impossible, that that which is not parcel of a manor can be demised *secund' Consuetud' Manerii*; and therefore it was adjudged, in the time of *Queen Mary*, in the case of the Duke of *Suffolk*, that where one had two manors, and granted a copyhold of the one manor, at the court of another manor, that it was a void grant; for it cannot be a copyhold, according to the custom of the manor whereof it is not parcel. But *Gawdy* doubted thereof, and conceived it had been well enough, if it had been so used from time whereof, &c. But, because upon the verdict it did not appear, that it had been granted by copy from time whereof, &c. it was held, that there was not any title found for the defendant; and therefore adjudged for the plaintiff. 1 Cro. 814. *Sands v. Drury*. See *Yelv.* 42. *Chambers and Mason*. 1 Bulst. 120. *Pultney v. Marfe*. Pal. 104. *Emden v. Dennis*. Latch 176. and 184. *Bellamy v. Bathorp*. S. C. Noy 89. S. C. Godb. 373. *Hardr.* 381. *Ingoldsb' v. Tyvel & al'*. 3 Lev. 365. *Wharter v. Lestres*.

*49. In an action of trover, upon a demurrer, the case was, the P * 362. plaintiff being owner of the rectory of *Evingham* in the county of *Northumberland*, brought his action of trover for twenty loads of wheat in *Harlow*, being the tithes of the rectory, set out from the nine parts. The defendant pleaded, that *Harlow* was a member of the manor of *Pridhoe*, both which are within the parish of *Evingham*, and conveys the manor to the Earl of *Northumberland*; and prescribes, that the Earl of *Northumberland*, and all those, whose estate he had in the same manor, from time whereof, &c. had paid to the parson of *E.* six pounds annually, in satisfaction of all tithes within the same manor; and further, that the said earl, and all those whose, &c. had used to have in respect of the said six pounds, the tenth part of all the corn within the said manor; and so these tithes within the said manor being severed from the nine parts, he took by title under the said earl. And it was thereupon demurred, and argued for the plaintiff, that this was not any plea; for a layman is not capable of tithes, and therefore no continuance of time can give him any title to that, whereof he is not capable; for by the antient course of our law, he cannot sue for them; and the

Readings and Observations

the civil law did not permit a man to sue for them there; and so he had not any remedy, and therefore not any right. Also none can prescribe in a thing in gross, *per que estate*; and here he prescribes as for a thing in gross; and he cannot prescribe as to a thing appurtenant to a manor; for a spiritual thing cannot be appendant to a temporal; and for that purpose cited a case to be ruled in this court betwixt *Shirwood* and *Winchcomb*. 39 *Eliz.* wherefore, &c. But all the court, upon the first motion, resolved to the contrary, that it is a good prescription; that when the lord hath used from time, whereof, &c. to pay this sum, &c. and in respect thereof to have all the tithes within this manor, it shall be intended, that at the beginning the lord had all in his hands, and then might prescribe to pay a sum in discharge of all the tithes within the manor; and when he gave the tenancies to hold of him, and always afterwards used to have the tithes of those lands and tenements; it is a very reasonable prescription; for now he hath no more than what he had before; for he had them before by retainer, and now he takes the tithes themselves. And *Gawdy* said, it may be true, that the parson before time of memory granted those tithes to the lord of the manor, rendering rent, which was confirmed by the patron and ordinary; and this being before time of memory, may well be so intended. *Quod Popham concessit*, and said, that that was their principal reason of the judgment between *Pigot* and *Hearn*. And they said, that in this case the lord might have good remedy at the common law, or in the spiritual court; wherefore they intended to have adjudged it for the defendant. But then an exception was taken to the pleading, that the conversion was supposed 10 *Sept.* 40 *Eliz.* and the defendant saith, that he found them the 20 *Sept.* 40 *Eliz.* and converted the 10th of *Sept.* which is repugnant in itself, which the court held incurable. *Vid.* 1 & 2 *Ph.* & *Ma. Dyer* 3. 1 *Cro.* 763. *Pigot v. Simpson* and others.

50. Trover for goods tried at the bar by a jury of *Kent*; upon the trial the case was thus:

The Earl of *Winchelsea* in the month of *August*, 1689, made his will, and thereby devised to the plaintiff all his personal estate to pay his debts, &c.

The will was proved:

But immediately upon the death of the earl, and before he was buried, the defendant who was married to the eldest son of the said earl, took possession of the house and goods in the declaration mentioned.

P* 363.

•The plaintiff produced the will under the probate; then she proved that the goods were appraised at 1800 l. she produced an inventory of them, and proved that they were the same contained in the declarations, she likewise gave evidence of the conversion.

The defendant produced a deed of gift of these goods made by the earl in the year 1650, *habendum* to the trustees therein named
for

on Actions on the Case.

for the use of his then lady (but since dead) for the term of her natural life, and afterwards that they should be and remain to his children.

The counsel for the plaintiff admitted, that though the same goods for which this action is brought, were likewise contained in the deed of gift, yet that deed could not be good against a creditor.

That the earl being in debt a judgment was obtained against him, and by a *testatum fieri fac.* his goods were taken in execution, and sold by the sheriff in *Hillary* term 1657, for 800 l. which was after this deed of gift.

It was proved that his steward paid the money, and redeemed the goods, and the earl gave him a bond for repayment, which was done, and the bond cancelled; so by this means he had gained a new property. A copy of the *testatum fieri fac.* was produced, and likewise the bill of sale by the sheriff, and the bond cancelled, and thereupon the plaintiff had a verdict. 4 *Mod.* 51. The countess of *Winchelsea* against the *Lady Maidstone*.

51. An action of trover and conversion was brought against a bailiff for taking goods by virtue of a *feri facias*; and the question was, whether the bailiff, it appearing that he took the goods by virtue of a *feri facias*, could be said to be guilty of a conversion to his own use, admitting that the goods were not subject and liable to the said execution; and it was adjudged for the defendant. 2 *Syd.* 271. *Baily v. Bunning*, S. C. 1 *Lew.* 173.

52. In trover the plaintiff declared, that he was possessed of divers goods, viz. of fifty pieces of gold, coined within this kingdom, *ac de viginti petrat. carnis bovinae*, (*anglice*, twenty stone of beef) *ac de viginti vasibus*, (*anglice*, wooden vessels) as his proper goods, which he lost, *quæ quidem bona & catalla postea apud* such a place, *ad manus & possessionem* of the defendant *per inventionem* debuerunt.

There was a verdict for the plaintiff, and entire damages given. And now it was moved in arrest of judgment, and these exceptions were taken:

1. He hath declared, that he was possessed of fifty pieces of gold coined within this kingdom, but doth not name what money it was, for which reason it is uncertain; for pieces of gold are coined here of several values.

2. That he was possessed *de viginti petrat. carnis bovium*. Now there is no such word as *petrat*, which signifies a stone of beef; and there is a proper word for a stone-weight: and the rule is, when an improper word is put in the declaration, for which there is a proper word to signify the same thing, it is always held to be naught.

3. That he was possessed *de viginti vasibus*, (*anglice*, wooden vessels) the word *vas* is too general: so *de uno pullo* hath been held ill for the same reason.

4. It

Readings and Observations

4. It is said; these goods *ad manus* of the defendant *per inventionem debuerunt*, instead of *devenerant*; for which reason this is not a good declaration. It was said on the other side, that in the first year of the king, the plaintiff declared in trover, that he was possessed *de una pecia branditti vini*, and that was held good after verdict, though there is a proper word for brandy. *Adjournatur.* 5 *Mod.* 324. *Salisbury v. Proctor.*

P * 364. 53. In an action of trover and conversion of certain loads of wood, upon a special verdict the case was; Sir *Thomas Palmer* was seized of a *great wood, and bargained and sold to one *Cornford*, and his assigns, as many trees as would make 600 cords of wood, to be taken by the assignment of Sir *Thomas Palmer*. *Cornford* assigns over his interest to the plaintiff. Afterwards Sir *Thomas Palmer* granted to the defendant so much of his wood as would make 4000 cords, to be taken at the defendant's election. The plaintiff afterwards, by the assignment of Sir *Thomas Palmer*, cut down the trees in question, to make 600 cords. And the defendant claiming them by virtue of his grant, took them, and it was found, that there was sufficient wood left for the defendant to take his 4000 cords. *Et si, &c.* And upon this verdict it was moved, that here was not a sufficient title found for the plaintiff. For first, it is not found, that the bargain and sale was for any sum of money, nor upon any consideration. *Sed non allocatur*; for it is intended to be so, being found by the verdict. But if it had not been so found, it might peradventure have been otherwise. As 1 *Mar.* 19 *Dy.* is. Secondly, it was alledged, that this grant to the plaintiff is void: for, until the assignment made by Sir *Thomas Palmer*, no interest vested in *Cornford* himself, so as he could not make any grant thereof over. But all the court held the grant to be good: for being made to him and his assigns, he may make an assignee which shall enure as a nomination to one who is to have by the appointment of Sir *Thomas Palmer*; and it may well vest in him, as the interest also. And here he hath an interest before the assignment made by Sir *Thomas Palmer*; inasmuch as if Sir *Thomas Palmer* will not assign it in convenient time, he himself might take them. And therefore he may assign this interest, as 44 *Ed.* 3. 43. is. But admitting the grant to the plaintiff had been void; yet *Popham* said, that the action was maintainable; because by the cutting down of them he had possession, and a good title against the defendant, and every stranger: and being cut down, it was not lawful for the defendant to take them: for if one sells 1000 cords of wood, to be taken at the vendee's election; and afterwards the grantor himself, or a stranger, cuts down parcel of the wood; the vendee cannot take that which is cut down: but he ought to make his grant good out of that which is growing. As if estovers were granted unto him, to be taken in a great wood, and the owner of the wood cuts down some wood, the grantee cannot take that which is cut down; but he must
take

on Actions on the Case.

Take his estovers out of the residue. And if all be cut down, he hath not any remedy, but an action on the case. So here, altho' the plaintiff had not a good title, yet his having possession of them, being cut down, sufficeth. *Quod Garudy and Clinch concesserunt.* Wherefore it was adjudged for the plaintiff. 1 Cro. 819. *Basset v. Maynard.* 5 Co. 24. b.

54. An action of trover and conversion was brought, on not guilty pleaded, there was found a special verdict to this effect;

Francis Bayle being a merchant, had made a fraudulent deed to the defendant of the goods contained in the count; but afterwards he went abroad to church, and to the *Exchange*; and did trade and commerce. And yet afterwards it is contained in the indenture of sale, by the commissioners to the plaintiff, that he had made this fraudulent deed; and that afterwards he had traded and attended at the *Exchange* until a day after; at which day he wholly absented himself. And upon this special verdict the defendant had judgment. For every deed to defraud other creditors (but those to whom this deed is made) is not sufficient to make one to be a bankrupt; it shall not bind: But upon the statute of 1 Jac. which makes him a bankrupt who makes fraudulent deeds; it ought not to be as this case was; viz. So long before he became a bankrupt. And there were many more imperfections in the special verdict. *Hut. 42. Cartwright v. Underhill.* See *T. Jones* 94. *Butler v. Waterhouse.*

*55. Trover for his anchor and sails: upon not guilty pleaded, P *365. a special verdict was found, viz. that the mayor and burgesses of *Newcastle*, by custom time out of mind, had used and ought to repair the port there; and had, in consideration therefore, a toll of 5s. per chaldron of all coals exported, to be paid by the exporter; and for that, by the same custom, he used to distrain any thing distrainable; and that the defendant being master of a vessel loaded with coals, intended to be carried out of the said port, refused; and for this they distrained the said anchor and sails, being part of the tackle belonging to the said ship: and if this was distrainable, they found for the defendant; otherwise for the plaintiff. And Mr. *Northey* urged, that the conclusion of the special verdict being upon a special point, the court could doubt of nothing but what was thereby referred to them. *Vid. 5 Co. 97. 1 Cro. 21. Mo. 261. pl. 420.* However the court heard and over ruled all the other objections, and held, 1st, that it was not necessary the town should shew that they actually did keep the port in repair; for their keeping the port in repair, is not the consideration, but their being bound by custom to do it. 2dly, That though the master is not strictly the exporter, yet as to port duties, the master is always looked upon as such, and the person answerable; for to put them to seek the merchants is impracticable, and it is but reasonable the master should pay a duty for the benefit of the port, and that the town

Readings and Observations

town should have the duty, who are to maintain the port. As to the distress, it was argued, that the instruments of trade are not distrainable; *viz.* a millstone is not; *Averia caruæ* are not; a horse in a smith's shop cannot be distrained; that the goods subject to toll only can be taken; and this was part of the ship, and going from market. *Vide* 3 Cro. 227. pl. 14 Dyer 199. 1 Leon. 231, 105. 3 Dro. 550, 569. Noy. 88. 1 Inst. 47. 1 Syd. 341. Dyer 312.

On the other side it was said, *Averia Caruæ* are not privileged where there is no other distress. *Vid. Stat.* 51 H. 3. 2 Inst. 122, 133, 565. So it is of instruments of trade; as if there be two mill-stones, or *averia otiosa*. Mo. 214. Dyer 302. Godb. 67. Owen 149. A boat is distrainable; *ergo* a ship, and *ergo* a sail of a ship. Dyer 177. pl. 73.

Sed per Holt, Ch. Just. The duty arises from the goods loaded on board the ship, with which the master is chargeable; therefore the ship, and every thing there of the master's, is chargeable as well as the goods; and the defendant had judgment. *Salk.* 1. Vol. 248. *Vinkestone v Ebdon*.

56. In trover, the defendant pleaded a recovery against *J. P.* and that a *feri facias* was awarded to the sheriff; and after the writ awarded and delivered to the sheriff, *J. P.* died possessed of the goods, and made the plaintiff his executor; and afterwards the defendant, by force of the sheriff's warrant, took these goods in execution, as bailiff to the sheriff, and delivered them to him. The plaintiff replieth, that the sheriff returned the writ *Tarde*; and upon this it was demurred in law. 1 Question, if the party dying after the writ of execution awarded, and before it was served; if it may be served upon his goods, in the hands of his executors or administrators? And it was held, it might; for by the execution awarded, the goods were bound, and the sheriff need not take notice of his death. 26 H. 7. 5. 6 E 6. Dyer 76. 2 Question, if the false return of the sheriff shall make the bailiff punishable for that he did lawfully; for he was a bailiff's messenger, and a meer servant to the sheriff, and not a bailiff of a franchise. And it was held clearly, that it should not; for by the execution of the bailiff, the party was discharged of the execution; and therefore there is not any reason he should take advantage against the bailiff; and it was adjudged for the defendant. 1 Cro. 181. *Parkes v. Mosse*. S. C. Moore 352.

on Actions on the Case.

*Other Cases where this Action hath been held to lie, and where not. P *366.

Hetley 22. Owen v. Price.	451. Gibson v. Thompson.
Allen 81. Udal v. Udal.	718. Bull v. Knight.
91. Davies v. Doys.	751. Butter v. Wakerhouse.
3 Cro. 271. Chapman v. Allen.	785. Butts v. Penny.
274. Petty v. Sands.	834. Clerk v. Payter.
515. Latham v. Atwood.	Allen 93. Alwin v. Taylor.
544. Lyfter v. Home.	Ray. 472. Put and Hardy v. Rawstern and others,
94. Owen v. Ap. Rees.	Danv. Abr. 20, 21.
148. Audley v. Halfey.	
89. Kynaston v. Moore.	
262. Wilfon v. Chambers.	
2 Keb. 588. Wilbraham v. Snow	
3 Keb. 74. Duke of Buckingham v. Lord Pembroke.	

Secondly, *Who may bring the Action.*

1. One *part-owner* of a ship may bring an action of trover for the whole ship. *Comb.* 367. *Dockwray v. Dickerfon.*

2. If an infant executor releases, yet he may afterwards bring an action of trover, if such release was not made upon a valuable consideration. 5 *Co.* 27. *Russell v. Pratt.* *Moor* 146. 1 *And.* 177. 1 *Leon.* 44.

3. An administrator may bring an action of trover and conversion, before letters of administration granted. *Stile* 341. *Long v. Hobb.*

4. A man may bring an action of trover and conversion for goods, though they afterwards come to his hands again. *Stile* 261. *Gower v. ———*

5. Where trover has been brought by *Baron and Feme*, and they declare, that they were possessed, and that the defendant converted them *ad dampnum ipsorum*; it was held naught after a verdict; for the possession of the wife, is the possession of the husband. 1 *Salk.* 114. *Nelthorpe & Ux. v. Anderson.* 1 *Ven.* 33, 24, 12.

6. In an action of trover and conversion, it was moved in arrest of judgment, that the action was brought by *Baron and Feme*, and the trover supposed to be before, and the conversion subsequent to the coverture, and therefore it ought to be brought by the *Baron* alone; for if a *Feme* loses goods, and after marries, the husband dies, his executor shall have the goods, because the property was in him by the marriage, notwithstanding the loss. And of this opinion was *Hyde* Chief justice, and *Kelynge*; and they also held, that the conversion is the cause of the action, and that being subsequent to the marriage, the husband ought therefore to bring the action alone.

But

Readings and Observations

But judge *Twissden* and *Wyndham* were of opinion, the action was well brought ; and they distinguished between actions which affirm the property, as *Replevins* and *Detinues*, which they therefore held, ought to be brought only in the husband's name, and actions which disaffirm the property, as *trespafs* and *trover*, which being founded on a *tort antecedent* to the *coverture*, ought therefore to be brought in both in their names. 2 *Syd.* 172. *Powes & Ux. v. Marshall.* V. 1 *Cro.* 508. *Rivers v. Gidskert.*

7. Where the intestate died in the defendant's house, and *A.* breaks open chest, and takes a way money of the intestate's ; it was by *Holt* Chief Justice held, that the proper action is an action of trover by the administrator, against the person that took it away ; and if the trover were first, and the administration afterwards, the plaintiff may either declare specially, or lay the trover after the administration granted ; and it will be good either way. *Comb.* 304.

P *367. *8. Where *A.* dies intestate, and *B.* hearing of it, requested *C.* to provide for the funeral, and that *B.* would reimburse him ; afterwards *B.* and *C.* come to an account, and *B.* delivers to *C.* a horse of the intestate's, in satisfaction of part of the charges of the funeral, which *C.* accepted of ; and afterwards *C.* took out administration, and brought an action against *B.* for this very horse. Chief Justice *Holt* was of opinion, that *C.* might bring this action, notwithstanding the objection, that he was *particeps criminis* ; for says he, clearly, if a stranger had taken out letters of administration, he might have brought an action against *B.* and there is no reason that this case should differ, because the plaintiff is *quasi* a third person, inasmuch as he now sues in right of the intestate ; but the other judges were of a contrary opinion ; and judgment was given for the defendant. *Carthew* 103. *Whitehall v. Squire.*

9. One jointenant, tenant in common or coparcener, cannot bring this action against his companion, but he may against a stranger. *Salk.* 290. *Browne v. Hedges.*

10. A goldsmith has lottery tickets of *A.* and *B.* and delivers *A.*'s tickets to *B.* as his own ; *A.* may bring this action against *B.* *Salk.* 283. *Ford v. Hopkins.*

11. If after an execution by *fiery facias* is executed, and before the goods are sold, any person takes them away, and converts them to his own use, the sheriff may bring an action of trover and conversion for them. 2 *Saund.* 47. *Wilbraham v. Snow.* 2 *Syd.* 447. 1 *Mod.* 40.

12. Trover may be brought by an executor, though the possession he had of the goods was not an actual possession, but only a possession given him by law. 2 *Mod.* 168. *Latch* 214. *Hudson v. Hudson.*

13. Where the master may have an action against the servant for money converted by him. *Noy* 12. *Anonymus.*

on Actions on the Case.

14. It hath formerly been a doubt, whether executors could maintain an action of trover, and it hath been insisted that an action of trespass *de bonis asportatis in vita testatoris*, was their proper remedy: And it appears by *Savil, Rep. p. 133.* that this opinion prevailed once; and in *Goldsb. p. 89.* it was doubted: Soon after, as appears by the case of the Countess of Rutland, in *Cro. 377. Moore 266. and Owen 156.* and by the case of *Ruffel and Prat*, reported in *1 And. p. 177, Moore 176. 5 Co. 274. 4 Leon. 44. and Noy. 70.* it was solemnly adjudged, that executors might maintain an action of trover and conversion; nor does it appear that this point was ever questioned since, though many such actions have been brought.

15. *Fremling* and his wife, executrix of *A. B.* brought an action of trover and conversion against *Clutterbook*, for goods of the testator's found and converted by the defendant, and obtained a verdict against him. The defendant moved in arrest of judgment, and took these exceptions. First, that the declaration was of a joint possession of goods of the husband and wife, and damages are given to the husband and wife, whereas the goods properly belonged to the wife only, as the executrix, and not the husband and wife. Secondly, it doth not set forth how the same came to the possession of the goods. But to this *Rolle*, justice, answered, that the possession of the wife, as executrix, was also the possession of her husband, and that the damages recovered shall go to the estate of the testator and so may concern them both; and for the second exception, this being a possessory action only, it is necessary to shew how the possession of the goods was gained. Judgment was staid till the other should move. *Stile 48. Fleming and Clutterbook.*

16. The plaintiffs brought an action of trover and conversion, as executrix, against the defendant, for an obligation, and declared it was lost in the testator's life time, but laid the conversion since his death. Two of the executors were served, and a *non prof.* entered as to them; and to the third the defendant pleaded *non cul.* and found against him, and five hundred pounds damages given; and it was now moved in arrest of judgment upon this severance; and held by *Hale*, Chief Baron, and the whole court, that summons and severance lies not in this case, because the conversion, which is the most material part of the declaration, was in the executors own time; so that upon the matter, the action is grounded on their own possession, as trespass of their own possession; in which case summons and severance does not lie, and consequently the nonsuit of one is the nonsuit of all; and all the proceedings after are to no purpose. *Per Hale*, Chief Baron, there are two sorts of severances; when the plaintiff will not appear, there he shall be summoned and severed; the other, when all appear, but some one or more will not prosecute; there he or they shall be severed by order of court; and judgment in this case was arrested. *Hard. 317. Manley & al v. Lovell.*

P *368.

Other

Readings and Observations

Other Cases by whom Action is to be brought.

1 Ven. 26. Batmore v. Graves.	206. Chambers v. Patinson.
3 Cro. 254. Rhemes v. Humphrys and others.	263. Blackborne v. Grev es.
3 Cro. 242. Berry v. Heard.	282. Sykes v. Walls.
3 Cro. 437. Tregmiel v. Reeve.	Ray. 463. Wedgewood v. Bayly.
274. Waller and Petty v. Sands.	2 Sound. 47. Wilbraham v. Snow.
3 Keb. 54. Smyth v. Smyth.	

Thirdly, *Against whom it may be brought.*

1. Trover lieth against a carrier for the owner of the goods ; and it may be brought by the carrier against him who so took them away. *Comb. 21. 1 Ven. 223. Comb. 333. Salk. 655.*

2. Trover was brought against an hackney coachman, and the goods were delivered to his servant ; and whether this delivery shall charge the master, was the question, and adjudged that it shall not ; for that it differs from a waggoner, where he is paid for the passenger, and the parcel also ; but in a coach the passengers are allowed to carry a small parcel ; and if any more be carried, for which the driver is paid, and it is lost, the master shall not be chargeable ; otherwise where the master is paid for it, and agrees to it. *Skinner 625. Middleton v. Fowler.*

3. It hath been held, where an action was brought against a husband and wife ; and it was laid, that the conversion was *ad usum ipsorum*, &c. and both were found guilty, and the damages assessed, that it is ill ; for they ought not to be joined. *Salk. 114. Nelthorp & Ux. v. Anderson. 38 E. 3. 1. 23 R. 2. 644. 3 Cro. 254. Rhemes v. Humphrys. Palmer 343. Berrey v. Newey. Stile 115.* This last case was where a stranger was joined with them in conversion.

4. And yet in 1 *Leon. 312. Marthe's* case, where goods came to a feme covert by trover, and she and her husband converted them to their own use, and the action was brought against the husband only. It was held it ought to have been brought against the husband and wife ; but *this does not seem to be law. Noy 79. W. Jones 143. Litt. Rep. 181. Yelv. 166. Draper v. Hulkes*, to the same purpose. *Buller's* case adjudged to the contrary. *W. Jones. 267.*

5. Whether an action of trover may be brought against a waterman, for goods miscarried, by reason of a tempest. 2 *Bullst. 289. Bird v. Astcock.*

6. Upon a trial at *nisi prius* at *Guildhall*, before my Lord Chief Justice *North*, in trover and conversion against an executor *de son tort* ;

on Actions on the Case.

tort; the question came to be, whether the goods having been taken in execution, upon a judgment obtained against the defendant by a creditor of the deceased, should discharge him against the plaintiff, who brought *this action as administrator. And the opinion of the chief justice was, that this execution was a good discharge against another creditor that should sue him, to whom he might plead *riens inter ses mains*; but it was no discharge against an administrator, for men must not be encouraged to meddle with a personal estate without right: but to prevent this mischief, where the party dies intestate, and there is a contest about the administration, a man may procure of the ordinary letters *ad colligendum*. P *369.

1 Vent. 349.

7. In trover and conversion of goods. Upon a demurrer, the case was, the ordinary committed administration of the goods of an intestate to the defendant; afterwards the next of kin sues out a citation in the court-christian against the defendant, to repeal the administration, and he, *pendente lite*, sells those goods, and afterwards his administration is repealed, and administration committed to the plaintiff, who for this conversion, *pendente lite*, brings this action; and it was moved for the defendant, that the action lies not; for the administration at the common law is well committed, and the statute doth not alter the law in this point, but gives the penalty against the ordinary, if he commits them not to the next of kin; and the administrator, until administration repealed, hath an absolute authority to dispose of the goods as he pleases. *Tanfield e contra*. The conversion, *pendente lite*, in the court-christian is not lawful, but is a tort to the plaintiff, and that, the sentence there proves; which is, that all things exempted, or done, *pendente lite*, shall be void; and the justices ought to have regard to the civil law in this point, as in 27 H. 6. Gard. 118. 2 R. 2. *Quare Impedit*, 143. and 4 H. 7. 13. And by the sentence it appears that the administration is revoked as if it had never been. And upon this reason it is in *Dyer* 339. where an administrator recovered a debt, and afterwards another procured himself to be joined in the administration, and released the debt, and afterwards it being revoked, this release was not any bar to the execution; and *Mich.* 35 & 36 *Eliz.* in the Common Bench, between *White* and *Cary*, this very point was in question, and adjudged, that the action lay. *Garwoly*. The action well lies; for the sentence does not repeal mean actions, acts done by an administrator which are for the intestate's benefit; but forasmuch as these goods were not converted or employed for the intestate's use, it is reasonable that he should be charged for them. *Popham* and *Fenner e contra*. For the administrator hath an absolute and lawful interest and power to dispose of the goods until repeal be made, and it is not like to an appeal upon a sentence, for that makes it as no sentence; but the repeal of the letters of administration doth not make it void *ab initio*, and make a lawful act tortious; but rather in

Readings and Observations

in this case, the new administrator shall have an account for the monies received, and the words in the sentence are not to be regarded, for they are ordinary in all sentences. So he having the goods lawfully, and converting them lawfully, shall not answer for them as for a tort done. And *Popham* here said, if administration being committed, the ordinary commits new administration, it is a repeal of the former, without any sentence of repeal; and if the first administrator waste the goods, the creditor shall have the action against him; and if he pleads, that administration is committed over, he may well by his replication maintain his action, because he wasted the goods when he was administrator; the matter was adjourned: but afterwards the action was discontinued by the plaintiff. 1 Cro. 469. *Wilson v. Packman*. 6 Co. 18. S. C. and *Moore* 369.

8. If after a verdict, and before the day in bank, or after judgment, the plaintiff's letters of administration are repealed, whereby the defendant becomes liable to the new administrator, he cannot in either case aid himself by plea, but shall be relieved on an *audita querela*. *Yelv.* 125. *Ket v. Life*. 2 Saund. 147. *Turner v. Davis*.

P * 370. *9. An action of trover and conversion was brought for an hat-band set with pearls and diamonds. Upon Not guilty pleaded, a special verdict was found, that the plaintiff was possessed thereof, and pawned it to *John Whitlock* for 25 l. but no certain time appointed for the redemption thereof; that *Whitlock* being sick, his wife in presence, and with his assent, delivered it to the defendant, and afterwards *Whitlock* made his wife his executrix, and died, who proved the will; that the plaintiff tendered to the said executrix the said 25 l. who refused, and afterwards demanded the hat-band of the defendant, who refused to deliver it, but converted it to his own use; whereupon, &c. and in this case, three points were moved; first, there being no time appointed for the redemption, whether it may be made after the death of him to whom it was pawned, or ought to be in the lives of both the parties? and as the justices resolved, it may be well made after the death of him to whom it was pledged, but not after the death of him who pledged it. *Yelverton* and *Croke* doubted, and held that it could not; for he at his peril ought to redeem it in his time, as it is upon a mortgage. But *Fleming* and the others against it; for pledging doth not make an absolute property, but is a delivery only until he pays, &c. so it is a debt due to the one, and a remainder of the thing unto the other, for which there may be a redemand at any time upon payment of the money; for the pledge delivered is but as a security for the money lent, so as he who borrows the money is to have his pledge again when he repays it, and his tender gives him an interest therein; and there is a difference between a mortgage of land and pledging of goods, for the mortgagee hath an absolute interest

on Actions on the Case.

terest in the land, but the other hath but a special property in the goods, to detain them for his security. 5 H. 7. 1. 9 Ed. 4. 25. 36 Ed. 3. Bar. 188. Secondly, it was resolved, that by this delivery of the said goods by the feme, with the assent of her baron, to the defendant, there passed no interest of them to the defendant, but (as it were) a custody only; and therefore the tender of the redemption ought to be made to the executrix, and not to the defendant. Thirdly, that when he tendered the money to the executrix, and she refused, it was as good as payment, and the special property of the goods is re-vested in the plaintiff; then when he demanded them of the defendant, and he refused to deliver them, but converted them to his own use, a trover and conversion well lies, although he came unto them by a lawful delivery, and not by trover; wherefore it was adjudged for the plaintiff. 2 Cro. 244. Ratcliff v. Davis. S. C. Yelv. 158. S. C. 1 Bulst. 29.

10. An action on the case was brought against executors, and the plaintiff declared, that he was possessed of divers goods, that they casually came to their testator's hands, who converted them to his own use, and avers, that the executors had assets; they pleaded that they were not guilty, and it was found for the plaintiff; and moved in arrest of judgment, that *non culp.* by them was no issue, because the plaintiff in his declaration had alledged no offence or tort in the executors, but in the testator for the converting the goods to his own use; therefore for the executors to plead *non culp.* in whom tort was supposed, did make no issue; and for this cause judgment was staid. Savil 13.

Fourthly, Of the Declaration.

1. Where trover is brought for several things, and the declaration describes one or more of the things by a *Latin* word that is infensible, the plaintiff may take his damages, as to those things that are well described, and release them as to those things that are ill described. 3 Salk. 366. Benbrigg v. Day.

2. In trover, the plaintiff declared for ten pair of curtains and vallance; it is good without shewing the kind and *quantum* of the stuff, and *so it is of such artificial things; but trover for planks, unless the plaintiff sets forth how many, is not good; but for planks in his granary, or for books in his study, is good. 3 Salk. 366. P *371.

3. The plaintiff declared for two hundred ounces of plate by the *Latin* word *argenti* (*anglice* plate); and it was held well enough. Campbell v. St. John, Comb. 306. Salk. 219.

4. In trover against husband and wife, the plaintiff cannot declare of a conversion by the husband and wife, to the use of the wife, nor to the use of the husband and wife: but he may declare of a conversion by the husband and wife, to the use of the husband, or that

Readings and Observations

the wife converted the goods to the use of a stranger. 3 *Salk.* 365. *Anonymus.*

5. A declaration in trover for twenty ounces of cloves, and held ill; though it is not shewn how much of each, or that they were mixed. *Salk.* 654. *Hartford v. Jones.*

6. Where a declaration was for converting ten trees, calling them *decem arbores*, though the exception was, that *arbor dum crescit lignum dum crescere nescit*; yet Rolle chief justice said, they were well enough expressed. *Stile* 235. *Pepham v. White.*

7. In trover, if the plaintiff alledges no place, although it be found for the plaintiff upon the general issue; yet the plaintiff cannot have judgment. 2 *Roll's Rep.* 66. *Anonymus.*

8. In describing the goods converted, when the proceedings were in *Latin*, it was the *Latin* word which the court were to take notice of; and if more was in the *Anglice* than the *Latin* word would bear, it is void; as that which is so mentioned above what the *Latin* word will itself describe. 2 *Roll's Rep.* 255. 2 *Cro.* 664.

9. Where the declaration was, *de tribus ponderibus lanæ ad valentiam octoginta solidorum*, judgment was staid for the incertainty; for *pondus* signifies every manner of weight. 2 *Roll's Rep.* 369. *Lawrence v. Turner.*

10. In trover for a dead thing, there ought to be added the value, and the price if it be alive. 2 *Cro.* 136. But if no value be mentioned in the declaration, it is good after a verdict. 653, 654. *Bradford v. Ramsey.*

11. An administrator, to whom administration is committed by a peculiar; if he doth not set forth in his declaration, that he was *loci illius ordinarius*, shall, notwithstanding he has omitted it, have judgment after a verdict. 1 *Cro.* *Lacy v. Smith.*

12. In trover and conversion, no other place is to be expressed in the declaration, but that only where the goods came to the defendant's hands. 1 *Bulst.* 206. *Atkins v. Wheeler.*

13. Coke said, it was adjudged in an action of trover and conversion, the conversion is traversable; for it is the substance of the action, and the tort supposed in him, and so may well be traversed: for if one finds goods, but doth not convert them, no action lieth. As the case was in a trover and conversion of goods. The defendant saith he took them damage-feasant, and impounded them, *absque hoc*, that he converted them to his use. And in *Leak's* case it was adjudged, that the place and time of conversion are to be alledged, for they are material; and for that they were not alledged, the bill was abated after a verdict. 1 *Cro.* 97. *Stranham's Case.* *S. Point.* 1 *Cro.* 78. *Hubbard's Case.* But the want of a place is aided, if the defendant plead a special plea; as sale in market-overt, after a verdict, and by the statute; because the venue is in the plea. *Goldf. Rep.* 54. and 89.

on Actions on the Case.

14. An exception was taken to a declaration in trover, that the plaintiff did not say he was possessed of the things *ut de bonis suis propriis*. But the plaintiff had judgment. See *Moore* 691. *Maynard v. Battell*.

*15. It was moved in arrest of judgment, on the return of the writ of enquiry, that the time of the conversion was not alledged; and the declaration for that cause was held naught by two judges. P *372.
1 *Brownl.* 8.

16. An action of trover of goods was brought, supposing the 3d. of May, 14 Jac. he was possessed of the goods, and the same day lost them; and that the 4th of May, Anno 14. *supradict.* they came to the defendant's hands by trover; and that *postea*, viz. *primo Maii anno supradict.* he converted them: and it was found for the plaintiff; and now moved in arrest of judgment, that the declaration is not good; for the conversion is alledged before trover, which cannot be; and therefore void: *sed non allocatur*; but it was adjudged, that *postea convertit*, is sufficient, and *scilicet* is void. And a precedent was then shewn in an *ejectione firmæ*, where the ejectionment was alledged, that *postea scilicet*, such a day, which was before the lease; and it was found for the plaintiff; for the *scilicet* being repugnant is void; and the *postea eject.* was held well enough. Whereupon it was adjudged for the plaintiff. 2 Cro. 428. *Tesmond v. Johnson. quære tamen*; for in *Yelv. p. 98. Wilbore v. Coggan, in assumptis*, the judgment was for this exception staid.

17. Error was brought of a judgment in the King's Bench: for that the bill, in an action of trover, was of 400 bushels of pippins, the declaration was forty bushels; and judgment being given upon *nil dicit*, the writ of enquiry recites the trover and conversion of 400 bushels. And thereupon damages found to 40 l. and judgment accordingly. And errors assigned, because the writ of enquiry of damages varied from the declaration upon the record; there being more in the writ than in the record upon which the judgment was entered. The defendant hereupon alledged diminution, and procured the bill upon the file to be certified; and then pleaded *in nullo est erratum*. And all the justices and barons held, that it was error; for the bill doth not warrant the declaration; and the judges ought to be warranted by the declaration on the record, and if it be variant from it, it is error; and they said, that it could not be amended; for it is the record to which the party was to plead: wherefore a rule was given for the reversal of the judgment; but afterwards staid upon a surmise, that the record itself was miscertified. 2 Cro. 294. *Cleydon v. Taylor*.

18. In an action of trover and conversion; after a verdict for the plaintiff, it was moved in arrest of judgment, that the action was commenced in *Hillary-Term*, and the conversion alledged to be on the third day of *February* in the same term; and the bill filed relates to the first day of the term, so before the cause of action.

Readings and Observations

But it was resolved by the court, that if the bail was entered after the third day of *February*, it is well enough; for it is that which gives this court jurisdiction.

So an ejectment may be brought upon a lease made in the same term: so the statute of limitation may be pleaded to an action, if the time be elapsed before the day wherein the bail is filed, though not before the first day of the term, wherein the action is brought; for the action shall not be said to be depending until the bail is filed. And upon search it was found, that the bail was filed the last day of the term. 1 *Ven.* 135. See 2 *Roll. Rep.* 475. *Lea v. Narsh.* 2 *Lev.* 13, & 176. 2 *Syd.* 373. *Lideor v. Backwell.*

P * 373. 19. To an action of trover of divers goods (naming them particularly) and converting of them, the defendant pleaded not guilty, and found against him, and damages assessed to 40 l. And it was now moved in arrest of judgment, first, that the action is brought of divers things by an administrator of goods of the intestate's found and converted; and it appears that parcel of those goods are things fixed to the freehold, and as parcel thereof, for which this action lies not; and divers parcels of them are insensibly alledged, and there be not any such *words in *Latin* or otherwise for them; and the damages being entire, there ought not to be any judgment; for the declaration is, that he was possessed *de duobus articulis*, *vocat.* Portal *cum suspensis*, *vocat.* Hinges; and *de uno molendino*, *vocat.* an hand-mill; and *de uno plumbeo*, *vocat.* a lead; and *de una alveola*, *vocat.* a washing-fat, and lost them, &c. which things appear to be fixed to the house, and are as parcel thereof, and to be accounted as goods; so the action lies not for them; for the portal is a door to the house, and the hand-mill and the lead, (which is a brewing lead) and the washing-fat, (which is parcel of the brewing vessels) are always fixed things, and go to the heir, and not to the executors, as 20 *H.* 7. is: *Sed non allocatur*; for it is alledged in the declaration, that he was possessed of them *ut de bonis propriis*. And it may be these things were severed from the freehold, and things lying by; and it shall be so intended when the plaintiff so declares, and the contrary appears not to the court by any matter shewn unto them by the defendant's plea. Secondly, for that he declares, *de quatuor ollis æriis*, *vocat.* brass-pots, where it ought to be *ollis æheneis*; for there is not such a word as *æriis*. *Sed non allocatur*; for when it is added, *vocat.* brass-pots, that is as much as to say, *Anglice*, brass-pots, which the court knows was intended; which although it be not in congruous *Latin*, or in apt words for it; yet it is good enough, and of such nature were divers other things in the declaration; but they had all one answer. Thirdly, because he declares, that he was possessed *de uno spadone*, *una equa pretii* 53 s. 4 d. So there is not any price at all for the gelding; and for that cause *Popham* and *Yelverton* held the declaration to be ill; for to every thing there ought to be added the value, if it be a dead
dead

on Actions on the Case.

dead thing, and the price, if it be alive; and forasmuch as this wanted thereof, they held it to be vicious. But *Williams, Tanfield* and *Fenner, e contra*; for they said it was not of necessity, especially where the thing is not demanded, but damages for it. And therefore *Williams* cited the the register, fo. 37. That such exception at the common law was not material. But they held, that at the most it was but default of form, which is aided by the statute of 18 *Eliz.* But the other justices denied it, and said, it was substance, and not form only. But afterwards upon viewing the roll in court, although the record of *nisi prius* was so, yet the roll is *de uno spadone & una equa pretii* 53 s. 4 d so the price extends to both; wherefore they held it all to be good enough. Wherefore they awarded the record of *nisi prius* should be amended according to the roll; and it was adjudged for the plaintiff. Note; There was a precedent cited, *Trin. 24 Eliz. Rot. 723.* That for wanting *vi & armis*, in trespass, it was resolved to be but form and not substance, and aided by 18 *Eliz. Noy* 115. 2 *Cro.* 129. *Wood v. Smith.*

20. The value of the goods in trover need not be precisely alleged; *aliter* in detinue; the reason of the diversity is, because in detinue, the things themselves, or the value of them, is to be recovered; but in trover only damages. Adjudged on writ of error. 2 *Roll. Rep. Goodwin v. Harwood.*

21. A writ of error was brought to reverse a judgment, given by default in the Common Pleas, in an action of trover and conversion, and the error assigned was, that the plaintiff had declared for two pieces of cloth, and did not express whether they were linen or woollen cloth; but the exception was over-ruled, and the judgment affirmed. *Nisi, &c. Stile* 419. *Iles and Winsor.*

22. It was moved in arrest of judgment, that the plaintiff had declared of the trover and conversion of a certain number expressed in the declaration of pieces *panni lanei, anglice*, of red, yellow and black cloth; which is uncertain, and cannot be used as it is here, to express cloth of divers colours; for *panni lanei* signifies only woollen cloth. But *Barn*, justice, said, all is but woollen cloth, P *374. though they be of divers colours, and therefore it is good enough. *Hodsdon*, the secondary, said, sometimes the colours are used to be expressed, and sometimes not. *Bacon*, It is better to express the colours than not; yet it is good enough without the expressing of them. Therefore let the plaintiff take his judgment. *Stile* 75.

23. An action of trover and conversion, for that the plaintiff, 9 *Martii* 18 *Jac. apud Chelmsford*, was possessed of a writing obligatory, wherein *John Petchy* and *Thomas Petchy*, were obliged to the plaintiff in 60 l. sealed with the seals of the said *John Petchy* and *Thomas Petchy*, *ut de scripto suo obligatorio proprio, & sic possessionatus*, 12 *Martii*, 18 *Jac.* lost it. And that upon the 13 *Martii*, 18 *Jac.* at *Chelmsford*, it came to the defendant's hands by trover: and that the defendant 20 *Martii*, 18 *Jac.* at *Chelmsford* aforesaid, converted it

Readings and Observations

it to his own use. Upon this declaration, the defendant demurred in law, because the date of the bond is not mentioned ; nor that it was delivered as their deed ; but without much argument it was adjudged for the plaintiff ; for he needs not shew the date, because it is lost, and the defendant hath esloined it. And he is not to recover the debt, but damages. Therefore secondly, the allegation that it was *scriptum obligatorium*, wherein they were obliged, hath intendment sufficient that they delivered it as their deed. Wherefore, &c. 2 Cro. 637. *Upchard v. Tatam*.

24. Error of a judgment in the Common Bench. Upon trover and conversion of a bond of 100 l. conditioned for the payment of 50 l. at such a day ; which came to the defendant's hands, and he being required such a day and year to deliver it, had not delivered it, but refused and converted it to his own use, (but no day, year, or place of this conversion mentioned) the defendant pleaded not guilty, and found against him, and judgment for the plaintiff. The first error assigned by *Grimston* was, because the date of the bond is not mentioned ; *sed non allocatur* ; for being lost and converted, he peradventure did not know the certain date of the bond, and if he should recite a date, and misrecite it, it would be a failer of his suit. The second error, because he did not alledge the day nor place of the conversion ; *sed non allocatur* ; for the denying to deliver upon request is a conversion ; and the day, year, and place are thereby alledged ; which is sufficient : and the allegation of the conversion (which hath no day, nor place) is not material, when there was a sufficient conversion before ; whereupon the judgment was affirmed. 2 Cro. 262. *Wilson v. Chambers*.

25. In trover and conversion for a mare.

Upon not guilty pleaded, and a verdict for the plaintiff, it was moved in arrest of judgment, that the mare was laid *ad valentiam*, and it should have been *pretii*. *Sed non allocatur* after verdict (2 Cro. 207. *Stile* 174, 182, 2).

The plaintiff declares, that he was possessed *de quadam equa ut de catallis suis propriis*, and that *catalla pred. casualiter perdidit*, and that coming to the defendant's hands, he converted *catalla prædicta* to his own use ; so that there is no express conversion of the mare.

The court said, that the declaration was inartificial, but good after verdict ; for *catalla prædicta* must refer to the mare ; for nothing else is mentioned before. 2 Ven. 174.

So is *bona & catalla prædicta*, though there was only a waistcoat mentioned, good on general demurrer, though perhaps it would be ill on a special one. See *Lutw.* 1537. *Allen v. Harris*.

26. In an action of trover for divers things, & *inter alia de sex catulis quatuor catellis & una amphora saporis*, after verdict for the plaintiff, it was moved in arrest of judgment, that *catulis* signifies whelps, *catellis* little whelps of any kind, and that *saporis* signifies favour for which no action lay ; but the court gave judgment for the

on Actions on the Case.

the plaintiff, and said, they would intend the whelps were dogs-whelps, and that no damages *were given but for the *Amphora*. P *375.
3 Lev. 336. *Chambers v. Warkhouse*. *Sed quare*; for this case does not seem to be law. *Vide* the following cases.

27. Trover *de duabus centenis plumbi uræ, anglice*, two hundred weight of lead ore.

It was objected, that *centena* signifies an hundred in a county, and it is uncertain therefore what is understood by it; but the court said it was good with the *Anglice*, and to be understood by the subject matter. Trover *de duobus ponderibus casei, Anglice*, two weighs of cheese, hath been held good; so *de duobus oneribus cupri, Anglice*, two horse-loads of copper. 1 Ven. 211.

28. In trover and conversion for divers parcels of householdstuff, an exception was taken to the declaration, because the plaintiff, amongst other things, had declared *pro sex parcellis plumbi Anerii, anglice*, pewter porringers: Whereas the word *parcellis* is uncertain; for a parcel doth consist of many things in number, and so *sex parcellis* cannot properly be applied to six porringers; but if it had been *sex peciis*, it had been better, though that be also uncertain. *Hale* held it was all one as if it had been *pro sex peciis plumbi cinerii*. *Rolle*, Chief Justice, inclined it was well enough, because though the words are not so proper, yet the description is good enough. *Ferman*, Justice, was of the same opinion. But *Nicholas*, Justice, that the *Latin* is not good; for if there be proper words for a thing, they ought to be used, otherwise barbarism will be introduced; and circumlocutions ought not to be used where there is a proper *Latin* word to be had to express a thing. *Ask*, Justice, agreed with *Rolle* the Chief Justice, and the plaintiff was bid take his judgment, except better matter were shewn to the contrary. *Stile* 199. *Graves v. Drake*.

29. In an action of trover and conversion the plaintiff had a verdict; the defendant moved an arrest of judgment, and took these exceptions to the declaration: First, the plaintiff declares *pro tribus duodenis fili, Anglice*, dozens of thread; which is uncertain; for it may be three dozen pounds of thread, or skenes of thread, or ounces of thread. To this it was answered, that it cannot be otherwise expressed, and the word dozens of thread is used amongst merchants, and well known unto them what is meant by them. Secondly, he declares for so many pounds of muscat, instead of *nucum muscatarum, anglice* nutmegs. But this exception was mistaken, for the record was otherwise; and besides, it was with an *Anglice*, which makes it certain. The court ruled judgment to be entered, except cause shewed for the plaintiff. *Stile* 80. *William v. Tyrer*.

30. In an action of trover and conversion, and a verdict for the plaintiff, it was moved in arrest of judgment, that the plaintiff did declare for books and for stockings found and converted, and doth not shew what books, *viz.* whether *English* or *Latin*, or in what other language; nor, whether law-books, divinity, physick, or any
other

Readings and Observations

other subject ; and because he did not declare what sort of stockings they were, whether woollen, worsted or silk, &c. But the court over ruled the exceptions ; and said, that books were not things of divers species, be they of what language or subject soever : Neither the stockings ; for were they silk, or woollen, or worsted, they were but stockings ; and so ruled judgment to be entered. *Stile* 25. See 1 *Bulst.* 126.

P * 376. 31. An action of trover and conversion of divers goods, & *inter alia de uno Risco, Anglice*, a trunk full of fine linen, *ad valentiam* 20l. & *de una Pixide, Anglice*, a box full of bands, cuffs and shirts, *ad valentiam* 10l. and of divers parcels of other goods. The defendant pleaded not guilty, and verdict found against him, and entire damages assessed to 80l. and it was moved in arrest of judgment, that this declaration is not good ; for *Riscus* is but a trunk only, and *Anglice*, full of fine linen is uncertain ; and damages were given upon that uncertainty. And *it was said, that this case differs from *Osbourn and Middleton's Case. Co. l. 10. f. 130.* For there *Fulcrum lecti* may be construed and understood of all that appertains to the furniture of a bed ; but *Riscus*, and an *Anglice*, full of linen, cannot be intended to be understood, and referred to linen ; and if it should be referred, it is uncertain ; and if it should not be referred to linen, it was never intended that 20l. should be for the value of the trunk ; and therefore it is not good, as *Playter's Case. Co. 5. f. 34. trespass, quare pisces suos cepit*, is not good for the incertainty. And of that opinion was *Haughton* ; for if he had said, *de Risco, Anglice*, a trunk full of gold to the value of 500 l. and damages had been given accordingly ; none will say, that it was for the trunk only, but the gold therein ; which had not been good for the incertainty. But *Lea, Doderidge and Chamberlain*, held it to be good, and that damages should be intended to be given for the trunk only : wherefore it was adjudged for the plaintiff. Note ; a writ of error was brought of this judgment ; and this judgment affirmed. 2 *Cro.* 664. *Bancroft v. Co.*

But 2 *Roll's Rep. p. 254. Bancroft's Case*, it is doubted, whether *un. Riscus, Anglice*, a trunk full of linen, *una Pixis, Anglice*, a box full of linen, were good.

32. In an action of trover and conversion *de decem paribus velorum & tegularum, Anglice*, curtains and vallance : It was moved in arrest of judgment, that the declaration was uncertain, because it did not appear how many there were of the one, or how many of the other, nor what was meant by a pair ; but judgment was given for the plaintiff, contrary to the opinion of *Twissden*, who relied upon the preceding case. 2 *Syd.* 445. *Taylor v. Wells. S. C. 2 Saund. 74.* And with this opinion agrees the judgment in the case of *Feeke and Ward. 1 Syd. 174.* but in 1 *Vent. 71. Anonymus*, which seems to be the report of the above-mentioned case of *Taylor and Wells*, it is said, it was adjudged to be ill. *Ideo quare.*

on Actions on the Case.

33. In trover of goods. The defendant pleaded not guilty, and found against him; and it was now moved in arrest of judgment to be an ill declaration; for he counts that he was possessed of such goods, shewing what they were *in specie cum aliis implementis ad valentiam* 3l. but expresseth not what they were; and that he was possessed of other parcels (particularly declaring what) *cum aliis necessariis*; but mentions not what they were; and that he was possessed *de suis*, but doth not set forth their number. The defendant, by verdict, was found guilty of all contained in the declaration, and damages intirely assessed for all, which being so incertain, the court cannot give judgment for those parcels which are incertain. And of that opinion was the whole court for the incertainty in the declaration. But *Gawdy* held, that in regard the defendant had admitted it, he cannot now after a verdict take advantage thereof. As 20 *Aff.* 3 is. But the other justices *e contra*. Because here is not any certainty at all, *pro implementis & necessariis*: But there is a reasonable certainty, although upon demurrer; because it is not altogether certain, judgment shall be against the incertainty; yet after verdict he shall take no advantage if there be any convenient certainty; but here is not any certainty. Wherefore it was adjudged for the defendant. 1 *Cro.* 817. *Wood v. Smith.*

34. The plaintiff declared in trover for several things, *& aliis utensiliis, Anglice*, implements, and obtained a verdict; but the damages being intire, judgment was staid, because of the incertainty of the expression, *aliis utensiliis quot quanta & qualia*. 3 *Lev.* 18. *Blackhouse v. Moore.*

35. Trover for two pair of pot-hooks, &c. After not guilty pleaded, and a verdict for the plaintiff, *Allen* moved in arrest of judgment, that hangers is a too incertain and equivocal word. *Baldwin*, for the plaintiff, insisted upon it, that since pot-hooks preceded the word hangers, the court could not intend these were any other hangers, than such on which pot-hooks used to hang. And he cited a *case of trover for a billiard-table, port, sticks and balls, and adjudged good, because the port, sticks and balls, should be intended things appurtenant to the table. But the court was of opinion, that it was too incertain a word; for the word does not immediately follow the word pot-hooks, but there are divers other things mentioned between; therefore judgment was staid. *Raym.* 2. *Seaman v. Barnes.* P * 377.

36. Exception to an action of the case brought, and the plaintiff declares, that whereas the plaintiff had delivered the defendant *unum statum salis, Anglice*, a bushel of salt, pretending that *statum* had another proper signification; but because it was shewed to the court, that *statum* by one dictionary, was *Latin* for a bushel, judgment was given for the plaintiff. 1 *Brownl.* 16.

37. In a writ of error upon a judgment in the common bench, in an action of trover, where judgment was given for the plaintiff,
error

Readings and Observations

error was assigned in the declaration, which was, because it was *de decem juvencis, Anglice*, bullocks and heifers, and did not say how many of the one, and of the other.

But it was answered, that the *Latin* word being proper, and of known signification, the *Anglice* was void, according to *Osborn's Case*, 10 Co. But the court reversed the judgment, and cited the case before in this court, trover *de viginti ovibus matricibus & agnis*; and it was resolved to be naught, for not ascertaining the number of each. But *Twisden* said, there was a trover brought *de viginti avertis*, viz. *Bobus, agnis, &c.* and *viginti* was applied to each *species*, and held well. It was offered in this case to distinguish it from the case *de ovibus matricibus & agnis*, that there the *Latin* was of two sorts; *sed non allocatur*; for the words here being equivocal, it was all one. 1 Ven. 317. *Davis v. Price*.

Other Case where the Declaration have been held good and sufficient, and where not.

- | | |
|--|---|
| <p>1 Ven. 71. Anonymus.
 1 Ven. 135. Anonymus.
 2 Ven. 63. <i>Blefs v. Frost</i>.
 174. Anonymus.
 3 Cro. 525. <i>Whyte v. Hanby</i>.
 2 Keb. 188. <i>Bird v. Watson</i>.
 2 Keb. 640. <i>Taylor v. Wells</i>.
 681. <i>Kemon v. Wells</i>.
 743. <i>Thomson v. Custis</i>.
 753. <i>Elfque v. Action</i>.
 3 Keb. 14. <i>Dennis v. Turbel</i>.
 3 Keb. 153. <i>Niller v. Green</i>.
 3 Keb. 209. <i>Esto v. Brown</i>.
 253. <i>Hancock v. Hodges</i>.
 693. <i>Price v. Davis</i>.
 —— <i>Dobson v. Bell</i>.
 1 Cro. 865. <i>Gramvil v. Rebo-</i>
 <i>tham</i>.
 4 Mod. 156. <i>Cook v. Bolinger</i>.
 Stile 136. <i>Heyford v. Hobson</i>.
 3. Cro. 545. <i>Lyfter v. Home</i>.
 Dyer 306. <i>Fines v. Spencer</i>.
 7 Co. f. 17.
 Stile 264. <i>Sawyer v. Russell</i>.
 1 Brownlow 16.
 Stile 69.</p> | <p>194. } <i>Heath v. Udall</i>.
 358. }
 2 Lev. 85. <i>Miller v. Green</i>.
 11. <i>Coleman and others</i>
 <i>v. Bard and Nelmes</i>.
 Stile 31. <i>Segar v. Dyer</i>.
 2 Syd. 60. <i>Ellis v. Yarrow</i>.
 1 Lev. 48.
 Stile 483. <i>Clark v. Fitzwilliam</i>.
 2 Lev. 177. <i>Dunwell v. Bullock</i>.
 1 Lev. 99. <i>Mayhow v. Flower</i>.
 2 Roll's Rep. 369. <i>Lawrence v.</i>
 <i>Turner</i>.
 3 Lev. 18. <i>Blackkouse v. Moore</i>.
 1 Cro. 818. <i>Draycott v. Piott</i>.
 1 Mod. 289. } <i>Wood v. Davis</i>.
 1 Lev. 301. }
 1 Ven. 17.
 Stile 232, 235. <i>Popham v.</i>
 <i>White</i>.
 360. <i>Webb v. Wath-</i>
 <i>burne</i>.
 2 Cro. 307. <i>Clifon v. Procter</i>.
 6 Co. f. 14. <i>Arundell's Case</i>.
 Stile 25. 1 Bul. 126.
 224. <i>Ernely v. Allen</i>.
 Fifthly,</p> |
|--|---|

on Actions on the Case.

*Fifthly, Of the Plea.

P *378.

1. In an action of trover for jewels, it was said by *Twisden*, there is no plea in trover, but a release, or not guilty, every special plea in justification being but tantamount to it. 1 *Keb.* 305. *Devoe v. Dr. Coridon.*

2. So has it been said by the Chief Justice *Holt*, that there is no proper plea in this action but the general issue; and he likewise said in the case of *Hartford v. Jones*, that the plea there mentioned, is the only good special plea extant in the books. But in order the better to understand this matter, it is to be observed,

1. That no plea or justification is good, which amounts only to the general issue.
2. That where a man justifies, he must confess or avoid the conversion.
3. That where the conversion is traversed, it must be traversed aptly and materially, and not to any superfluous matter in the plaintiff's declaration.
4. That in some cases the conversion, and in some the plaintiff's property, and in others the time and place is to be traversed.
5. That a recovery in trespass is a good bar to an action of trover.
6. That a recovery against one defendant, is a good bar for another defendant to plead.
7. That this action of trover, is within the statute of limitations.

To illustrate which, and several other particulars, see the following cases.

3. In trover and conversion, the defendant may plead not guilty, and give in evidence, that he distrained them till he was paid; but cannot plead specially that he took the goods by distress, or that he detained them as the horses of his host, till he paid for the horses standing; but if he pleads a matter which confesses the conversion, and avoids it, as in the case of *Yelverton* 198. it is good. by *Holt* Chief Justice. 3 *Salk.* 365. 2 *Salk.* 654.

4. In trover for one hundred sheep, the defendant justified under *asseri facias*, by virtue whereof he took them in execution; and it was adjudged upon a demurrer that this plea was ill, because it doth not answer to the conversion, and he should have pleaded not guilty, and given this matter in evidence. 3 *Salk.* 365.

5. In the case of *Put and Hardy* in *Raymond* 472. 3 *Mod.* 11. It was adjudged, that a judgment for a defendant in trespass was not pleadable in bar to an action of trover for the same goods; but

Readings and Observations

but that is not law, as it is said by *Holt* chief justice, and may be seen hereafter. *Comb.* 376. *Feilding v. Senat.*

6. It is not a good plea in bar for the defendant to say, that the plaintiff and another were joint-merchants, and jointly possessed of the ship and goods; and that one was dead, and had made an executor, for at most it is but in abatement. 3 *Lev.* 290. *Kemp v. Andrews.* *Show.* 188.

7. A release pleaded by one of three defendants to an action of trover operates to discharge the rest. 4 *Mod.* 379. *Kiffin v. Willis.*

P * 379. 8. A special plea in trover was held ill, because it did not confess and avoid, nor traverse the plaintiff's title to the goods alledged in the declaration, but only gives the plaintiff a colourable possession, without right or property, and a diversity was there taken between this action and an action of trespass, *quare vi et armis*; for in trespass, colour of possession given by the defendant to the plaintiff is sufficient, because the declaration is general, upon a supposal without any certain title; and therefore it is sufficient to answer a supposal of a title with a colour *of possession only; but in an action of trover, and in all other actions, where the plaintiff makes a title to the thing demanded, or to a thing for which he demands damages, there it behoves the defendant to make a better title to himself, and to traverse the plaintiff's title, or otherwise to confess and avoid it; as in 4 *Jac.* 1. It was adjudged in an action of trover for goods, where the defendant made a title to them paramount, and that he bailed them to the plaintiff to keep, by which the plaintiff became possessed, and that the defendant (as he well might) took them as his own goods. It was therefore adjudged no plea, because he answers the plaintiff's title only with a colour of possession. *Yelv.* 173. *Priestly v. White.*

9. The defendant may justify the trover at the place in the declaration, and the conversion at another place. 1 *Roll's Rep.* 1. *Hill v. Hawkins.*

10. If the plea of the defendant be, that he took the corn in such a place, by virtue of a custom for taking it for cleaning the market-place, it has been held that it amounts to more than not guilty. 1 *Roll's Rep.* 1, 2, 45.

11. If the action be for taking a horse, and the defendant pleads that he is an hostler, and it was put to him at livery, and there died, it is no more than not guilty. 1 *Roll's Rep.* 22. *Whitaker v. Collet.*

12. In an action upon the case, the plaintiff declared for corn, which came to the hands of the defendant, and that he converted it, and supposed the coming to his hands to be in *London*. The defendant pleaded that he was seized of certain lands, in *R. in Berks*, and that the plaintiff did thereof disseise him, and sowed the lands; and before severance he himself re-entered, and took away the corn,

on Actions on the Case.

as it was lawful for him to do, *absque hoc*, that any corn came to his hands in *London*; and by the opinion of the whole court, the traverse was held to be good. 4 *Leon.* 202.

13. An action of trover for goods was brought, and for converting them to his own use in *Ipswich*; the defendant pleaded, that the goods came to his hands in *Dunwich*, in the same county, and that the plaintiff gave to him all the goods which came to his hands in *Dunwich*, *absque hoc*, that he is guilty of any trover or conversion in *Ipswich*; it was holden to be a good manner of pleading, by reason of the special justification. *Vide* 27 *H.* 6. But where a justification is general, the county is not traversable at this day. *Vide* 19 *H.* 6, 7. 4 *Leon.* 106.

14. If the defendant pleads a sale in market-overt, it is good, without giving colour to the plaintiff. 1 *Roll's Rep.* 273. *Bisse v. Tyler.*

15. A justification, if it is not local, but transitory, is not good, and amounts but to the general issue. 1 *Roll's Rep.* 395. *Phillips v. Weeks.*

16. To plead the custom of *London* for buying goods in a shop, as in a market-overt, is not good, but must be given in evidence on the general issue. 1 *Roll's Rep.* 397. *Row v. Tompson.* 2 *Cro.*

165. 1 *Cro.* 454. Other cases where a sale in market-overt hath been held no plea. *Godb.* 267. 1 *Roll's Rep.* 273. *Hetley* 49. 2 *Cro.* 165. *Owen* 27. 1 *Cro.* 485. *Moor* 624.

17. To an action of trover for divers loads of corn, the defendant pleaded and entitled himself unto them as tithes severed; and because the plea amounts but to not guilty, the plaintiff demurred, and shewed it for cause, that the plea was not therefore good; and without argument it was adjudged for the plaintiff. 3 *Cro.* 157. *Lynnet v. Wood.*

18. In an action upon the case for trover and conversion of goods, the defendant justified the taking of them damage-feasant, *absque hoc* that he converted them *aliter vel alio modo*; and it was thereupon demurred in law; for that the traverse was not good, because he confessed not any conversion; the plea also amounts to not guilty. Wherefore without argument it was adjudged for the plaintiff. 1 *Cro.* 435. *Dee v. Bacon.*

19. In trover and conversion, supposing that the defendant had sold the thing for which the action was brought, *non vendidit* was held no plea, but the defendant ought to have pleaded not guilty. *New Benl.* 41. *Lord Mounteagle v. the Countess of Worcester.* S. C. *Dyer* 121. S. C. 1 *And.* 20.

20. In trover the plaintiff supposed that he was possessed of divers loads of corn and hay, at *H.* in the county of *M.* and that they came to the hands of the defendant by trover, and that he converted them to his own use. The defendant pleaded, that before the trover, he was seized of certain lands in *Burton*, in the county of *Stafford*,

Readings and Observations

ford, in fee, and the corn and hay was growing upon the land, and he cut them as his proper goods, and was possessed thereof till he lost them; and they came to the hands of the plaintiff by trover, and he lost them again, and they came to the hands of the defendant, and he converted, as it was lawful for him to do. And upon this the plaintiff demurred in law; for that the plea amounts only to the general issue; and this cause was shewn for demurrer. And the court held, that as this was shewn specially for cause of demurrer, it was an ill plea, and gave judgment for the plaintiff. 1 Cro. 146. *Ward v. Blunt*.

21. In trover for six oxen in *London*, and there converted, &c. the defendant pleaded that he seized them in the manor of *D. in Essex*, as goods waived there, and so justified, *absque hoc*, that he was guilty in *London*: and *per cur'* it was no plea; for it amounts but to the general issue, containing no matter local, to make the place material. 1 Cro. 174. *Bullock v. Smith*.

22. In trover and conversion of twenty sheep; the defendant pleaded, that the Queen was, and yet is seized of the manor of *Newport-Pagnel*, in the county of *Bucks*; and that *malefactores ignoti* stole those sheep from the plaintiff, and brought them within the said manor, and there waived them: whereupon the defendant, as bailiff to the Queen of her said manor, seized them as the Queen's goods to the Queen's use, which is the same trover and conversion, and prays in aid of the Queen. Whereupon the plaintiff demurred specially, &c. *Garudy* and *Popham* held, that the plea was not good; for that the conversion was not answered: he also ought not to have aid, because it is but a chattel; he hath not alledged, that he hath answered for them to the Queen; but that he needed not to have alledged any pursuit of felon. For *Popham* said, it ought to be alledged that the felon fled; or that he was in fear to be apprehended, and for that cause waived them: for if a felon carries away goods, which he hath stole within a manor, and leaves them there, and at another time goes away, the goods are not waived; for waiving shall be where he hath the goods when he flies for fear to be apprehended for them. And the reason of the forfeiture is, because there was a default in the party robbed, that he did not pursue him to have taken the goods from him, and therefore the law gives them to the Queen. But it is not necessary, that he be pursued for the felony, when he leaves the goods, so that he flies for this cause. But afterwards, because the plea was not in bar, but concludes, *si Regina inconsulta*, &c. they all resolved, that the judgment could not be given as upon a matter of bar. And because aid was not grantable in this case, it was awarded, that he should answer without aid. And so it was adjudged. 1 Cro. 693. *Foxley v. Annesly*. 4 Co. 109. S. C. And *Moore Rep.* 572.

23. In trover and conversion of a cow *apud Salop*. The defendant pleaded, that the queen was seized in fee of such a manor, and

demised

on Actions on the Case.

demised it, and all estrays therein, &c. to J. S. for life, and conveys it by mean conveyances to himself; and that this cow came thither as an estray; whereupon he seized her, and caused her to be proclaimed in two market-towns next adjoining. And the plaintiff claimed a property; and the defendant demanding of him to pay for her feeding, that he *refused, and thereupon he denied to deliver the cow, and traverses that he is guilty of the conversion, *apud Salop'*. And it was thereupon demurred, and held ill; because he shewed not the letters patent; and because he alledged not, that the proclamations were made in the parish-church; and because he traversed the will; and it was adjudged for the plaintiff. 1 Cro. 716. *Brownlow v. Lambert*.

P *381.

24. To an action *sur trover*, the defendant pleaded, that before the time, wherein the plaintiff supposes the goods to come to the defendant's hands, one S. A. was possessed of them; and amongst other goods sold them to the defendant, but retained them in his own hands, and afterwards sold them to the plaintiff, by reason whereof the plaintiff was possessed, and afterwards lost them, and they came to the defendant's hands, who converted them *prout, &c.* Whereupon the plaintiff demurred; and it was held by the court to be an ill plea; for it amounts to not guilty: and it was doubted whether the court should compel the defendant to plead not guilty, or award a writ of enquiry; but at last it was resolved, that a writ of enquiry should be awarded. 1 Bro. 5. 2 Cro. 319. *Austin v. Austin*.

25. To an action upon the case on trover of 300 sheep, the first of December, 36 Eliz. The defendant pleaded, that he was sheriff of the county of Lincoln, and that J. S. recovered against the plaintiff 100 l. and thereupon had a *feri facias* to levy that debt; which writ was returnable *crastino animarum*, 35 Eliz. That this was delivered to him, being then sheriff of the said county, upon the first of October, 35 Eliz. to be executed; that he, by force thereof, upon the 20th of October, 35 Eliz. took the said 300 sheep, and sold them upon the 22d day of October, anno 35 Eliz. 100 and 4 sheep for 20 l. parcel of the said 100 l. and that the other 192 sheep remained in his said hands *pro defectu emptorum*. And on the said day of *crastin. anim.* he returned the said writ accordingly, and all this matter. The which is the same conversion, *absque hoc*, that he converted *aliter vel alio modo*; and thereupon the plaintiff demurred: and after argument the whole court held the plea to be insufficient. First, and principally, because he doth not by his plea confess any conversion, and then the traverse is ill: but he ought upon this matter to have pleaded not guilty, and have given this matter in evidence. Secondly, because he supposes the trover and conversion to be on the first of December, 36 Eliz. and he justifies the conversion in October, 35 Eliz. So he meets not with the plaintiff in time, and therefore he ought to have traversed it; and the traverse

Readings and Observations

traverse *aliter vel alio modo*, shall never answer to the time, but to the manner of the conversion. Thirdly, he makes not any justification for four of the sheep, but that he seized them; but did not shew what he did with them: wherefore the plea doth not answer all that which is comprised in the declaration; and for that cause it was held ill in all. And of that opinion was all the court, and appointed judgment to be entered for the plaintiff; but after caused it to be staid for the equity of the matter. 1 Bro. 4. *Ascue v. Sanderfon*.

26. In trover and conversion of a ship, and nine pieces of the plaintiffs declared, that the first of *March*, 21 *Jac.* he was possessed, and the same day lost them which came to the defendant's hands, who 3 *Octob.* 3 *Car.* converted them to his own proper use. The defendant pleaded the statute of 21 *Jac.* of limitation of actions; and that the 20th of *March*, 21 *Jac.* *causa actionis accrevit*; so as not only three years, and more, are incurred since the parliament, but also six years after the conversion, before any action commenced. *Et hoc, &c.* The plaintiffs replied, that they were possessed of the same ship, as their proper goods; and so being possessed before the 20th of *March*, 19 *Jac.* viz. 1 *Martii*, 19 *Jac.* they agreed at *London* aforesaid, in *parochia & warda predicta*, that the said defendant, as their servant, should transport

P *382. *the said ship and goods to *T.* in *Spain*, being parts beyond seas, and should afterwards restore them unto the plaintiff upon request; whereupon the defendant taking the said ship, the said 1 *Martii*, 9 *Jac.* transported her to the parts beyond seas, viz. to *T.* and 20 *Martii*, 19 *Jac.* there sold the said ship and goods to persons unknown, and converted them to his proper use; and that the defendant, after the said conversion, remained in *partibus transmarinis usque primum Maii*, 1 *Car.* by reason of which stay, they could not sue him *per legem terræ*; and that 1 *Maii*, 1 *Car.* apud *London*, they required him to re-deliver the said ship and goods, which he refused to do. But that he then and there converted and disposed of the said goods. The first question was, whether this action was within the statute of limitations; and it was held, that though actions of trover are not mentioned specifically in the statute, yet it is implied in the general words of actions upon the case. The next question was, admitting the defendant was beyond seas for six years after the conversion, and did not return into *England*; whether the plaintiff had not liberty to bring the action at any time within six years after his return? for the *proviso* is on the part of the plaintiff, if he be over the sea at the time of the cause of action, that he shall have time after his return; and by the same equity, it shall be so where the defendant is over the seas, and cannot be sued. But that point the court did not resolve. Thirdly, if this request, and not delivery after his return, be not a new conversion, and cause of action; so that although he was barred before by the statute of limitation,

on Actions on the Case.

limitation, whether he shall not hereby be restored to that action. And *Jones* and *Whitlock* conceived, that he should; and that he may be well intended, the goods came to his hands again after his sale; and the demanding them of him, and his denial and conversion, is good cause of action. But *Croke* doubted thereof. Fourthly, it was argued, that here the replication was a departure from the declaration; for by the declaration he supposeth a casual loss, and a trover by the defendant, and that to be 21 *Jac.* But in the replication he supposeth to restore; and then a sale of them the 20th of *March*, 19 *Jac.* so it varies in the time and manner how the defendant had them; also by his own confession, the conversion was made above six years before the action brought. But although *Croke* doubted therein, yet *Jones* and *Whitlock* over-ruled him, and gave judgment for the plaintiff, *absente Richardson*, Chief Justice. 3 *Cro.* 245, & 335. *Swayn & al' v. Stephens.* S. C. *W. Jones* 252.

27. In trover the defendant pleaded a release, &c. And it was held *per Holt*, chief justice, that in trespass, where the defendant pleaded a release before the time, he must also go on with an *absque hoc*, that he is guilty *ad aliquod tempus postea*: but if he does not vary the time, there needs no traverse; for suppose you alledge the trespass such a day, and the defendant justifies as to that day, the plaintiff may shew another day, and it is no departure, for the defendant has occasioned this; and there is a great difference between a bond and a trespass: if the declaration lays the bond to be dated on one day, the replication cannot say it was dated on another; but in trespass the plaintiff may depart as occasion requires; *sed adjournatur.* 1 *Salk.* 222. *Webley v. Ralmer.*

28. In an action upon the case upon a trover and conversion to his own use, *per venditionem quibusdam hominibus ignotis*; the defendant pleaded, that the goods were bailed to him, to bail to *J. S.* to whom he had delivered them, *absque hoc*, that he did convert them to his own proper use, *per venditionem hominibus ignotis.* The traverse was held ill; for the conversion to his own use, is the cause and the ground of the action, and not the selling the goods, &c. 2 *Leon.* 13.

*29. In trover for an horse, and selling him, and converting the money to his own use, The defendant confessed, that it was the plaintiff's horse, and that one *J. Courtinal* found and delivered him to the defendant to re-deliver it upon request: whereupon he re-delivered him to the said *J. C.* before the action brought, *absque hoc*, that he sold and converted the money to his own proper use. The court held, that as the substance in this case was the conversion, it might well be traversed; but as the defendant had taken a traverse to the converting the money to his own use, which was not materially alledged in the declaration, but is superfluous, and as the defendant by his traverse hath made it part of the issue; the

Readings and Observations

traverse therefore is ill in that point ; and the demurrer being upon the traverse, it was adjudged for the plaintiff. 1 Cro. 554. *Kynnersley v. Barnard*.

30. In an action upon the case, the plaintiff declared in trover for a bag of money, and the conversion of it : the defendant pleaded, that the bag of money was delivered to him as a pawn to keep until *A.* and *B.* were agreed which of them should have it ; and pleaded further, that *A.* and *B.* were not yet agreed who of them should have it ; for which cause he kept it, *absque hoc*, that he converted it to his own use ; upon a demurrer in this case it was held, that the conversion was traversable. See the same case, 4 Ed. 6. *Br. Action upon the Case*, 113. So here *Fenner* agreed with *Wray*. 1 Leon. 247.

31. *Galliard* brought an action upon the case against *Archer* ; wherein the plaintiff declared, that he himself was possessed of certain goods, which by trover came to the hands of the defendant, who had converted them to his own use. The defendant pleaded, that before the trover supposed, one *A.* was possessed of the same goods as of his proper goods, and sold them to the defendant ; and that he had not any notice that the said goods were the goods of the plaintiff ; upon which the plaintiff demurred in law. And by *Anderson* the plea is not good ; for the plaintiff may chuse to have his action against the first finder, or against any other, that hath the goods after the sale, gift, or trover : and it hath been held by some, the defendant having the goods by sale, might traverse the finding. See *Contr.* 27 H. 6. 13. a. And that in detinue, where the plaintiff declares of a bailment, the defendant may say, that he found them, and traverse the bailment. 39 H. 6. 37. by *Moyle* : and by *Wyndham*, justice, the defendant may traverse the property of the goods in the plaintiff. 12 E. 4. 11. 1 Leon. 180. *Galliard* and *Archer's Case*.

32. In an action of trover for a gelding, the case was : one *Porter* stole this gelding from the plaintiff, and sold it to the defendant in open market, by the name of *Leister*, and it was entered so in the roll-book, that *Leister* sold him. The question was, if this alteration of the name shall not make any alteration of the property, although the sale was in open market ? *Wyndham* and *Rhodes*, justices, held this to be no good sale to bar the plaintiff, and grounded their opinion on the statute of the 2 & 3 Phil. M. c. 7. which provides, that no property of stolen goods shall be altered that are sold, unless the name and surname of the parties to the sale be written in the roll-book ; and *Shuttleworth* moved, that it should be in the market, and walked up and down there for an hour together, which is not set forth by the defendant in his bar. But the justices said, that such special plea need not to be, but it shall be intended. *Owen* 27. *Gibbs's Case*.

on Actions on the Case.

33. In an action upon the case, on trover and conversion of sixteen broad cloths; the defendant pleads, that before the time of the trover and conversion, one *Morrice* was possessed of those goods, and sold them to the defendant; and before he had notice that they appertained to the plaintiff, he sold them to *J. S.* the which matter, &c. and it was thereupon demurred, 1 Cro. 480. *Gybson v. Garbyn.* But it does not appear what was done thereon, but according to the case, in 2 Bulst. 134. 299. *of *Holman and Karrisley*, P *384. the defendant ought to have traversed the plaintiff's property.

34. An action of trover at *Paxton*, in the county of *Hunt.* the defendant pleads a bargain and sale at *Royston*, in the county of *Hert.* in the market there, whereby he after converted them at *P.* in the county of *H.* The plaintiff saith, that he was possessed of those goods at *P.* in the county of *H.* and that *J. S.* there stole them from him; and by covin betwixt him and the defendant, at *P.* in the county of *H.* he sold them to the defendant, as he had pleaded. The issue was upon the sale made covin, &c. and it was tried in the county of *H.* and found for the plaintiff; and it was moved to be a mis-trial, for it ought to have been by a jury of the county of *Hert.* or at least-wise by a jury of both counties. And of that opinion was *Gawdy.* But the other justice *e contra*; for the sale is confessed, and the issue is upon the covin, which is well tried by a jury of the county of *Hertsf.* where it was alledged. And it was afterwards adjudged accordingly. 1 Cro. 510. *Harbing v. Sherman, Goldf.* 158. S. C.

35. In trover, the defendant pleaded, that he took them as bailiff of the king, for a distress upon a plaint in *curia manerii*, and sold them; and it was thereupon demurred, and adjudged ill; for upon a *distringas*, the cattle shall not be sold, especially in a court-baron, although it were in the King's court. 2 Cro. 255. *Gomerfal v. Wyats.* S. C. *Yelv.* 194.

36. In trover and conversion for two tuns of wine, the defendant pleaded, that the King, *jure coronæ*, was seized in fee of the prisage of all wines imported *ex partibus transmarinis* by any person, whether a subject or alien; and that the prisage was *a tempore ejus*, &c. answered to the King, his progenitors, their farmers or deputies, in the manner following, *viz.* out of every vessel, importing into any port, or other place within this kingdom, 20 tuns of wine for any person *a partibus transmarinis*, and of that or *de aliquo vase inde vini prædicti* unloading a tun, and out of every vessel so importing 20 tuns of wine for any person into any port or other place within this realm; and *inde seu de aliquo inde vase prædicti disonerat* two tuns of wine, *viz.* one before the mast of such a ship, and the other behind the mast *ejusdem navis*; and that the King being so seized before the time that two tuns came to the defendant's hands, as the plaintiff supposes, *viz.* 21 Sept. Anno 5. by his letters patent, *hic incur' prolat'*, granted to Sir *T. Waller*, the office of chief butler, to

Readings and Observations

him the King, his heirs and successors, with all the fees, &c. who was constituted thereby chief butler, *habendum*, &c. for life, to be exercised by him or his deputy, & *ulterius dicit*, that the chief butler for the time being used and accustomed by himself or deputy, to collect and receive to the King's use the said prisage, due as aforesaid: and also, that the said 13th day of April, Anno 7. *quædam navis*, loaden with 20 tuns of wine, came to the city of Exeter aforesaid, *a partibus*, &c. *scil't a villa de Bourdeaux in Gallia*; and that at the city aforesaid, nine tuns and a half of the said 20 tuns, being the plaintiff's wine, *adtunc exonerat' fuerunt ex navi præd' per quod* two tuns of wine were due to the King for prisage; and being *legitime constitutus* deputy to Sir T. Waller, *tunc* & *adtunc* chief butler & *per ejus præceptum* the aforesaid two tuns *wini præd. pro prisagio dicto 13 die April. anno 7. præd.* at the city of Exeter, to the use of the King did take, and them to the King's use convert and dispose, *prout ei bene licuit quæ est eadem conversio*, &c. that the plaintiff supposes to be to the defendant's use, & *hoc paratus est verificare*: to this plea though four exceptions were made; yet the plea was held good. *Yelv. 198. Kenicot v. Bogan.* And this was the case that the late lord chief justice Holt held, that it was the only good special plea extant in our books. *Salk. 164.*

37. In trover and conversion of goods at D. in the county of Nottingham, the defendant pleaded, that he recovered against the P *385. *plaintiff a debt of 20 l. by bill in the King's Bench, and thereupon had a *feri facias* directed to the sheriff of York, who *apud Wakefield, in com. Eborum*, seized those goods, and delivered them unto him in satisfaction of this execution; and so justifies the conversion. And it was thereupon demurred, and without argument ruled, that the pleading was ill. First, Because he shewed not where the Queen's Bench was at the time of the recovery. It being a court removeable; as 5 Ed. 4. 8. is. Secondly, the trover and conversion is supposed to be in the county of Nott. and he justifies in the county of York, without traversing, &c. Thirdly, the sheriff upon a writ of *feri facias* cannot deliver the defendant's goods to the plaintiff in satisfaction of his debt. Wherefore it was adjudged for the plaintiff. 1 Cro. 504. *Thomson v. Clerk. Noy 56. S. C.*

38. In trover of goods, the defendant justifies, as servant to the sheriff of Middlesex, because the plaintiff had stolen those goods, and carried them to D. within the county of Middlesex; at which place the defendant seized them *ut bona wavata*; and without argument it was adjudged for the plaintiff; for he ought to alledge a felony committed; and that the goods were waived, by the felon: but it is not alledged that the felon waived them. Wherefore it was adjudged *ut supra.* 1 Cro. 611. *Davies's Case,*

39. To an action of trover and conversion of goods in London. The defendant justified, for that one Robert Bash was seized in fee of 20 acres in Stanstead, in the county of Hertford, and granted a rent-

on Actions on the Case.

rent-charge to *Robert Bafh*, his executors and assigns of 16l. *per annum*, during the life of *Frances*, the wife of *Robert Bafh*; which *Robert Bafh* died intestate, and *Frances* his wife was administratrix unto him; and the defendant, as her servant, took a distress in the said 20 acres, for the said rent, by the command of the said *Frances*, and impounded them there, and traverses the taking and conversion of them in any other place. And it was thereupon demurred, and all the court held the plea to be ill; for the inducement to the traverse (which ought always to be good) is not a sufficient cause of justification for the taking of the distress; for this rent was determined by the death of *Robert Bafh*, because there cannot be an occupant of rent. And the feme is not assignee by her taking of administration; for none can make title to a rent to have it against the ter-tenant, unless he be party to the deed, or conveys a sufficient title under it. Wherefore it was adjudged for the plaintiff. And whereas an exception was taken to the plea, because he traversed the county, the court did not speak thereto; for that they resolved the substance of the plea to be insufficient. 1 Cro. 501. *Salter v. Butler*. Noy 46. S. C. *Yelv.* 9. S. C. *Moor* 664.

40. In trover and conversion, the plaintiff declared, that whereas he was possessed of a bag of hops, and a bag of flax, to the value of £c. and that the defendants found them, and the third day of *October* converted them; and the defendants pleaded, that *Sandwich* is an ancient village, and that the custom of foreign attachments is used there as in *London*, and that these goods were lost upon default in *November*, and traversed; *absque hoc* that they were guilty of any conversion in *October*, or at any other time or day than the times before, which are contained in the declaration, that the defendants were not guilty before, (*Scil.*) *October*; upon which the plaintiff demurred, and judgment was given for the plaintiff, although it was objected, that the justification here, by the custom aforesaid, had taken away the property; and as the plaintiff would be barred in detinue, so he is in trover: but the court was of the contrary opinion, that the defendant's plea in bar here shall not be good without a traverse; and as it is, the time is not made material, but any time before is sufficient. *Het.* 166. *Green v. Bronker and Greenstead.*

*41. In an action upon the case for a trover, the defendant after P *386. an imparlance pleaded an outlawry of the plaintiff; and it was holden by some to be a good bar, and therefore it may be pleaded after imparlance; as 16 E. 4. 4. in debt upon specialty; but not in debt upon a contract, trespass, battery, imprisonment, &c. for such matters the King shall not have by outlawry. *Q. if this be law.* 3 Leon. 235. *Markham and Pitts's Case.*

42. In an action upon the case, the plaintiff declared, that he was possessed of certain chattels, which came to the defendant by trover; the defendant pleaded, that heretofore the plaintiff brought debt

Readings and Observations

debt against the now defendant, and demanded certain monies ; and declared, that the defendant bought of him the same goods (whereof the action is now brought) for the sum then in demand, to which the then defendant waged his law, and had his law, by which *nihil capiat per breve, &c.* was entered ; and demanded judgment, if, &c. And by *Wyndham* and *Rhodes*, justices, the same is no good bar in this action ; for the waging of the law, and the doing of it, utterly disproves the contract supposed by the declaration in the said action of debt, and then the plaintiff is not bound by the supposal of it, but is at large to bring his action ; and so judgment was given for the plaintiff. 2 Leon. 37. *L. Sands* and *Cagnard's Case*.

43. Trover and conversion *in communi banco* ; the defendant pleaded judgment *in banco regis* upon special verdict in trespass for the same goods ; and that the goods in the one and the other were the same, and conversion and taking the same, &c. The plaintiff demurred ; and upon argument the whole court were of opinion, that it was a good bar, upon the authority of *Ferrer's Case* ; and that notwithstanding the case of *Putt* and *Royston*, *in banco regis*, adjudged by *Pemberton contra* ; which case my Lord Chief Justice *Pollcxsen* said he was never satisfied with, and as he remembered a writ of error was brought, and the judgment questioned ; but afterwards agreed, that he saw no difference between a general and a special verdict. However they all thought a judgment in the one a bar to the other ; for that the actions were of the same nature : and judgment was given for the defendant. *Shorr*. 146. *Lechmore v. Toplady, & al.*

44. Action of trover of certain plate ; the defendant pleads, that at another time the plaintiff had brought his action for this same plate against *J. S.* supposing the conversion to have been done by him. And in that action had judgment to recover 20 l. damages, and had *J. S.* in execution for the damages ; and avers, that it is for the same goods, and for the same trover and conversion ; and it was thereupon demurred. And after argument by *Clerk* for the plaintiff, that it was not any plea ; because they having judgment, and the party's being in execution, is not any satisfaction unless the money be paid ; and then without satisfaction it is not any plea in bar of this action : as in debt against two, by several *præcipe's*, upon one obligation, judgment and execution against one is no plea for the other without satisfaction. And execution of the body is not any satisfaction ; as 33 H. 6. 47. 4 H. 7. 29 H. 8. Title *Executors* 132. 14 H. 4. But all the court held the plea to be good ; for the cause of action being against divers, for which damages incertain are recoverable ; and he having judgment against the one for damages certain, that which was incertain before, is reduced *in rem judicatam*, and to certainty, which takes away the action against the others. And therefore *Popham* said, if one hath judgment

on Actions on the Case.

ment to recover in trespass against one, and damages certain, although he be not satisfied, yet he shall not have a new action of trespass. By the same reason *e contra*, if one hath a cause of action against two, and obtain judgment against the one, he shall not have remedy against the other; and the alledging, *that he hath the one in execution for this cause, is not an answer to the purpose; and the difference betwixt this cause, and the cause of debt upon an obligation against two, is, because there every of them is chargeable and liable to the intire debt; and therefore the recovery against the one, is no bar against the other until satisfaction. And *Fenner* said, that in case of a trespass, after the judgment given, the property of the goods is changed, so as he may not seize them again: Wherefore by all the court, it was adjudged for the defendant. 2 Cro. 73. *Brown v. Wooton Moor* 762. P * 387.

45. Action on trover of divers trees, *apud D.* in the county of *Surrey*; the defendant pleads, that *Queen Mary* was seised in fee of the manor of *D.* in the county of *Suffex*, where those trees were growing, and granted it to the defendant in tail, whereby he was seised thereof; and that *J. S.* cut the said trees and granted them to the plaintiff, who lost them, and the defendant found and converted them, &c. The plaintiff replies, *de injuria sua propria*, &c. And thereupon issue was joined. *Coke* moved, that the replication was ill; for *de injuria sua propria* is not any plea, where the defendant makes justification by claiming an interest in the freehold to himself; as 16 Ed. 4. 4. 44 Ed. 3. 18. and 14 H. 4. 32. is upon the same reason. But where one claims not any interest, but justifies by command or authority derived from another, it is otherwise: And of that opinion was the whole court. Wherefore a repleader was awarded. 1 Cro. 539. *Archbishop of Canterbury v. Kemp*.

46. In trover the defendant pleaded, the now plaintiff had brought an action for the same things against *T. S.* and obtained judgment and execution, and avers they were the same things; and on demurrer judgment was given for the defendant. And a diversity was taken by the whole court where the demand and recovery is of a thing certain, or of one that is uncertain; for if two are jointly and severally bound in a bond of 100l. there recovery and execution against the one, is no bar to an action against the other; for it is no satisfaction of the 100l. 4 H. 7. 22. But where two commit a trespass which lies intirely in damages, there a recovery and execution against the one is a good bar against the other: Nay, it was agreed, that the very judgment was a sufficient bar, *quia transit in rem judicatam*; and the incertainty is reduced by the judgment to a certainty, and so altered and changed from what it was; therefore the plaintiff cannot resort back to the original incertainty of the thing demanded; so is judgment in battery against one a good bar to an action brought against another for the same. *Yelv.* 62.

See

Readings and Observations

See other Cases concerning the Plea in this Action, in the following Books.

Hetley 49. Hedges v. Franklyn. 62. Panton v. Hassell. 166. Green v. Bronker and others. 3 Cro. 157. Lynnet v. Wood. 35. Lacon v. Barnard. 245. Swayn v. Stephens. 2 Keb. 57. Skinnington v. Reynolds. 437. Denye v. Perry. 3 Keb. 127. Dakers v. Dunkin. 333. Ireton v. Newton. 709. Astrey v. Ballard. 1 Cro. 539. Archbishop v. Kemp. P * 388. 1 Cro. 667. Ferrers & al' v. Arden. 2. Mod. 63. Stubbins v. Bord and others.	Stile 331. Rogers v. Done. 3 Cro. 25. Lacon v. Barnard. S. C. Hutton 81. 11 Rich. 2. Tit. Trespas 17. 40 Ed. 3. fol. 27. 46 Ed. 3. fol. 18. 14 H. 7. fol. 12. 44 Ed. 3. fol. 2. 3 Mod. 194. Beck v. Thyrtwit. Stile 178. Coles v. Sybbye. 2 Leon. 177. Sands v. Brocas. 1 Cro. 485. Comyns v. Bowyer. 2 Cro. 165. Johns v. Williams. * 1 Cro. 454. Palmer v. Welley. 5 Co. 83. b. Goldsb. 158. 2 Cro. 68. Taylor v. Chambers. 1 Keb. 305. Trin. 14 Car. 2. Danvers's Abr. 25.
--	--

Sixthly, Of the Trial, and Evidence.

1. Where many are concerned in the taking goods, and then an action is brought against one or more, it is said, that one of them concerned in the taking, may be admitted as an evidence against the rest. *Comb. 367. Dockwray v. Dickenson.*

2. In trover, the defendant cannot give a release in evidence, but he ought to plead it. *Com. 473. Kingston v. Read. Quære de hoc.*

3. In trover by an administrator on the intestate's possession, the defendant cannot give in evidence a will on the general issue; otherwise if it is on the administrator's own possession. *1 Salk. 285. Far. 141.*

4. In trover and conversion, where there could be no trial by reason of a fault in the *Habeas Corpora*. *1 Ven. 297. Anonymus.*

5. In trover at *nisi prius*, before Holt Chief Justice, upon evidence the case was this. A carpenter sent his servant to work for hire to the Queen's Yard, and having been there some time, when he would go no more, the surveyor of the yard would not let him have his tools, pretending a usage to detain tools, to enforce workmen to continue till the Queen's work was done; and a demand and refusal being proved at one time, and a tender and refusal at another, Holt, Chief Justice said, that the very denial of the goods to him that hath

on Actions on the Case.

hath a right to demand them, is an actual conversion, and not only evidence of it, as has been holden; for what is a conversion, but an assuming upon ones self the property and right of disposing of another's goods; and he that takes upon himself the right of disposing of them, is guilty of a conversion; so the taking and carrying away another man's goods is a conversion. So if one comes into my close, and takes my horse, and rides him, that is a conversion; and here, if the plaintiff had received the goods, upon their being tendered, notwithstanding the action would have lain upon the former conversion, and the plaintiff's having his goods afterwards, would go only in mitigation of damages, and he had no regard to the pretended usage, but compared it to the doctrine among the army; that if a man comes into the service, and brought his own horse, that the property thereof was immediately altered and vested in the Queen, which he had already condemned. And in this case one of the particulars in the declaration being ill laid, the defendant was found not guilty as to that, and guilty as to the rest. *Mod. Ca. 212. Baldwin v. Cole.*

6. In an action of trover and conversion which was brought for oats, &c. the case upon evidence appeared to be, that certain trespassers had taken these oats from the plaintiff, and brought them to the mill to make them into oatmeal; and the plaintiff came to the miller before any thing done, and demanded the oats as his, and forbid him to proceed to make it into oatmeal, but the miller did proceed for all that, and made it into oatmeal. And the judge held it to be a conversion in the miller, and directed the jury accordingly; although it was argued by the council for the defendant, that a miller was a public officer, and did but his duty in this case. And in this case it was held further, that if *A.* takes goods from me, and these afterwards come to the hands of *B.* by his buying them, or otherwise, and he converts them to his use, *B.* shall not be charged to me without a new demand made of them unto him, and a detention afterwards. *Clayt. 57. Holdsworth's Case, Mod. 460. Cro. 495. Golds. 152.*

*7. Upon a motion for a new trial, the case appeared to be this; P *389.
an executor several years before, had left some household stuff in the house, by the consent of the heir, who used them, afterwards; and within six years of the action brought, the executor demands the goods, and the heir refused to let him have them; whereupon this action of trover was brought, and the statute of limitations was pleaded; and it was adjudged, that the using the goods before the demand, was no conversion or evidence of it; for it was with the consent of the executor till then; and the demand being within six years, the refusal which ensued it is the only evidence of a conversion in this case, and that being within the six years, though the trover was before the statute, cannot be pleaded. *Farest. 99. Worley Montague v. Sandwich.*

Readings and Observations

8. In an action of trover and conversion, upon not guilty the evidence was, that the goods were taken and sold, by virtue of a commission of sewers; and it was ruled, that this matter might be well given in evidence, upon not guilty pleaded; as detaining of beasts in a market for toll. *Alley 62. Combs v. Cheyney.*

9. A denial to deliver goods, which the defendant hath in his possession is evidence unless it be in trover, for a thing in the open fields, which the plaintiff might have taken; but the finding of its being denied by a verdict, is not of itself sufficient for the court to construe it a conversion; but it is said that it is good evidence to a jury of a conversion. 1 *Roll's Rep. 59. Isaack v. Clarke.*

In this case of *Isaack v. Clarke*, it will be very proper to state the case, and take notice of the several points resolved therein. The jury found by a special verdict, that one *Adams* had a judgment against one *Lewis*, and against one *Watkins*, and another that were his pledges, in the court of the city of *Exeter*; and the defendant *Clarke* being the serjeant at mace in the city, after a *non est inventus* returned against *Lewis*, came to the house of *Watkins*, to levy an execution of the debt upon certain butts of wine, and by virtue of a *fiery facias* seised them; and the plaintiff being there said to *Clarke*, I deliver to you this bag of money, in which was 22l. as in the declaration, with an intent, that you shall keep it till the next court, only for a delivery of the wine aforesaid to the said *Clarke* that day upon request, if *Watkins* do not obtain a forbearance of the debt of the plaintiff *Adams*. But *Watkins* did not obtain such forbearance, nor was the wine redelivered, or any thing done at the next court; and afterwards the plaintiff demanded the bag of money, and *Clarke* refused to pay it. Upon this case two questions arose. 1. Whether *Isaack* hath a right to have the bag of money, or no. 2. Admitting that he has, yet whether he has not mistaken his action. *Haughton*, as to the first point was of opinion, that the plaintiff hath no right to the bag, inasmuch as it is found that the serjeant seised the sack, &c. and it appears he did not take them out of the possession of the owner, but had this bag of money as a pledge, that the goods shall be redelivered upon request at such a day; yet notwithstanding, though the defendant does not make a demand, at the day, yet the plaintiff shall not have the bag of money, till the serjeant hath the butts delivered to him; for the request at the day is not material, but he might request it at any time afterwards; as if a man pawns goods to be redelivered such a day upon request, if he does not request the goods, on that day he may do it at any time afterwards; as to that first point, *Doderidge* was of another opinion, and that as there was no request on that day the privity of the bailment was determined. *Croke* was of the same opinion with *Haughton*, as to that point. But *Coke* said, he should be of the opinion of his brother *Haughton*, if there was no more in the case than was mentioned by him; but here, says he, the plaintiff hath a good

right

on Actions on the Case.

right to the sack ; for as the *feri facias* was returnable at the next court, so *that the serjeant might have sold the sack at any time, P *390.
before the day of the return, but when the day is past, his power of selling is determined. And here it appears to be past, and it could be to no purpose for the serjeant to have the sack delivered to him, when he can do nothing with it ; and if his power had not been determined, it is true a request at that day would not have been material. As to the second point, the question was properly divided into three parts. 1. Whether trover and conversion would lie upon a bailment. 2. Whether the denial of the money without any thing more, was a conversion. 3. If all be adjudged against the defendant, yet whether upon this verdict the plaintiff could have judgment against the defendant. In the argument of this case divers points were spoken to, whether the bailment is traversable, of the nature of an action of detinue, and its difference from an action of trover, where the privity of the bailment is determined ; where a man shall have advantage upon a special plea, which he could not have upon not guilty, where an action of trespass or trover will not lie against the person to whom goods are bailed, and where it does, where the denial shall or shall not be deemed a conversion ; and the difference between money in a bag and out of a bag ; but upon the whole, judgment was given against the plaintiff.

10. Where the selling the goods was adjudged not to be a matter issuable. 1 *Anderfon* 20. the Lord Mountague against the Countess of Worcester.

11. An action of trover was brought for five cows ; upon not guilty pleaded, a special verdict was found, that one *Blegrave* was possessed of those kine, and put them to pasturage with the defendant, and agreed to pay him twelve pence for every cow weekly, as long as they remained with him at pasture ; and that afterwards *Blegrave* sold them to the plaintiff, and he required them of the defendant, who refused to deliver them to the plaintiff, unless he would pay for the pasturage of them for the time they had been with him, which amounted to ten pounds. Afterwards one *Forster* paying him the said ten pounds, by the appointment of *Blegrave*, he delivered the five beasts unto him ; and if *super totam materiam* he be guilty, they find for the plaintiff and damages twenty-five pounds ; and if, &c. then for the defendant. *Jones and Croke* (*absentibus cæteris Justiciariis*) conceived, that this denial upon demand and delivery of them to *Forster*, was a conversion ; and that he may not detain the cattle against him who brought them, until the ten pounds be paid, but is put to his action against him, who placed them at pasturage. And it is not like to the cases of an innkeeper or a taylor ; they may retain the horse or garment delivered to them until they be satisfied ; but not when one receives horses or kine, or other cattle to pasturage, paying for them a weekly sum, unless

Readings and Observations

unless there be such an agreement betwixt them. Whereupon a rule was given, that judgment should be entered for the plaintiff, 3 Cro. 271. *Chapman v. Allen*.

12. In an action of trover and conversion, nothing was proved but a tortious taking of the cattle by way of trespass, and driving them away; and it was ruled a good ground for this present action, and a conversion shall be intended; otherwise when he comes to them by trover, there an actual conversion shall be proved. Cl. 112. *Beckwith v. Elsey*, 2 Syd. 264. *Bruen v. Roe*, agrees as to the first point, but says, that where the defendant comes by the goods by trover, that an actual demand must be proved.

13. In an action of trover, &c. to prove the conversion, it was offered, that the plaintiff did demand satisfaction for the corn; and it was ruled good evidence, the demand being to the party himself who took the corn; though the corn itself was not demanded, but satisfaction, *quod nota*. Cl. 122. *Rookeby's Case*.

P* 391. 14. *A.* brought an action upon the case, and declared, that the dean and chapter of *Westminster*, did lease unto him a house for years by deed indented, of which indenture he was possessed, and afterwards lost it; and by trover it came to the hands of the defendant, who sold it, and converted the money thereof coming to his own use; the defendant pleaded not guilty, and the plaintiff gave in evidence, that the said lease was made to him, and to one *B.* and that the said indenture was delivered to the said *B.* and that was agreed to be the possession of them both; and afterwards *B.* died, and afterwards *A.* the plaintiff was the sole owner of it; and that was holden to be good evidence on the part of the plaintiff; and if the plaintiff can prove the other part of his declaration, *i. e.* that the indenture came into the hands of the defendant, and that he sold it, that then he should recover. But it was given in evidence on the defendant's part, that the said *B.* sold to the said defendant his part and interest in the said lease, and also the said indenture; so as now he is become tenant in common with the plaintiff, and then his sale doth not give any cause of action to the plaintiff, and that was holden by the whole court to be good evidence without pleading it; the case went further, that *A.* being within age. his father leased the lands for twenty years; and afterwards the son at his full age, upon the back of the indenture, did release to the defendant all his right; and it was holden by *Wray* Justice, that when the father leased, he did it as guardian to his son; and it was not any ejectment, but it was a lease in the behalf of the son, although the son might avoid it; and then when the endorsement is *ut supra*, the same is a good assignment, and after the plaintiff was nonsuit. 2 Leon. 220.

15. In an action of trover and conversion of goods to the defendant's use; upon not guilty pleaded, they were at issue; and there an inventory of the goods was given in evidence to the jury, as the goods

on Actions on the Case.

goods were appraised by upholsters. And in this evidence another point did arise, these goods were taken in execution, and delivered to the defendant by the sheriff; and afterwards the owner of the goods, against whom the execution was awarded, made a deed of gift of them to the plaintiff by these words, *He granted all those goods which were late put in execution.* Coke Chief Justice held, That this was not sufficient evidence. 4 Leon. 243. Arden and Goad's Case.

16. In an action of trover and conversion, if the jury find the conversion upon a bailment, yet that does not destroy the action, if it is for a conversion of money in a bag, a denial is a conversion, because it cannot be known from other money; but a denial of the delivery of a bond is not a conversion of itself; but where money is delivered as a pledge, till another thing be delivered, an action of trover will not lie against a person who receives the money, till the thing for which the money was pledged be redelivered. Moor. 841.

17. Where the plaintiff had a *bill of exchange* drawn upon the defendant, and the same was sent by J. to be accepted, who kept it, and would not deliver it, though the plaintiff had indorsed the bill, yet J. S. might be a witness. 1 Salk. 136. Lucas v. Haynes.

18. See a special verdict in trover for tithes. Telw. 43. Chambers v. Mason, and several exceptions to the matters found thereby.

Concerning Evidence in Trover.

1. In an action of trover for a ship and cargo; it was objected in point of evidence, that the cargo was shipped by A. B. and company; and B. being dead, the action brought by A. only is ill, because it appears others have an interest; but it was ruled, that this ought to be proved, and if there are others, it is matter in abatement, and ought to have been so pleaded; and a distinction was made between an action *founded upon a tort, as this was, and a P *392. contract where the plea is *non assumpsit*; because upon *non assumpsit* it may be deemed another contract, but the party may make a tort joint or several; and if a man brings trover for a ship, and upon the evidence it appears he has but a sixteenth part, it is good, and the interest of the others shall only be given in mitigation of damages. Dockwray and Dickenson. P. 8 of W. 3. B. R. Skinner 640.

2. In an action of trover brought by an executor or administrator, on the possession of the testator or intestate, it is not necessary for the plaintiff to prove himself executor or administrator; but if it be brought on his own possession, he must prove it, to make himself a property in the goods as executor, &c. Far. 141.

3. An

Readings and Observations

3. An action upon the case was brought for not delivering a horse, and for converting it to his own use, held good after a verdict; but upon a demurrer, *Hob.* was of opinion it would have been naught. 3 *Cro.* 16. 2 *Cro.* 150. 1 *Vent.* 366. 1 *Syd.* 295.

4. An action of trover was brought for goods, and the proof depended upon a *feri facias* and a *venditioni exponas*; and because they could not be found upon record, proof of them by witnesses was admitted as evidence; so a conviction of record was proved by witnesses, the record being burnt, it being not a matter directly in issue, but only inducement to the issue. *Har.* 323.

5. In trover and conversion, issue was joined that the horse in question was bought at *Dale* in the county of *York*, in open market there; but the evidence was, that it was bought at *S.* in *Lancashire*; and it was holden, that this did not prove the issue; and that as this is pleaded, the place is material; whereas upon a general issue it had not been so. *Clay* 131. *Anonymus.*

6. In trover, upon evidence at a trial before *Holt*, Chief Justice, at the sittings in *Middlesex*, the case was, the plaintiff proved the goods to be in his possession, and to be taken away by the defendant: the defendant shewed, that these were the goods of *Jane Blackham*, in her life-time; and that the defendant had taken out letters of administration to her, and so was intitled to the goods. Upon this the plaintiff proved, that some few days before her death, she was actually married to him: And in answer to that it was insisted, that the spiritual court had determined the right to be in the defendant; for they could not have granted administration to the defendant, but upon supposing there was no such marriage; and that this sentence being of a matter within their jurisdiction, was conclusive, and could not be gainsaid in evidence. And it was said by *Holt* Chief Justice, that a matter which has been directly determined by their sentence, cannot be again tried. Their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary; but that is to be intended only in the point directly tried. But otherwise is it, if a collateral matter be collected or inferred from their sentence, as in this case; because the administration is granted to the defendant, therefore they infer that the plaintiff was not the intestate's husband, as he could not have been taken to be, if the point they tried had been married, and their sentence had been, not married. 1 *Salk.* 290. *Blackam's case.*

P *393. 7. In an action of trover for money, the case upon evidence appeared to be, that the plaintiff's son had a general authority from his father, to receive and pay his father's money. The son took a bill for money due to his father, and received it without a particular authority for that purpose; and this receipt was with an intent to imbezil and spend it: But he gave a receipt as for money had to his father's use; and this money was given to the defendant. The questions were, first, if the son could be a witness in this case to prove the delivery? And secondly, *whether the father could maintain

on Actions on the Case.

an action of trover? *Holt*, Chief Justice, was of opinion, that the son might be admitted as a good witness, his testimony being corroborated by other circumstances; and that the action was maintainable for the father; for that the general authority that the son had to take his father's money, made the receipt of the money to be to his father's use, and is a good discharge of the debt, so as that the father could not avoid the payment, and charge the person that paid the money with an action; and then, if the payment was a good discharge, it is reasonable it should be his money; and the possession of the son is the possession of the father, the son being to this purpose as his father's servant; and according to this opinion the plaintiff had a verdict, but he said he was willing to have a case made of it; but the defendant acquiesced in his opinion. 1 *Salk.* 209.

8. In an action on the case for a trover and conversion brought by *J. S.* a citizen of *Colchester*, against the farmers of toll of the city of *London* for taking of goods; the defendant pleaded not guilty. Upon a trial at bar, *Jones* and *Croke* being only in court, the defendant confessed the taking of the goods for non-payment of toll, which the citizens of *London* claimed by custom, and the citizens of *Colchester* claimed to be exempt by charter of King *Richard*, and the citizens of *London* proved by several records and entries in their books, that the citizens of *Colchester* paid toll. And on the evidence, the counsel for the plaintiff objected, that this was no good evidence on not guilty, but ought to have been pleaded specially; to which opinion *Croke* inclined. *Sed Jones e contra*; for it is not like a general action of trespass, in that he must plead specially the custom for toll; but in an action on the case for trover and conversion, every thing that proves the conversion lawful may be given in evidence on the general issue; but the jury was permitted to bring in a special verdict if they pleased: nevertheless they found a general verdict for the defendant; and judgment was given accordingly. *W. Jones* 340. *City of Colchester v. City of London.* Note; It appears by 1 *Roll's Rep.* 44, in the case of *Hill* and *Harwkes*, that the custom to take the toll may be pleaded specially.

9. In trover, upon not guilty pleaded it appeared in evidence, that the defendant was tenant by the curtesy of lands in *Ireland*, and had cut down and sold the trees of the estate; and that the reversion belonged to the plaintiff, and two others in coparcenary: upon a case made for the opinion of the court, it was resolved, First, That in local actions, as in trespass *quare clausum fregit*, the plaintiff cannot prove a trespass but where it lay, nor lay it in any other place but where it is; but it is otherwise in actions transitory, as trover: *ergo*, here he may lay the conversion, and prove it in *Ireland*. *Vide Stile* 331. Secondly, One jointenant, or tenant in common, or parcener, cannot bring trover against another; if he does, it is good evidence to destroy the action upon not guilty: but if

Readings and Observations

if one jointenant brings trover against a stranger; in that case the defendant may plead it in abatement, but cannot take advantage of it in evidence. 2 *Lev.* 113. *Cro. El.* 554. 1 *Salk.* 290. *Brown v. Hedges.*

10. The detainer of goods from an owner after request, is allowed for a sufficient evidence to maintain a conversion: and *Hobart* said, that though legally it were not a conversion, yet in that case it was reasonable to allow it for an evidence to prove a conversion; because, if one man have goods of another lawfully, by finding or bailment, yet when the owner requires them, he that had them can no longer lawfully hold them; and therefore when a man still detains them from another, it argues he claims them as his own, and so uses them. *Hob.* 187. *Agar v. Lisle.* S. C. not S. P. 1 *Brow.* 5. S. C. *Hutt.* 10. But that book says, a request and refusal to deliver is good evidence to prove a conversion; but if it be found specially, it cannot be adjudged a conversion.

P* 394. *11. If the goods were not the plaintiff's, the defendant shall not plead it; but shall plead not guilty, and give it in evidence. *Bro. Action on the Case.* Pl. 109.

12. In an action upon the case upon a trover and conversion of 200 l. delivered by the plaintiff to the defendant; and upon not guilty pleaded, the question was, if denial by the defendant to pay it upon request, would bear an action; and the case of *Isaac* was argued, who brought an action of trover, &c. for 200 l. in a bag; and by a verdict it was found that a demand was made thereof, and a denial to pay; and by *Doderidge*, it was a conversion.

13. Trover for fourteen lemon-trees, and the statute of limitations pleaded. On evidence at *nisi prius*, *coram Holt*, chief justice, it appeared, the plaintiff obtained leave from my Lord *Brudenell* above six years before to have the trees stand in his garden at *Tewit-tenham*; and that his Lordship's gardener might take care of them. After my Lord sold his garden, with all his trees therein, to my Lord *Portland*; who afterwards sold the garden, and whatever he had from my Lord *Brudenell*, to the defendant; and a demand and refusal within six years proved upon the defendant.

Here it was objected, 1. That the gardener, who received the trees first from the plaintiff, and continued gardener all along, and looked after and reared the trees, could not be a witness; for that he, in case he proved a title in the plaintiff, could hereby intitule himself to an action for his labour and skill employed in rearing up the trees; whereas if it went for the defendant, he was to have nothing.

But this was over-ruled by *Holt* chief justice, because if the gardener took care of them as my Lord *Brudenell's* servant, he was to have nothing for his pains from the defendant.

2. If my Lord only gave the gardener leave to do it for the plaintiff, the gardener then was so far the plaintiff's servant; and

On Actions of Covenant.

A. covenants to pay 20l. to B. not naming his executors or administrators, yet they are chargeable by action of debt or covenant after the death of A. because he covenanted for himself.

3 An action of covenant was brought against an executor, upon the covenant of the testator, to teach an apprentice his trade; it was moved, that this covenant was personal to the testator, and does not bind his executors, but only binds the master during his life to teach the apprentice; but *per Curiam*, it binds the executors also, and they ought to see the apprentice taught his trade; and if they are not of his trade, they ought to assign him over to another, who is of the trade, so that he may be taught. 1 Lev. 177. Walker v. Hull.

4. An action of covenant was brought by A. against B. as assignee of D. for that upon an indenture of demise, D. covenanted for himself, his executors and administrators, to leave 15 acres every year *absque cultura*; and that D. granted his estate to the defendant, and then a breach is assigned that he did not leave 15 acres to pasture, but that such a day he plowed up all; all the court held, that this covenant is to be performed by the assignee, though he be not named, because it is for the benefit of the estate; but to a collateral act, as to build *de Novo*, or such like, it shall not bind him. 2 Cro. 125. Cockson v. Cock.

* 5. And so where lessee by patent bargains and sells to C. and P* 113 it was mentioned in the patent, that the patentee, his executors, and assigns should repair, the bargainee is bound by this, and the declaration is good, though he is not named assignee. 2 Cro. 240. Ralph Low Ewre v. Strickland.

6. Where it was held, that a bishop is not bound to pay the taxes which his predecessor had covenanted to pay. 2 Lev. 68. Davenant v. Bishop of Sarum.

7. A person covenants that another shall enjoy his land for twenty-one years, and afterwards resigns, he shall still be bound by his covenant. 3 Bul. 203. Rudge v. Thomas.

Against Grantees, Assignees and Lessees.

1. If A. leases for years to B. and B. for himself, his executors and administrators covenants with A. to build a wall upon part of the land, demised, and after B. assigns, the assignee is not bound by this covenant; for the law will not annex the covenant to a thing not *in esse*. Pasch. 25 El. Spencer's case, 5 Co. 15. adjudged.

2. But if B. had covenanted for him and his assigns to build the wall, &c. this would have bound the assignee, because it is to be done upon the land, and the assignee is to have the benefit thereof. Pasch. 25 El. 5 Co. 15. *per curiam*.

3. But though the covenant be for him and his assigns, yet if the thing done be merely collateral, and no way concerns the thing demised, the covenant shall not bind the assignee; as if it be to build an house upon other land of the lessor, or to pay a collateral sum. Pasch. 25 Eliz. 5 Co. 15. *per curiam*.

Vol. II.

K

4. But

Readings and Observations

4. But if a man demises sheep, or other personal things for a certain time, and the lessee covenants for him and his assigns, at the end of the term to deliver such sheep, &c. or the price for them, and the lessee assigns them over, the assignee shall not be bound by the covenant; for it is but a personal contract, and there is not such privity as between lessor and lessee of land, and his assigns. 5 Co. 16, 17.

5. So if a man leases land for years with a stock of cattle, and the lessee for him and his assigns, covenants to deliver the stock at the end of the term. 5 Co. 17.

6. If a lessee for years for himself, his executors and administrators, covenants with his lessor to leave 15 acres every year for pasture *absque cultura*; and after the lessee assigns, the assignee, though not named, must perform the covenant, because it is for the benefit of the estate, according to the nature of the soil; but a collateral covenant, as to build *de novo*, &c. shall not bind him, unless named. Pasch. 4 Jac. between Cockson and Cock. Cro Jac. 125. adjudged. 2 Danv. 239.

7. An action it is said will not lie upon an *implied covenant* against an executor. Moor 74.

8. The lessee covenants to repair during the term, an action of covenant lies against the assignee of the term, and is not determined by the death of the lessee, although he doth not covenant with the lessor and his assigns. And it was also held that the breach was well assigned, that he permitted the messuages to be ruinous, without saying that he had not repaired them. Moor. 399.

9. *A.* brought a writ of covenant against *B.* executor of *C.* setting forth, that *C.* by indenture had demised to *A.* for years; that *Scarles* one of the defendants entered upon *B.* for that *C.* was only tenant for life, remainder to *Scarles*; and that *Scarles* within the term defeated the estate of *B.* the lessee by his entry; and it was adjudged that the action would not lie. Moor 74. Swan v. *Scarles*.

P* 114 * 10. An action of covenant was brought by the assignee against the lessee on a lease (excepting an entry with liberty to wash in the kitchen, and a passage for that purpose) for hindering him of his passage, and it was held to lie. 1 Show. 388. Bush v. *Callis*.

11. Though an action will lie by the lessor against the lessee, after an assignment for a breach of his covenant, yet it seems that must be upon an express covenant; for though *yielding and paying* do make a covenant by implication of law, yet it is not such a covenant upon which the lessor may bring an action against the lessee after an assignment. 1 Sid 447. 1 Sid 266. 2 Cro. 309. Barnard v. *Godscale*.

12. But where the action was brought by *A.* against *B.* as assignee of one *M.* upon an indenture, wherein *M.* covenanted to pay annually during the term, 20s. to the church-wardens of *St. Saviour's*, and to repair, and the breach was assigned in both these instances:

On Actions of Covenant.

instances and entire damages; the court held, that the assignee is not chargeable with this covenant of the payment of an annual sum as it is a mere collateral covenant, and the judgment was reversed. 2 Cro. 438.

13. Where it was adjudged that the action would lie against an executor of a lessee, who had assigned his term upon a covenant, not to erect a building upon the premises. Cro. Car. 188, *Bachelor v. Gage*.

14. Where it was adjudged to lie against an assignee of part of the land upon a covenant to repair. 3 Cro. 222. *Congham v. King*.

15. That it lies not against an infant upon indentures of apprenticeship. *Gilbert v. Fletcher*. Cro. Car. 179.

16. And a difference is said to be taken between a covenant in deed, and a covenant in law; for where it is a covenant raised by implication of law, there after the assignment of the lessee and acceptance, no action lies against the lessee, but where it is by an express covenant, there it always lies against the lessee; and if the covenant be to repair a house, then the lessor hath it in his election to sue the lessee, or his assignee; but if it be a collateral covenant, there though it be express, the action only lies against the lessee. *W. Jones* 223. *Conan v. Kemise*, *W. Jones* 245.

17. Where the action hath been held to lie against the lessor, and where not. *W. Jones* 360. *Cave v. Brooksby*.

18. Where a man makes a lease for life, and after a lease for years, to commence after the lease for life, and afterwards grants the reversion in fee, with warranty against him and his heirs, and assigns, and all claiming under them; lessee for life dies, the grantee enters, and the lessee for years enters upon him; 2, whether grantee may bring an action against the grantor. 2 Roll's Rep. 25. *Rudge v. Pincombe*.

19. Whether trespass or covenant lies against the assignee of the executor of the lessee. *Latch* 98. *Lisle v. Martin*.

20. *A.* made a lease for life to *B.* and covenanted for him and his heirs, that he would save the lessee harmless from any claiming, by, from, or under him; *A.* died, and his wife brought a writ of dower against the lessee, and the lessee brought an action against the heir; and it was adjudged against the heir, but otherwise would it have been if the demandant in dower had been the lessor's mother; for then she did not claim under him. *Godb.* 333. *Anonymus*.

21. Tenant for life of land makes a lease and breaks his covenant, he in reversion is not chargeable therewith; for here is not any warranty, for he in reversion is not as a grantee or lessee, but assignee, to whom this warranty in law cannot extend; but admit the warranty does extend to the lessee, yet it is now determined with the estate of tenant for life. 1 Leon. 179. *Cheiny v. Langley*.

* 22. The defendant being seised of land in fee, let it for life, P* 115 remainder for life rendering rent, and afterwards acknowledged a statute; and after that by indenture bargained and sold the rever-

Readings and Observations

sion, and covenanted with the bargainee, his heirs and assigns, that it should be discharged within two years, of all statutes, charges and incumbrances, (excepting the estate for life) the statute is extended; and thereupon this reversion and rent was extended, the bargainee grants this reversion to the plaintiff, who, for not discharging of this statute, brings an action of covenant; and all this matter being disclosed by the court, it was thereupon demurred; the question principally moved was, whether the plaintiff as assignee, shall have benefit of this covenant made to the bargainee by the common law, or by the statute of 32 H. 8. But because the covenant was broken before the plaintiff's purchase, the plaintiff being then in extent, and so a thing in action which could not be transferred over, it was adjudged for the defendant, that the action was not maintainable against him; and here the court held clearly, that the statute of 32 H. 8. doth not extend to covenants upon estates in fee, or in tail, but only to leases made for life, or for years; and therefore this assignee was out of the statute; but for the other matter principally it was adjudged *ut supra*. 1 Cro. 863.

23. A man made a mortgage for years to *A.* who, without the mortgagor's joining, assigned it to *B.* who assigned it to *C.* under whom the plaintiff in ejectment claimed; and it was objected by Levinz, that though he admitted, the first mortgagee might well assign without making any entry, or joining the mortgagor, who is but tenant at will to the mortgagee, and his possession, as such, is but the possession of his mortgagee; yet the assignment of the first mortgagee determined the lease at will, and the mortgagor thereby became tenant at sufferance, and his continuance in possession divested the term, and turned it to a right, so that it could not be assignable without *B.*'s entry on the mortgagor's joining; that it was at least a divesting of the term at the election of the assignee, according to Blunder and Daw's case, 1 Cro. 305. and *B.* the assignee had made his entry, and brought an ejectment against the mortgagor, which admitted his being out of possession; and they shewed the record itself, wherein the assignee was lessor of the plaintiff; *sed per* Holt Ch. Just. upon executing the deed of mortgage, the mortgagor by the covenant to enjoy till default of payment, is tenant at will, and the assignments of the mortgagee could only make the mortgagor tenant at sufferance; but his continuing in possession would never make any disseisin, nor divesting of the term; otherwise if the mortgagor had died, and his heir had entered, for the heir was never tenant at will, but his first entry was tortious; or if the mortgagee had entered upon the mortgagor, and the mortgagor had re-entered, for the mortgagee's entry had been a determination of the will, and the re-entry of the mortgagor had been merely tortious. Salk. 246.

24. If *A.* seised of lands in fee, conveys it by deed indented by *B.* and covenants with *B.* his heirs, and assigns, to make any other assurance upon request, for the better settlement of the land, &c.

On Actions of Covenant.

and after *B.* conveys it to *C.* who conveys it to *D.* and after *D.* requires *A.* to make another assurance according to the covenant, and he refuses, *D.* shall have an action of covenant in this case against *A.* by the common law, as assignee to *B.* Trin. 14 Car. B. R. between *Middlemore* and *Goodall*, upon a demurrer admitted and agreed *per curiam*; but judgment was given against the plaintiff for another cause. 1 Roll's Abr. 521. letter K. pl. 6.

* Other Cases against whom this Action may or may not be P* 116 brought.

Hutton 63. Jennings v. Pitman.	1 Leon. 277. Bishop v. Redman.
Popham 137. Bret v. Cumberland.	3 Leon. 51. Anonymus.
1 And. 12. Serles v. Stranham.	2 Keb. 352. Cremer v. Humberston.
82. Isted v. Stoneley.	686. Horn v. Chandler.
1 Brownl. 20. Fisher v. Anneers,	3 Keb. 39. Bolton v. Lee.
1 Bul. 281, 282, 283. Attoe v. Hemings.	1 Keb. 155. Bree v. Curr.

Other Cases where the action hath been held to lie against the Assignee.

1 Brownl. 19, 20, 10 H. 7. 10.
5 Co. 16. Dy. 257. Dy. 19, 14. Dy. 114. Bro. Cov. 50.

Against the Heir.

Dyer 337. b. Wotton v. Cooke.

Where it has been held to lie against Executors.

Dyer 14. Anonymus.

114. Ingery v. Executor' Hide.

324. a, b.

Thirdly, Of the Performance, where it hath been held to be duly performed, and where not.

1. If the covenant be performed in substance, and according to the intent, it is good, though it differ in words; as when one covenants to deliver the testament of the testator, and he delivers *litteras testamentarias*, and so pleads it, yet that is deemed a performance because it is the substance, though it differs in words. 7 E.

4. 3. 1 Roll's Abr. 424.

2. But if a covenant be to withdraw a suit, a discontinuance is no performance, because it differs in substance, for a *retraxit*, which is the proper entry, for withdrawing a suit operates as a bar to another action, but not so of a discontinuance. 2 Ed. 4. 8.

3. If the condition or covenant be to assure lands to such a person as the obligee or covenantee shall name, and after he assures this to the obligee or covenantee himself, this is a good performance of the condition or covenant, though it be not alledged that the obligee named himself; for his acceptance is a nomination of himself. 1 Roll's Abr. 424. Houseye v. Wild.

4. If a lessee of an house covenants not to let the shop, or yard, or other things belonging to the house, to any that shall sell coals there, and afterwards the lessee lets all the house to one who sold coals,

Readings and Observations

coals, that covenant is broken, because the intent was not performed. 1 Roll's Abr. 427. pl. 7. Chinsby and Bonner v. Langley.

5. Where *A.* covenants to make an assurance to *B.* before such a day, at the costs of *B.* *A.* is to have notice what manner of assurance he is to make, and the *B.* is to tender some sum of money proportionable to the costs. Moor 454.

P* 117 6. *B.* Lord of a manor covenanted with his copyholder to assure to him and his heirs the freehold and inheritance of the copyhold, and the copyholder, in consideration of the same to be performed, did covenant to pay such a sum; and it was the opinion of the whole court, that the copyholder is not tied to pay the money before the assurance is made, and the covenant performed: but if the words had been in * consideration of the said covenant to be performed, then he had been bound to pay the money presently, and he must have had recourse to an action of covenant. 2 Leon. 211, 212. Brocen's case.

7. Where a man covenants to do all acts for the further assurance, the party is bound to acknowledge the note of a fine at the assizes, although there be no writ of covenant depending. Moor 810.

8. If a man hath three daughters, and covenants with *J. S.* that he shall have the disposition of the marriage of one of them, it is in the election of the father, of which of his daughters he shall have the marriage, and he need not deliver either of his daughters before he is required; but upon request he is bound to deliver a daughter to him; for otherwise he could not have the effect of the covenant, because persons could not repair to her while in her father's custody. Moor 72, 73.

9. An action of covenant was brought against two, *B* and *C.* upon an indenture, wherein they covenant artificially to erect a house; one of them lets judgment go by default, and the other pleads that they did artificially erect the house; and upon issue joined, it is found for the defendant; no writ of inquiry shall issue against the other defendant, nor shall he be charged with any damages; and it is not like the case where two covenant to go to *York*, for that must be personally performed by them both; but the performance of one shall work a discharge as to both, and so would it have been if it had been pleaded in that manner. 1 Sid. 76. Boulter v. Ford.

10. Upon marriage covenants the case was, that *A.* covenanted to pay *B.* his son-in-law and daughter 20*l.* per annum, and the question was, if this should be for a year only, or for their lives; and adjudged that it shall continue for their lives. 1 Sid. 151. Hookes v. Swaine.

11. When a covenant is for the lessor, to save the lessee harmless and indemnified, and that he shall quietly enjoy against such a person in particular; it shall be construed against a tortious entry. Cro. Eliz. 213.

And

On Actions of Covenant.

And if the lessor enters, it lieth upon a covenant raised by implication of law, that a man shall quietly enjoy where there is only the words *demisit et ad firmam tradidit*, but against the entry of a stranger; it lies not against the lessor without a covenant, which is in the nature of an express warranty. *Andrew's Case of Gray's Inn.* Cro. Eliz. 214.

12. Where a covenant shall be performed, and still remain good, though the estate be void. *Waller v. the Dean of Norwich.* Ow. 136.

13. A man covenants to grant an advowson to another, what time he has to do it where no time is limited. 3 Bulk. 167. *Allen v. Wedgwick.*

14. Where the covenant was by A. that he should make a lease to B. or to his assigns for three lives as he should name, and B. names himself and two others; A. refuses, and upon an action upon this covenant it was held, that A. had his election to make it to B. or to his assigns for three lives. 2 Bulst. 168.

15. Where A. covenants with B. to pull down three messuages, and to build in the same place three substantial houses, and that he would, during all that time, well and sufficiently repair all the houses so agreed to be built, and also all, and every the sewers, &c. and the said demised premises, and the houses and buildings thereupon to be erected and built, and every of them would leave well repaired; and the defendant built four houses, it was held that the covenant extended to his repairing the fourth house, by three judges against one. 2 Ven. 128. *Dowse v. Cale.* 3 Lev. 264.

16. Where a covenant is to make a further assurance, Q. whether he is not obliged to make it with usual covenants. 1 Sid. 467. Dy. 262. b. 2 Cro. 115. 2 Roll's Rep. 191. Raym. 190. 2 Keb. 685. 1 Roll's Abr. 423. Yel. 45. 1 Leon. 29.

* 17. If a man covenants that his son, then *infra Annos nobiles*, P* 118 shall marry the daughter of J. S. and he does marry her, and after at the age of consent, the son disagrees to the marriage, yet is the covenant performed. *Fenner's case*, Owen 25.

What will excuse the Performance of a Covenant, are the Acts of God, or the Acts of the Party.

1 Of the Acts of God.

1. If a man covenants to do a certain thing, before a certain time, though it become impossible by the act of God, yet this shall not excuse him, forasmuch as he precisely bound himself to do it. 1 Roll's Abr. 450. pl. 8.

2. If a man covenants to deliver goods at London, and the boat is over-turned by tempest, yet this shall not excuse him. *Thompson v. Miles.* 1 Rolls fol. 450. pl. 9.

3. Yet if a man covenants to build a house before such a day, and afterwards the plague is there before the day this shall excuse him from the breach of the covenant for not doing it before that day;

Readings and Observations

day; for the law will not compel him to venture his life, but he ought to do it in a convenient time after. 1 Roll's Abr. 450. pl. 10.

4. And this difference hath been taken where the law creates a duty or charge, and the party is disabled to perform it without any default in him; as in the case of Waste, where the house is destroyed by a tempest. But when the party by his own contract or covenant creates the duty or charge upon himself it is otherwise; as if a lessee is bound to repair, though the house be burned down by lightning he must repair it. Allen 27.

5. If *A.* covenants that his son shall marry *B.*'s daughter, if the daughter refuseth, yet the covenant is broken, for the daughter is a stranger, and *B.* hath taken it upon him that his son shall marry her. Perk. 756.

6. Where a lease for years was made, and the lessee covenants to defend the land from the water which surrounds it, upon the penalty of 10l. if by a sudden flood the banks are destroyed, he must repair them again, because of his covenant, but he is excused from the penalty, because it was the act of God. Dyer 33. Anonymous.

2. Of the Acts of the Party.

1. If lessee for years covenants to convey the water which stands upon the land before such a day, and after the lessor enters before the day, and continues there till the day past, yet this shall not excuse the performance of the covenant, for that is collateral to the land. Hill. 37 El. B. R. 1 Roll's Abr. 453.

2. If a man covenants with me to collect my rents in such a town, and I interrupt him, this shall not excuse the covenant. H. 37 El. B. R.

3. If lessee for years of an house covenants to repair, and to leave it in as good plight as he found it; and afterwards, certain sparks of fire come out of the chimney of the lessor into his house near adjoining, by which the lessee's house is burnt down, this shall excuse the performance of the covenant, so that he is not bound to re-edify it, because it came by the act of the lessor himself. 1 Roll's Abr. 454.

4. If the thing to be performed by the covenant may not be performed without the presence of the covenantee, there his absence shall excuse the performance. 1 Roll's Abr. 457. As if the covenant be to make a feoffment to the obligee.

P* 119 * 5. If a man be bound to *B.* that *J. S.* shall marry *Jane E.* before such a day, and before the day *B.* marries her himself, hereby the covenant is discharged. 1 Inst. 206.

6. A man covenants to enfeoff the covenantee before such a day, and after, and before the day, the covenantee disseiseth the covenantor, and keeps it with force and arms till after the day, so that the covenantor cannot enter, this shall excuse the performance. 8 Rep. 92. Frances's case.

On Actions of Covenant.

7. If a lessee for years covenants to relinquish part of the land at the end of the term, fallowed, and fit for wheat, proviso the lessee upon such warning, may surrender and depart at any feast of *Michaelmas*, at any time within the term of performing the covenants; if he after warning surrender, and doth not leave the land fallowed, he hath forfeited his covenant; for the acceptance of this surrender doth not dispense with the covenant in as much as by the covenant he is to accept it. *Moyle v. Austin*, 1 Roll's Abr. 455.

8. Whether on a covenant to do a thing, and no time is limited, the party ought to do it in a convenient time, or at any time during his life, or whether to be hastened by a request. 1 Leon. 124, 125. *Carter v. Booth*.

Other Cases relating to the Time when a Covenant is to be performed.

6 Rep. 30. 1 Instit. 208.	15 Ed. 4. 30. 6 Rep. 30.
Cro. Eliz. 298. Popham 198.	1 Instit. 208. a. Cro. Eliz. 798.
1 Roll's Abr. 436. letter C. pl. 3.	Nose v. Bacon.
1 Roll's Abr. 441. letter L. pl. 2.	1 Roll's Abr. 438. letter Q.
1 Roll's Abr. 440.	2 Co. Manter's case.
See other Cases where Covenants are said to be well performed, and where not.	
1 Leon. 29. Alington v. Bale.	1 Roll's Abr. 425. Shan v. Belby.
124. Cater v. Booth.	1 Leon. 52. Leigh v. Hanmer.
3 Leon. 1, 2. Anonymus.	1 Brownl. 21. Bright v. Cooper.
4 Leon. 187. Anonymus.	2 Lev. 67.
18 Ed. 4. 20. b.	1 Lev. 293. Beavy v. Turner.
1 Roll's Abr. 427. pl. 4. Core's case.	2 Mod. 138.
Hardr. pl. 69. Constable v. Clobbery cited.	1 Mod. 223.
3 Leon. page 1.	1 Leon. 136.
Where Notice and Request hath been held Necessary, and where not.	Dyer 122.
1 Keb. 232. Anonymus.	1 Roll's Abr. 456.
1 Keb. 681. Eliz. v. Roberts.	Godb. 445. Jones 314.
843. Selby v. Walker.	1 Roll's Abr. 438. Peter v. Carter.
Yelv. 37. Sheeton v. Cushe.	441. Pierpoint v. Thumbley.
Dyer 108, b.	Ibm. Somes v. Squibb.
Dyer 338. Wotton v. Cooke.	Yelv. 44, 45. Pudsey v. Newsham.
1 Roll's Abr. 459, 460. Sir John Spencer's case.	Moore 682. 1 Brownl. 84.
Ibm. 460. Chapman v. Chapman.	T. Jones 195. Nath v. Ashton.
Stile 31. Cro. Eliz. 136.	1 Lut. 308.
1 Lev. 185.	Cro. Eliz. 62. Gallies v. Budbury.
1 Keb. 155. 1 Lev. 47.	
Cro. Jac. 390. Palmer 532.	

3 Mod.

Readings and Observations

3 Mod. 295. Harrifon v. Hayward.	butt.	248, 249. Sims v.
1 Roll's Abr. 443. Halsted's case.	Smith.	
2 Roll's Abr. 250. Smith v. Gar-	1 Keb. 681. Eli v Roberts.	

P* 120 * Fourthly, Where Covenants have been adjudged to be suspended, extinguished, or otherwise discharged.

1. A man covenants with his intended wife to give her leave to dispose of so much by her will, and then they inter-marry; the husband having given a bond to a third person for the performance of the covenant; after the death of the wife, the husband is sued upon the bond, for not permitting her to make her will. It was insisted that the covenant was discharged, but there is no determination. See Hob. 216. in the case of Smith and Stafford.

2. *A.* makes a lease for years to *B.* by deed, and covenanted that *B.* the lessee and his assigns should quietly enjoy, &c. the lessee assigns over his term, and a stranger enters upon the assignee, the assignee takes 40l. in satisfaction of his being ejected of the assignor, and afterwards brings an action of covenant against the executor of the lessor. The defendant pleads the acceptance of the 40l. it was held to be no bar; for here is a double covenant, one of the lessor, and the other of the assignor, and therefore the assignee might have two actions, and the acceptance of the 40l. did not destroy his right of action against the executor of the lessor; and it was said, that if a lessee for years assigns over his term, the lessor having accepted rent of the assignee, he cannot demand the rent of the lessee, but he may sue upon other covenants. Stile 300. Whitway v. Pinfont.

3. Whether a bare entry without shewing disseisin or expulsion, will suspend a covenant to pay a rent-charge. 2 Show. 337 Fountain v. Gnauers.

4. A covenant for payment of money at a future day, the defendant pleads a release made before that day, of all debts, dues, actions, and causes of action, writings obligatory, &c. It was adjudged, That the release of all writings obligatory, did not release covenants not broken, for that is releaseable only by special name; and although a covenant be a writing obligatory, yet it hath a particular signification; as when we declare *per scriptum obligatorium*, it means no more than a bond, and demands will not reach it, for that will not release a rent before it is due. 2 Show. 90. Carthage v. Manley.

5. *A.* sets forth, that the queen by letters patent granted a license to him and his assigns, to import *Spanish* wool, and that he by indenture granted to *B.* the defendant, and *R. N.* the said license for eight years; in consideration whereof, *B.* covenanted to pay *A.* 100l. per annum, and further, that every year at *Lady-day*, or within

On Actions of Covenant.

within 20 days, after, *B.* should make a new bond for the payment of the 100*l.* the next year, and assigns a breach for not payment of 50*l.* and for not entering into a bond; the defendant pleads, that there is a proviso in the indenture, that if the defendant every year did not make a bond, or failed in payment of the money at the day, that then the indenture, and every clause, &c. shall be void. Now it was held, that this did not so make the indenture *ipso facto* void, as that *A.* could not bring an action of covenant broken before this breach, but only had relation to future breaches, so that the covenants should have no effect. Cro. Eliz. 77. Nuns v. Gee.

6. Where a covenant was made by *B.* to *C.* and *D.* that *A.* should pay eight pounds yearly to *C.* and to a stranger, this stranger married *E.* who released this payment; and the question was, whether by this release made by the husband of the stranger, who had an interest in the money, *B.* shall be discharged of this covenant; and it was held that it did not. 2 Bulst. 30, 31. Inick and Harris v. Ludburrow.

7. Where covenants are discharged by eviction. Yelv. 22, 23. P* 121

* 8. It is generally said that covenants made in a void deed are void; so it is held in Sopram and Skurrey's case, Yelverton 18. where the declaration did not express that *Z.* had demised the house; and if there be no demise, there is no term, and the indenture being sealed on the part of the lessee, and not on the part of the lessor, it operates to no purpose, neither in respect of the interest, nor in respect of the covenants, for the covenants depend upon the lease; and if such a lease be made, and afterwards surrendered, all the covenants and bonds for the performance thereof are *eo instanti* void also.

9. But upon a void lease the covenants are said to be void in Capenhurst's case, 1 Keb. 131, 164, 182. But 2. if that case be law, for in Owen 136. it is said, if the covenant depends on the interest of a lease, as a covenant to pay rent is void, if the lease is void. But where the covenant is for a thing collateral as a covenant, that the lessor is owner at the time of the lease, or that the lessee shall quietly enjoy; these covenants being collateral to the lease and interest are good, though the lease be void. So where there is a covenant to save the plaintiff harmless against *L.* in a void lease, and the lessee is disturbed by *L.* the covenant is good; for when an estate is created, in which there is a covenant implied in law, there if the estate be void, the covenant is void also. But when there is an express covenant in the deed, it is otherwise, though the lease be void or voidable; as if the lessor covenants that the lessee shall enjoy during the term, and the lessee resigns, yet is the covenant good, though the term be gone. Owen 436.

10. Where *A.* leases by deed to *M.* for ten years, and *M.* covenants at the end of the term to leave four acres of the land sowed and ploughed, and in it also there was a proviso, That if *M.* mislikes his bargain, that upon a year's warning he may surrender

Readings and Observations

render his estate, and *M.* surrendered, but had not left any fallowed; it was adjudged, that the acceptance of that surrender had not dispensed with the covenant. Noy 18, *Austin v. Moyle*. 1 Leon. 179. *Cheney v. Langley*.

11. Where a parson makes a lease for years, in which there are diverse covenants, and after he becomes non-resident, by which the indenture became void; yet the parson may maintain an action of covenant broken before his non-residency. Cro. Eliz. 244.

12. Where the mayor and citizens of *London* covenanted to find eight men to grind every day in *Bridewell mill*, which they let to the defendant, and agreed, That if they failed therein, the defendant pulled down the corn-mill, and made it an horse-mill, and would now deduct so much out of his rent, as he ought to be allowed for the eight men; but all the court held, that by the alteration of that mill in this manner, the lessors are discharged of their covenant; and that this conversion is a waste, although it were for the lessor's advantage, and so it is to convert a corn-mill to a fulling-mill. 2 Cro. 182.

13. Where the heir of a grantor of an advowson tortiously presented to the church, the ancestor having covenanted, that the grantor from time to time shall make good the grant of the presentation, from all incumbrances made, or to be made by him and his heirs; this tortious presentation was adjudged no breach; but if it had been that he should peaceably enjoy, a tortious disturbance had been a breach. Winch 25. *Dr. Hunt v. Allen*.

14. Where the lessor covenants that the lessee shall peaceably enjoy the land, the tortious entry of the lessor is a breach; so it is said if the word *peaceably* had not been there, Hob. 49. But where it is that he shall enjoy peaceably without any lawful impediment, suit, disturbance, &c. a tortious taking of the profits by the lessor is said to be no breach, because of the words *lawful impediment, &c.* and the lessor is a trespassor. * 1 Roll's Abr. 429. But a tortious entry and ouster is said to be a breach. *Cave v. Brookby, Ib.*

Fifthly, When a Covenant shall be construed to be broken.

1. Though the covenantor performs the letter of the covenant, yet if he does any act to defeat the intent or use of the covenant, he is guilty of a breach.

2. As where *A.* covenants that *B.* shall have his grains, that *A.* who is a brewer shall make; and he delivers him all his grains, but delivers them mixed with hops, whereby they become of no service to *B.* this shall be construed a breach of the covenant, it not being performed according to the intention of the parties. And so it is if *A.* covenants with *B.* that he will leave all the timber upon the ground at the end of the term, and *A.* cuts it down.

On Actions of Covenant.

it is a breach, though he does not carry it away. Skinner 39, 40. Anonymus. T. Jones 191.

3. On a feoffment, husband and wife covenant that they are able, and may grant, and will make farther assurance if required within seven years; the wife was an infant at the time of the covenant, and dies within seven years; her nonage is a breach of the covenant as to the ability to grant, but not as to the making of a further assurance. Skin. 42. Nath v. Ashton.

4. An action of covenant was brought by the assignee of a term against the first lessee, in which he covenants, that the plaintiff shall be free from all incumbrances, and be saved harmless, and indemnified from all arrears of rent; and a breach was laid, that 64l. for rent was in arrear, the plaintiff does not here shew he is damnified; for till an action is brought, or distress made, or other damage accrued, he is not damnified; and it is not like to a condition of a bond broken; for there is a damage immediately by the parties being subject to the penalty. Skinner 397. Griffin v. Harrison.

5. Where there is a covenant to make an assurance upon request, if there be a grant made to a stranger before the request, that is a breach of the covenant. Moor 452.

6. If the lessee occupies land excepted in his lease, that is not a breach of the covenant. Moor 553.

7. A suit in chancery is not a breach of covenant, for permitting to enjoy without disturbance. Moor 859. Brownl. 23.

8. Where a man sells land, and covenants to save the vendee harmless, upon request in that case, if the land be extended before any request by force of a statute, there the covenant is not broken; for now the covenant is become impossible by the negligence of the covenantee, for he cannot save him harmless, because he was injured before any request. And it is said, that where there is a bargain and sale of a manor, with an advowson appendant, and a covenant to save harmless from all incumbrances; now if the church becomes void, and another presents by force of a grant of the next avoidance, before the contract made with the bargainee, and the clerk was presented, instituted and inducted, and then the bargainor is required to save the bargainee harmless; it was adjudged that the covenant was not broken, because the request was not made before the church became full. Moor 189.

9. *A.* enters into articles with *B.* to pay 110l. at a certain day to come, and *B.* articles, that upon the receipt of the 110l. he would give *A.* an acquittance, and would also enter into a bond for 400l. to save him harmless from all claims of certain lands; breach assigned that *A.* tendered the 110l. to *B.* at the day, but *B.* refused to receive it, and to give him an acquittance, and also to enter into the bond; after a verdict it was held, that there is no breach of covenant alledged whereupon to ground an action; for that the articles express, that upon the receipt of the 110l. the defendant

Readings and Observations

defendant should give the acquittance and enter into a bond; and the breach alledged is, that the plaintiff tendered the 110l. at the day, and the defendant refused to receive it, and had not sealed the acquittance, nor entered into the bond; and it may be it was the intent of the parties, that it should be in the election of the defendant, either to receive the 110l. or not to receive it; and the plaintiff is not prejudiced by the defendant's not receiving it; for if he should sue for the 110l. the tender and refusal may be pleaded. *Stile 481. London v. Craven.*

10. The covenant wherein the breach was assigned was, That *he should make such an assurance as his counsel should devise of an annuity of 20l. and alledged for breach, that his counsel devised that he should bind himself, and his heirs, by an obligation, for the payment of this annuity yearly; which he had not done; and issue being joined thereupon, after a verdict it was moved in arrest of judgment, that this was not within the covenant, and so no breach; for it is not any assurance of the annuity. Popham: If a man covenants to make such an assurance of the manor of D. as his counsel shall devise, and the counsel deviseth an obligation, or a statute to be made, for the peaceable enjoyment thereof, he is not bound to make it; (*quid curia concessit*) but if the covenant were to do such act or acts for the assurance of the manor of D. as his counsel shall devise, and they devise a statute for the peaceable enjoyment thereof, he is bound to do it. It was also moved, that this was not within the covenant, because the devise was, that he should bind him and his heirs, and there is not any word in the covenant that the heir should be obliged; wherefore, &c. But the court gave not any answer thereto; and it was ended by arbitrement. *1 Cro. 370, 1.**

11. *B.* covenants that he was seised of *Black-acre* in fee-simple, where in truth it was copyhold land in fee, according to the custom; it was held by the court, the covenant is not broken, and the jury shall give damages in their consciences according to that rate; that the county values fee-simple land more than copyhold land. *Noy 142.*

12. Covenant against the Lady *Swinberton*, executrix of Sir *John Swinberton*. The plaintiff counts, that Sir *John Swinberton*, in 8 Jac. let unto him the manor of *Birch-hall* in *Essex*, for 21 years, and covenanted, that the plaintiff should, without let or disturbance of him, his heirs or assigns, or of any other person, by or through his means, title or procurement, and shews for breach, that in 5 Jac. the Lord *Peters* by fine granted that land to the said Sir *John Swinberton*, and to this defendant his fence, and to the heirs of the said Sir *John Swinberton*; and that this fine was so levied by the means and procurement of the said Sir *John Swinberton*; and that afterwards he made that lease in 8 Jac. to the plaintiff, who entered; and afterwards Sir *John Swinberton* made the defendant his executrix, and died, and the defendant

ousted

On Actions of Covenant.

ousted him, and so she hath broken the covenant, &c. It was thereupon demurred and objected, that this title which the feme claims, is not by any title or means derived from Sir *J. Swinerton*, nor by his conveyance, but by the Lord *Peters*; so as she hath the estate immediately from him, and the surviving shall plead it as an immediate estate to herself; and this covenant doth not extend to titles paramount the Baron, but to titles derived under him, and after his estate created; vid. 14 E. 4. 1. Dyer 153. where it was held, that the survivor shall plead an estate made unto himself only, 26 H. 8. 3. 22 H. 6. 52. Dyer 42. But all the court held, that in regard there was an averment, although she claims by the conuzor, yet she is in, and claims by the means of her Baron the lessor; for if the Baron had not procured the fine, she would not have had any *estate, and therefore she is within the covenant; a person who claims by his means, although she claims by rule derived from another, and there was not any disturbance by his procurement, because it was after his death; wherefore it was adjudged for the plaintiff. 2 Cro. 657. 2 Roll's Rep. 286. P* 124

13. A. covenants with B. that before Easter next, he would make a good, sure, sufficient and lawful estate in fee-simple, of the manor of D. discharged from all grants, bargains, sales and incumbrances; if he makes a lease for years under the accustomed Rent, Q. If it be a breach of the covenant. Dyer 139. a.

14. If A. covenants for quiet enjoyment against all persons claiming under him, and A. recovers a jointure or her dower, that is a breach. Palmer 339, 340.

15. Where A. lessee lets an under lease of part of those lands to B. and covenants for his quiet enjoyment, if the original lessor enters for non payment of rent, this is a breach of A's covenant with his lessee. 1 Bulst. 18. *Stevenson v. Powell*.

16. A. lessee for years under a tenant for another's life, having made a lease at will upon the death of tenant *pur autre vie*, grants the estate for the remaining lives, and covenants that he had power so to do; the estate being in him by way of occupancy, and to make a further assurance, and that he should enjoy quietly, the lessee at will being the occupant; whether by this the covenant is broken or not. 2 Bulst. 11, 12, 13. *Chamberlain v. Ewer*.

17. A. covenants, that he or his son *Richard*, or either of them shall work with B. the plaintiff, at the grinding and polishing of glasses, the plaintiff paying to each of them so much; B. alledges a breach, that he requested *Richard*, and tendered to him so much, &c. and he refused to work; the objection was, that the request was made to *Richard*, who was a stranger to the deed, without any notice to the court; held that the word *either* shall be taken most beneficially for A. and that *Richard's* refusing was a breach of the covenant. 2 Sid. 107.

18. Per

Readings and Observations

18. *Per Holt Ch. Justice*, where several lands are charged with a rent-charge, and the owner of these lands makes a lease thereof, and covenants with the lessee to save him harmless, &c. and afterwards the lessee pays the rent to the grantee of the rent-charge voluntarily, and without compulsion, in such case he pays it in his own wrong, and must pay it again to the lessor; but if he is distrained for the rent-charge, and his goods taken, this is a breach of the covenant, and not before; and the lessee must not alledge generally, that he was compelled to pay the rent, but must shew how. 3 Salk. 109.

19. Where the Lord *Rich* did covenant, that certain lands conveyed to the plaintiff for her jointure are of the value of 1000l. per annum, and so shall continue notwithstanding any act done, or to be done by him; and the action was brought, for that the lands were not of the yearly value of 1000l. and it was adjudged against the plaintiff, for the words (*notwithstanding any act*) extend as well to the time of the covenant made as to the time future; and though they were not then of that value, the covenant was not broken, except some act done by him were the cause of it. 1 Cro. 42, 43.

20. Tenant for another's life made a lease for twenty-one years by indenture, and covenanted, that he had not done any act to prejudice the said lease, but that the plaintiff should enjoy it against all persons; tenant for life dies, and the lessor enters, the lessee brings an action of covenant against the executor; and it was adjudged that it lay not, for the last words, *but that he shall enjoy it against all persons*, refer to the first words, viz. *for any act done by him*, &c. and so the covenant is not broken. 1 Cro. 615.

P* 125

* 21. Where the lessor for years covenants, that the lessee shall quietly enjoy, &c. upon whom a stranger entered, and ousted him. Ch. Justice Rolls held, that the covenant in this case was broken, though it be a stranger that entered, and ousted the lessee; and this difference was taken, where a stranger enters upon the lessee, and commits a trespass, and where he enters and ousts the lessee. Stile 67. Anonymus.

22. Where a covenant is to pay rent at the two most usual feasts, viz. *Midsummer* and *Lady-day*, or within fourteen days after, the first payment to be made at *Christmas*; the breach is not well assigned for not paying the rent at *Christmas-day*, but it ought to be for not paying it at *Christmas*, nor within fourteen days after. 1 Show. 77. Anonymus.

23. Where there was the common covenant to repair, and the breach assigned was, that the house fell to the ground such a day; the defendant pleads, that it was true, the house was burned down by casualty such a day, and that the plaintiff entered the next day and evicted him, whereby he could not repair it; it was held that the action was attached, and that the entry therefore could not be any suspension. 2 Show. 401. 403. Pool v. Archer.

24. See

On Actions of Covenant.

24. See the case of *Cresser v. Young*, where it was upon a bond for the performance of covenants, and the defendant after *Oyer* of the deed pleads performance generally, and the plaintiff replies entry and expulsion; and after a verdict for the plaintiff, it was moved in arrest of judgment, that here the breach is not well assigned, for that the plaintiff had not set forth a title in the defendant, and by consequence his entry was tortious, and he a trespassor, and that there no action of covenant would lie. But the court held it was a difference always constantly allowed, where the breach is assigned in the entry of a stranger, there the plaintiff ought to shew a title in the stranger; otherwise where the breach is alledged in the entry of the lessor himself; and that the words *lawful incumbrances* would make no difference; and the court would not drive the plaintiff to his action of trespass, when by the general implied covenant in law, he had engaged no way to avoid his own deed, either by a rightful or tortious entry. 2 Show. 427.

25. A man covenants that he hath good right to grant the manor of *Dale* by him granted, in which he had no right; whether by this the covenant is broken or not. 2 Brownl. 12.

26. Where there is a covenant to leave the premises in as good plight as they were at the commencement of the lease, and the lessee cuts down a tree, the lessor shall not stay till the end of the term before he brings his action, but shall have it immediately. *Waters v. Mountague*, Godb. 335.

27. Where *A.* covenants with *B.* to cause a statute to be cancelled, and the same to be vacated upon payment of 10l. before such a day, and at the day he tendered the statute to be cancelled; but before that day the defendant had sued out an execution upon that statute; and if the suing out an execution before the day be a breach of the covenant was the question; and it was adjudged that it was. *Robinson v. Aunts*, 1 Sid. 48.

28. Where the lessee of a mill covenants to relinquish at the end of the term, as good mill-stones as were then there at the commencement of the term, or to give satisfaction for so much as they should be worse, according to the judgment of two indifferent persons, who should see the same; although those two persons should not agree upon the value, yet if the lessee does not satisfy the lessor for so much as the mill-stones were worse, the covenant is broken. 1 Lut. 688. *Studhelme v. Morrison*.

* 29. If one is obliged to pay 10l. or so much as *J. S.* shall appoint, and *J. S.* does not appoint any sum, the 10l. must be paid, otherwise it is a breach. Lut. 694. P* 126

30. So if one is obliged to make a lease to *J. S.* before *Michaelmas*, or to pay 100l. if *J. S.* dies before *Michaelmas*, the covenantor must pay the 100l. Lut. 694.

Readings and Observations

See other Cases where Covenants may be held to be broken.

Owen 100. Foster v. Wilson.	Godb. 113. Wood v. Ash.
1 Bul. 4. Proctor v. Johnson.	1 Leon. 93. Hamington v. Ryder.
90. Goldney v. Curtis.	3 Leon. 44. Anonymus.
2 Bul. 93, 94, 95, 96. Freeman v. Sheene.	1 Leon. 324, 325. Foster v. Wilson.
2 Bul. 115. Reve v. Harris.	3 Leon. 44. —————
3 Bul. 204, 205. Tisdall v. Essex.	71. Anonymus.
169, 170. Allen v. Wedgewick.	61. Anonymus.
Godb. 45. God v. Winch's case.	Popham 146. Talbot v. Lacen.

Sixthly, Of the Action where it lies, and where it hath been adjudged well brought, and where not, in Regard to the Manner, Time or Place.

1. Where the plaintiff demised and granted to the defendant a messuage, and a piece of land, (*except a small piece of land upon which a pump stood*) but demised to the plaintiff the use of the pump in common, with other tenants; and the plaintiff assigns a breach, that the plaintiff permitted the pump to be broken down and destroyed, and so let it remain; whereby the plaintiff could not have the use of the pump pursuant to the indenture. It was adjudged upon a writ of error, that the action did not lie; and the judgment was reversed upon a writ of error for the reason of Twifden, that there is no misfeasance in the defendant, and no thing done by him to obstruct the plaintiff from the use of the pump; as if *I grant to a man a way over my land, I shall not be bound to repair this way.* And in this case of the pump, the plaintiff might have repaired the pump, although the soil itself, or the pump be not granted to the plaintiff, yet by the grant of the use of the pump, the law gives him that liberty; so if a man gives me leave to lay leaden pipes in his land, I may enter and dig the land to amend the pipes, although the soil be another's. But if I lend another a piece of plate, and covenant by deed, that the party to whom it is lent shall have the use of it so long, if the plate be worn by the ordinary use without any default, he shall have no action of covenant against me. And this is not like to the case of a way, which if I grant a way or water-course, and voluntarily stop it, an action will lie against me; or if a man grants estovers and destroys the wood; in such cases the party grieved may have an action. And Twifden said, that if the lessor enters upon the land, and cuts down the trees, whereby the lessee lost the tops and tops, the proper action is not an action of covenant, but an action of *trespass in the case*. 1 Saund. 321, 322. Pomfret v. Rycroft, and the cases relative to this question are as follow:

On Actions of Covenant.

follow: 4 Co. 19. 2 Roll's Rep. 399. Palmer 188. Ow. 104, 105. 1 Mod. 113. 2 Leon. 104. 4 Co. 80. Yelv. 175. Cro. Eliz. 674. Cro. Jac. 121. Popham 151. Moor 644. 11 Co. 52. 2 Roll's Rep. 143, 152. 1 Ven. 26, 44, 45.

2. By indenture *D.* leases a house excepting two rooms and free passage to them; the lessee assigns, and the assignee disturbs the lessor in * the passage thereto; and for this disturbance the lessor P* 127 brought an action of covenant, and the court held, that the action lies. The diversity is this; if the disturbance had been in the chamber, 'tis plain then no action of covenant would have lain, because it was excepted, and so not demised; *aliter*, where the lessee agrees to let the lessor have a thing out of the demised premises, as a way, common, or other profit *apprendre*; in such case covenant lies for the disturbance. Vide 3 Cro. 657. Mod. 553. and this covenant goes with the tenement, and binds the assignee. Judgment *pro quer.* 1 Salk. 196.

3. Where the agreement is thus, 'tis agreed that *A.* shall pay to *B.* 700l. for the land in *D.* this amounts to a covenant to convey the land, and an action lies. *Pordage v. Cole*, 1 Lev. 274.

4. It lies upon a *concessit* of a term in a fine, although there be no deed, and that likewise against a feme covert. *Wotton v. Heale*, 1 Lev. 301.

5. *A.* tenant for life made a lease for years to *B.* *B.* by indenture grants, bargains and sells, &c. to *C.* *A.* dies, *D.* the reversioner enters, and *C.* brings an action against *B.* no action in this case lies, for the covenant determines with the estate. If tenant in tail makes a lease for years and dies without issue, the covenant determines with the estate. Cro. Eliz. 57. *Landydale v. Cheney.*

6. Where it hath been held, that if the covenantor disables himself from performing a covenant, an action shall lie against him immediately. Cro. Eliz. 479.

7. Where *A.* covenants with *B.* that upon a surrender of the old lease, he will grant *B.* a new one, and *A.* levies a fine to another, *B.* need not tender a surrender, because *A.* has totally disabled himself to grant a lease. Cro. Eliz. 450. *Scott v. Maynie.*

8. See the difference between covenant and debt, as to bringing the action. 1 Brownl. 19. *Mordant v. Watts.*

9. This action will not lie upon the counterpart of a deed, but the party must have detinue for the deed, if it be got into other hands. *Yelverton v. Cornwallis*, Noy 53.

10. If there be a covenant that another shall have 20 loads of wood annually, and the covenantor cuts all the trees down himself, an action of covenant will lie against him. Moor 18. case 65.

11. A lease was made to two for 99 years, if three lives should so long live, and this to commence after the lease for life, yielding a certain rent, and yielding 3l. in the name of a heriot, after the death of the lessees, or either of them; it was adjudged by three judges

Readings and Observations

judges against one, that the action would not lie, and that the construction of the covenant was, that they were not bound to pay for the heriot, but in case of a death after the commencement of the lease. 1 Ven. 91. *Lion v. Carew*.

12. Where a lease is made for five years, and afterwards another for 31 years, and the lessee for five years refuses to attorn, by which nothing passed to the second lease during the five years without attornment, yet the last lessee having covenanted to repair during the 31 years is bound by his covenant; for though the lease did not commence in point of interest, yet it did in point of computation. 1 Ven. 18. *Lewin v. Forth*.

P* 128

13. Where an agreement was made between an attorney, in behalf of his client, and the plaintiff, that the plaintiff should have, hold and enjoy such lands for one whole year, excepted out of the said demise, a little close, &c. to one *Edward Knollis*; *Edward Knollis* brought an action of trespass against the plaintiff, and recovered against him 20l. for entering into the premises; it was adjudged that the declaration was insufficient, because it does not mention what right *Knollis* claimed; and * if this agreement should be construed a collateral covenant by a stranger, it would be hard to extend it to a tortious entry. 2 Ven. 62.

14. See 1 Show. 70. Where it is said to have been held by the court, that in covenant it is sufficient to say in assigning a breach, for disturbance of enjoyment, that such a one *habuit jus titulum*, even for the entry of a stranger, because you know not his title, but however you must say that he *habuit ante dimissum*.

15. Where it was adjudged that the plaintiff might bring an action of debt or covenant at his election. *Stile* 31.

16. Where the lessee covenants that he will relinquish lands in as good condition as they were let to him, and he cuts down oaks, which can never grow again during the term, an action of covenant does not lie during the term, but an action of waste immediately. 2 Roll's Rep. 332, 347, 348. *Walter v. Mountague*.

17. Covenant lies upon a writing, whereby the defendant covenants to be accountable. 1 Lev. 47. *Brice v. Carre* and others.

18. Copyholder in fee according to the custom leases for 31 years, the lessee covenants to repair, the lessor surrenders to *J. S.* and the lessee also surrenders to *J. D.* of which the lessor had notice before his surrender, and accepted the rent from *J. D.* After the assignment, *J. D.* suffered the tenement to be in decay, upon which *J. S.* brought an action of covenant against the first lessee, who pleaded the assignment to *J. D.* and notice and acceptance of the rent by the lessor, before the surrender to *J. S.* upon which the plaintiff demurred; and it was adjudged, that the action would well lie; for if copyholders are enabled to demise by custom, they may covenant and make conditions for re-entries. *Skinner* 296, 305. *Glover v. Cope*. For the question in this case was,

On Actions of Covenant.

was, whether the surenderee of copyhold lands is a person within the purview of the statute of 32 H. 8. so as to enable him to maintain this action against the lessee, by reason of the privity of contract transferred to him by force of that statute, as a grantee of a reversion might at common law, or whether copyhold lands are within the meaning of that act, it being formerly held they were not. And after two solemn arguments at the bar, it was adjudged *per Holt Ch. Justice*, and the court for the plaintiff, &c. that the grantee of the reversion of copyhold lands was within the intention and the equity of that statute, which is a remedial law, and of great and universal use, and absolutely necessary, as well for copyholders as others; and that by this construction of the statute, no prejudice can arise to the lords of copyhold manors, and the only reason why copyhold lands have been adjudged not to be within the purview of statutes, which contain general words, is because of the respect to the lords prejudice.

Quod nota; For this is the first case which ever was adjudged upon this point. Carthew 201.

19. Covenant upon a demurrer, the case was, tenant in tail, reversion to the Queen in fee, lets it for twenty-one years by indenture, and covenants that the lessee shall enjoy it against all persons without the interruption of any, besides the Queen, her heirs and her successors, *Existentibus Regibus vel Regnis Anglia*. The Queen grants her reversion to Wentworth. the tenant in tail dies without issue; Wentworth enters and ousts the lessee; and it was adjudged that this action lay, for none are excepted besides the Queen and her successors, and not her patentee. 1 Cro. 518.

20. Where the lessee covenanted to leave the houses, trees and woods, at the end of the term, in as good plight as he found them, and afterwards the lessee cuts down a tree; in this case the covenant is broken, and the lessor shall not stay till the end of the term before he brings his action, because it was apparent that the tree cannot * grow again, and be in as good plight as when he took the lease. Godb. 335.

P* 129

21. A. and B. his wife seized of a house to them, and the heirs of the husband, let the same to C. wherein he covenants to repair; the husband and wife convey the reversion to D. in fee, who brings an action as assignee of the inheritance; and as this case was set forth, it was judged he might. 2 Cro. 285. Major v. Talbot.

22. The plaintiff had the reversion of two houses, one in fee, and the other for years, and makes a lease for years, with covenants for reparations of both houses; and the question was, whether the plaintiff should have one or several actions; and it was adjudged that he should have a joint action for both. 1 Brownl. 20. Pyot v. Lord St. John.

23. An action of covenant was brought in London, for not repairing an house in Essex, by an assignee of the reversion; and held

Readings and Observations

held it would not lie, there being no privity of contract, that being gone by the assignment, and the plaintiff being entitled thereto, only by reason of his having the land; therefore the action ought to have been brought only in the county where the lands lie. Vide *Bord and Cadmere's case*. 3 Cro. 183. 2 Jones 144. 1 Sid. 401. 2 Show. 200. *Creswick v. Saunders*. 2 Cro. 446. *Sheirs v. Bretton*.

24. But it is said, 'covenant in its original nature is a transitory action, and so it is reckoned in Westm. 1. Chap. 35. which restrains inferior courts from compelling men to answer before them, of contracts, covenants or trespasses, done without their jurisdiction. And so it is deemed by Cook, 2 Inst. 229, 321. where he reckons covenant with debt, detinue and contracts, which are *nul- lius loci*; and therefore at common law might be alledged in another place than where made or did arise. 1 Show. 193.

25. What covenants have been held local, and what transitory, vide 2 Sid. 60. *Dixon v. Williams*.

26. A lessee for years of lands in Lincolnshire, and B. the lessor grants and assigns over the reversion to C. and D. and they bring an action of covenant in London for non-payment of rent; and the court held, that the action was well brought in London, and the reason, because the statute of H. 8. cap. 34. puts the assignee of the reversion in the same plight as the lessor was in; and it is clear he might have brought an action in London, but otherwise had it been in debt.

27. And this difference was taken between debt for rent and covenant; for if lessee assigns his term, and afterwards the lessor accepts rent of the assignee, the lessor cannot maintain an action of debt against the lessee; but yet he may bring an action of covenant. And if the lessee assigns his term, and afterwards the lessor assigns his reversion, and the assignee of the reversion accepts rent of the assignee of the term, yet he may bring an action against the first lessee. 1 Sid. 401. *Thurby v. Hale*, 2. Cro. 309. 1 Saund. 237, 230. 1 Ven. 10, 58. 2 Keb. 448. 5 Co. 17, 18. 1 Cro. 222. 1 Cro. 101, 132, 136, 143, 183. 2 Cro. 334. 2 Bulst. 142. 2 Ro. 522.

Note, The difference above, between the case pl. 23. and pl. 26. that one is for repairs of the house, and the other for rent.

Other cases wherein this action hath been held to lie, and where not.

Owen 105. *Belford v. Hall*.

2 Brownl. 160. *Waters v. the Dean and Chapter of Norwich*.

1 Leon. 2. *Wade v. Bemboe*.

P* 130

* Seventhly of the Declaration.

1. A covenant was made to find meat, drink, and other necessities, and the breach was assigned in not finding meat, drink and other

On Actions of Covenant.

other necessities, and entire damages given; and it was held, that though this breach was too general, yet 'tis good, for it may be as general as the covenant is. 3 Mod. 69. Proctor v. Burdet, Show. 472. Plome v. Plaisted.

2. There must be such certainty in the declaration, that if the defendant should be sued again, he may plead the recovery in bar, but there need not to be so much certainty in assigning a breach of covenants, as there must be on a bond to perform covenants. 3 Mod. 69.

3. Where an action of covenant was brought by an assignee of an assignee of lands, which were exchanged, for quiet enjoyment; and the breach assigned was, that a stranger having a right and title did enter; and the judgment was arrested for not shewing by what right or title the stranger entered; for it may be he had a title under the plaintiff himself. 3 Mod. 135. Mofse v. Archer.

4. Where the covenant is for payment of rent expressly, there needs no demand to be set forth in the declaration; otherwise if it be on a bond for the performance of covenants. 1 Ven. 259. Norton v. Harvey.

5. The plaintiff declared upon articles between him and the defendant, whereby the defendant covenanted to pay him such a sum, the plaintiff making him a sufficient estate in such lands before the feast of St. Thomas; and then he sets forth, that although the plaintiff had performed every thing contained in the said agreement on his part to be performed, that the defendant had not paid the money. It was held, that the words, He making a sufficient estate, were a condition precedent to the payment of the money; therefore the plaintiff in his declaration should have averred the performance of it particularly, and not by such general words. 1 Ven. 147. Large v. Cheshire.

6. In an action of covenant, the plaintiff declared that he had by indenture demise to the defendant two messuages, &c. in M. and then a covenant was, that the defendant, her executors, administrators, and assigns, should permit the plaintiff at his own costs to make a drain to convey waste water to the main shore; and then assigns a breach, that the defendant's assignee would not permit the plaintiff to make such drain; three exceptions to the declaration were adjudged fatal.

First, Because there was no certain place laid where the demise was made.

Secondly, That the Covenant is, that the defendant, her executors, administrators and assigns shall permit, and the breach is laid in the assignees not permitting; and it appeared by the pleadings, that the assignment was made to the defendant's assignee before the demise to the plaintiff; and this covenant cannot be extended further than the assignees of the defendant after the demise made.

Thirdly, 'Tis said, that the assignees *non permiserunt*, but shews no special disturbance, which ought to have been set forth. 2 Ven. 278.

7. Where

Readings and Observations

7. Where a notice or demand was held unnecessary. *Stile* 31, 32.

8. Where an averment of performance on the part of the plaintiff is necessary in the declaration, and where not. *Lut.* 249.

9. Where *A.* covenanted with *B.* to build a house, according to the rules prescribed by an act of parliament, for the building of London after the fire; and assigns a breach, that the defendant did not cover the cantilivers with lead, according to the rules prescribed by the statute; it was held good, though there was no positive allegation, that the act of parliament had prescribed that they should be so covered. 2 *Lev.* 85, 86. *Dive v. Jenman.*

P* 131 * 10. In declaring against an assignee by the grantee of the reversion, it is sufficient for the plaintiff to say, that the reversion came to him by diverse mesne conveyances, and so it is sufficient to say, that the term came to the defendant by diverse Mesne conveyances, because the grantee of the reversion is a stranger to the title of the assignee of the lessee: But if a man pleads a term in himself, such general allegation is not sufficient, but he must shew the estate out of which his is derived. 3 *Lev.* 19. *Pit v. Russell.*

11. *A.* being seised of lands in fee by deed dated 1649, granted a rent-charge to one *Brewster* and his heirs, and covenanted for further assurance; and on the same deed there was an indorsement, that the rent was to be paid clear of all taxes; afterwards *A.* confirmed the grant, and covenanted to pay the rent-charge clear of all taxes. Afterwards by the land-tax 3 *W. & M.* 4s. per pound is laid upon land, and power given to the tenant to deduct 4s. in the pound, with a proviso, not to alter covenants or agreements of parties; and it was held by the court, that such a covenant, if made in the year 1640, would not have freed the rent-charge from the taxes imposed by these acts, because there was no such parliamentary tax in being, or known at that time; but because there were such taxes in the year 1645, which was before the grant; therefore this covenant must be construed to extend to them; for otherwise it would signify nothing; and *Holt Ch. Justice* held in this case.

First, That the heir of the grantee could not maintain an action of covenant against the lessee or of the grantor, but only against the grantor and his heirs for a warranty; though a covenant real does not bind the land till judgment had in a *Warrantia Charta*, much less that which is only a personal covenant; an assignee of land may have covenant against the covenantor, and his heirs, where the covenant runs with the land. 42 *E.* 3. 5. 5 *Co.* *Spencer's Case*; but covenant will not lie merely against one as assignee of land. *Hard.* 87. pl. 5.

Secondly, Where the question is, whether a covenant be repealed by act of parliament, this is the difference, viz. where *H.* covenants not to do an act or thing which was lawful to do, and an act

On Actions of Covenant.

act of parliament comes after, and compels him to do it, the statute repeals the covenant; so if H. covenants to do a thing which is lawful, and an act of parliament comes and hinders him from doing it, the covenant is repealed. Vide Dyer 27. pl. 178. But if a man covenants not to do a thing which was then lawful, and an act comes and makes it lawful to do it, such an act of parliament does not repeal the covenant. 1 Salk. 198. Brewster v. Kitchell.

12. In covenant the plaintiff declared, that the defendant covenanted to pay the plaintiff out of the profits of the Prerogative-Office, 43l. per annum, (after that there be an account between them which shall be cleared) over and besides such a sum; the exceptions taken were two. 1. That it is not said at what time and place the account was made. 2. Nor for what sum the account was made up to; and the exceptions were allowed, and the judgment was said. 1 Sid. 304. Buckner v. Rolestone and Cottle.

13. To declare that by such a deed, It is witnessed that the plaintiff demised, &c. is as good, and sometimes better, than to say, that by such a deed the plaintiff demised, but not so in debt. 1 Sid. 376. Stephenson v. Stephenson, 1 Cro. 195. Wilson v. Jeffrey.

14. And where the declaration was in the detinet against an executor, and it did not appear, whether the rent incurred in the life of the * testator or no, it shall be so intended after a verdict by P* 132 the word detinet. 1 Sid. 176. Stephenson v. Stephenson.

15. In covenant the plaintiff declared *quod per scriptum suum* the defendant covenanted; this was adjudged ill for want of shewing it sealed, or calling it a deed. Cro. Eliz. 571. Southwell v. Brown.

16. Where a declaration was, that A. the testator had sold to B. 20 tun of copperas, and agreed with B. the plaintiff, that if A. failed in payment of such sum, at such a day, that B. might have and quietly enjoy the copperas as his own; and the plaintiff shews that the testator failed in payment of the sum, but the plaintiff could not have and enjoy the copperas; but this declaration was ill, for want of shewing how he was disturbed in the enjoyment. Chantflower v. Prestley, Cro. Eliz. 914.

17. Where there is somewhat insensible or idle in the indenture and the plaintiff does not recite it, yet the declaration shall be good, and it shall be esteemed no variance. 2 Cro. 358. Goodman v. Knight.

18. Where a bill upon the file was ordered to be amended, that had omitted the substance of the declaration, in shewing, that after the death of the tenant for life, the plaintiff then *primo intravit*. Cro. 365. Chamberlain v. Ewer.

19. In covenant the plaintiff declares, that W. R. and his wife, conveyed a fine of lands *sur concessit* to the plaintiff with warranty; *per curiam*, an action of covenant will lie upon this warranty, as well

Readings and Observations

well as on a voucher or *warrantia charta*. 3 Salk. 107. Anonymus.

20. The plaintiff conveyed an office to the defendant, provided that out of the first profits he paid the plaintiff 500l. adjudged, that an action of covenant lies on this proviso; for it is not by way of condition or defeazance, but in nature of a covenant to pay the money. *Ibm.*

21. Covenant to pay *W. R.* 100l. he making him an estate in *D.* adjudged, that if he tender him a feoffment, and offer to make a livery and seisin, &c. he may bring an action for the money, as if he had actually made a title. 3 Salk. 107, 108.

22. In the case of *Forte v. Vines*, where a man made a lease for years, and covenanted that neither himself nor his executor would interrupt the plaintiff during the term, but would suffer him to enjoy; in an action of covenant brought for the entry of the executors; it was adjudged, that the plaintiff need not shew that the executor did not enter by any elder or good title; but it is all one as if the action had been brought against the covenantor; but where a stranger enters, there the plaintiff ought to shew that he entered upon his elder and good title. 2 Roll's Rep. 209.

23. The declaration was upon a covenant by an indenture between the plaintiff and the defendant, and one *A.* and upon oyer of the deed, it was between the plaintiff and the defendant, and *A.* and *B.* for that cause it was held naught. 15 E. 3. three covenant jointly and severally, and the plaintiff declares *quod defendens non solvit*, without saying nor any of the others; and yet that was well enough, because the action was not brought against them all, for then it had been otherwise; and if any of the others had paid it, the defendant might, and properly plead that; so it is in debt upon an obligation, where two are bound jointly and severally. Noy 75.

24. In covenant the plaintiff declared that *A.* being indebted to him, and arrested at his suit, the defendant, in consideration that he would order the bailiff to let *A.* go at large, undertook and covenanted with the plaintiff to bring in the body of the said *A.* and deliver him into the custody of the said bailiff, such a day, &c. The defendant prayed oyer of the deed, which was, I (the defendant) do promise and engage myself to bring in the body of *A.* to the custody of *B.* bailiff, such a day; and thereupon it was demurred; & per Cur' first the plaintiff cannot set forth matter of fact in his declaration not contained in the deed itself, so as to alter the case; therefore all such matter * of fact so alledged or averred is immaterial. 8 Rep. 151.

P* 133

The plaintiff is no party to the deed, nor so much as named in it; and though covenant may be brought on deed poll, yet the party must be named in the deed. 1 Roll. Abr. 517.

25. In an action of covenant the plaintiff declared, that the defendant *Per scriptum Articulorum convenit*, and doth not say *figit*

On Actions of Covenant.

of the defendant *figillat*; It is said in this case that it is not good, for that it shall not be intended to be *factum* without shewing it. Cro. Eliz. 571. Southwell v. Browne. But Q. if this be law.

26. For you may observe in the following case of Green v. Cubit, in 1 Ven. 70. where a writ of error was brought to reverse a judgment given in the court of Norwich, in an action of debt upon a bond, where the plaintiff declared, that the defendant *per scriptum suum Obligatorium* became bound, and the chief error assigned was, the plaintiff did not say *figillo defendantis figillat*. But notwithstanding the objection, the court affirmed the judgment; and indeed there was this more in the case, that the defendant here pleaded, that the bond was entered into by duress, and so the court held that was a confession of the scriptum being a deed. And in the above-mentioned case in Cro. Eliz. it does not appear what the plea was, but it seems it was after a verdict.

27. But there is another case in Hill, 7 Georgii, of Atkinson v. Coatworth, reported in Modern Cases in Law and Equity 33. where the declaration was, that the defendant *per Indenturam inter partes prædictas* covenanted, and that was held well enough, tho' no mention was made of the signing, sealing or delivery; and an indenture does no more imply that it was *factum figillat*, than *scriptum Articulorum* imply that it was sealed and delivered; *tamen quare*.

28. The addition of a person who is no party to the deed is idle, and he ought to be omitted out of the declaration; so if the covenant has insensible words, those only which are sensible ought to be recited, and the breach ought to be laid therein. Cro. Jac. 358. Goodman v. Knight.

29. But where the plaintiff declared by an indenture, made between the defendant and A. and upon oyer of the indenture, it appeared to be made between A. and B. and the defendant; it was held ill. Latch 50. Constable v. Clobery.

30. In an action of covenant for not repairing a house, the plaintiff declares that it was in decay, and did not say wherein; to which the defendant demurred, and shewed for cause, that it was not particularly set forth, wherein it was in decay, which the court held to be ill, as well as in waste. 3 Keb. 478. The Countess of Portland v. Andrews.

31. The plaintiff let houses for years to the defendant, and covenanted to repair the houses by such a day; the defendant by the same indenture covenanted with the plaintiff, that from the time that the plaintiff was to repair the houses unto the end of the term, he would repair and leave them so repaired; and for not performing this covenant on the defendant's part, the plaintiff had not shewed for his part, that he had repaired the houses according to the covenant; and so the declaration supposed he was not bound to repair, because he was bound to repair from the time the plaintiff had repaired them, and not before; and so no cause of action;

Readings and Observations

action; by Roll in Bragg and Nightinghall's case. Stile 140.

Where there are reciprocal covenants, if one doth not perform the covenant on his part, it doth not excuse the other. Vide this case in 1 Roll's Abr. 416.

P* 134

* 32. Covenant that the defendant shall put in good repair the houses, out-houses and stables; the breach was that the defendant permitted the racks in the stable to be in decay. It was moved in arrest of judgment, that the plaintiff did not set forth that the racks were fixed in the stable, and so part of the freehold. By Pollexfen, it ought to have been shewed that the racks were set up affixed; *alii Justiciarii contra*; it shall be intended they shall be fixed for the use of the stable. 2 Vent. 214.

33. Covenant, the lessee should repair the house; provided, and it was agreed, that the lessee should have necessary timber to be allowed and delivered by the lessor; the lessor allowed so many loads of timber, and a general request was laid; the plaintiff should have alledged a special request to the defendant; it was laid in the declaration, that a stranger brought the timber; which was ill, for that amounted to an entry on the lessee's possession. 1 Brownl. 23. Holden v. Taylor.

34. Error of a judgment in Northampton in a writ of covenant, the error assigned was, that the declaration there was ill, because he declares of a covenant, whereby the defendant covenanted to find the plaintiff with meat, drink, apparel, and other necessities, and doth not shew in particular what other things were the necessities; and the breach was assigned as general as the covenant, viz. that he did not find him with meat, drink, apparel and other necessities, and doth not shew in particular what other things were necessary or not; and per Cur' the declaration was ill. Cro. Jac. 486. Mills and Astell.

Vide contra
Antea 1.
This case
reversed.
Vide Postea
P. 137,
sec. 8.

35. Lessee covenants that he would not cut down any more timber growing, than for sufficient or needful reparations for the building; the plaintiff assigns a breach that he had cut down to the value of 10l. and converted it to his own use; verdict pro Quer'; per Cur', it is erroneous, it is not the same covenant, and so no breach, if he had converted it to his own use, except it be averred that he had cut down more than was necessary for reparations. Stile p. 5. Wingfield v. Sherwood.

36. Defendant covenanted that he, his executors and assigns would repair a mill, which was defective in reparations, and the defendant, his executors and assigns, did not repair it; the declaration was demurred to, because he did not alledge in the disjunctive, but in the conjunctive. Cro. Eliz. 348. Colt and How.

37. Plaintiff declared on a deed dated the 30th of January, defendant demandedoyer, and the date thereupon was by an indenture of another date. This mis-entry may be amended being only uponoyer, which is the act of the court; *aliter* had it been on a deed

On Actions of Covenant.

a deed so pleaded, and this may be amended in another term, being only a false recital by the court. 1 Keb. 101.

38. In an action of covenant to pay 4l. per annum, during the life of A. T. the count was, *cum per quoddam Scriptum Sigillat' per quod testatum existit*; which per Cur' is well enough, after a verdict, some said the *per quod* ought to be omitted, but per Cur' it is one and the same sense. 1 Sid. 375. 2 Keb. 430. Stephenson's case.

39. Defendant covenanted he was seised in fee, &c. and would free from incumbrances; and in it there was a covenant for quiet enjoyment, and the breach assigned was upon an entry and eviction by another, and concludes *Et sic conventionem suam prædictam infregit*, in the singular number, and doth not shew in what covenant in particular. But per cur', *conventio est nomen collectivum*, and if twenty breaches be assigned, he still counts in *placito quod teneat ei conventionem inter eos fact'*. And the breach being of all the covenants, and the recovery in one, would be a good bar to an action, afterwards to be brought upon either of these covenants. 2 Mod. 311. After and Mazein.

* 40. A covenant in some cases is to be pursued strictly; the P* 135 plaintiff declares, that the defendant covenanted to take the plaintiff for a clerk, and to allow him two shillings for every quire of paper he should copy out; the breach is assigned, that he copied out a bill containing four quires and three sheets, for which 8s. 3d. was due; and judgment was reversed because there could be no apportionment in this case, it was 2s. per quire, but not *pro rata*. Allen p. 19. Needler and Guest.

41. Defendant covenants, whereas the King had granted the office of aulnager to the Duke of *Lenox*, who had made the plaintiff his deputy for seven years, of all the places in *Essex*, (except *Colchester*) that the defendant covenanted, whereas the said Duke of *Lenox* had made a deputation of that office in *Colchester* for two years to *E.* that at the end of the two years, he would procure to them a deputation for seven years in the same manner that he had; proviso that they, upon the making thereof should give security for payment of 100l. per annum; and they alledged in fact, that they were always ready to give security for the rent, and that the defendant had not procured the deputation; defendant demurs, per cur' the declaration is good; it is enough, they have alledged readiness to give security, and they need not shew they required deputation to be made as the other was, or indeed that any deputation was made to *E.* The covenant mentions a deputation, and he is estopped to say the contrary, and he ought at his peril to procure to the plaintiffs such a one as that was, neither need they shew the breach according to the usual form; *et sic non tenuit conventionem in hoc*, for there was a breach sufficiently alledged. Bro. Jac. 297. Barwicke v. Gibson.

42. Charter-

Readings and Observations

42. Charter-party between *B.* owner of a ship, and *L.* and *M.* merchants, freighters of a ship; *B.* puts to freight to them the ship in a voyage to *Guinea*, at 48*l.* per month, then there is a covenant for the payment of the freight, viz. when the ship arrives at *Guinea*, the freight then due was upon notice of it to be paid in *England*, and the residue when she arrives in *England*; and saith, that at such time she arrived at *Guinea*, six months and ten days were then past, which comes to so much, and notice thereof given; and that after such a time the ship arrived in *England*, and that the freight for six months of the time of the last payment came to 287*l.* 4*s.* and the defendant had not paid any of the sums. It was excepted to the declaration; that it appears upon computation that the plaintiff demanded more upon the first breach than is due by 30*s.* and less than is due upon the second breach by 16*s.* and though the first may be cured by the jury finding less, or by the plaintiff's releasing the overplus; yet where the demand is less than is due, this is a fault incurable. Hale makes a difference between this case of covenant and debt; and held, that after a verdict it had been cured without question, although upon demurrer there may be some doubt, the demurrer being general; but upon a special demurrer it had been ill; and judgment *pro quer.* and said the defendant may move this in arrest of judgment after a writ of enquiry if he would. 2 Lev. 56. Bolton and Lee, and 3 Keb. 39.

P* 136 43. Plaintiff declares by indenture dated the 7th of September, 1657. whereby the defendant covenants, that he and one *T. W.* would deliver to the plaintiff so many maunds of salt-petre at such a rate before the 20th day of October ensuing, the plaintiff paying so much a maund; and to the performance thereof, the defendant binds himself in 500*l.* defendant demands over, and it appears between the covenant and the obligation, there is a proviso, that if the defendant should between that and the said 20th day of October, be disabled by sea, &c. to deliver the said salt-petre, that the deed should be void; and pleads, that he within the time aforesaid had * prepared 1000 maunds of salt-petre, and that the boat wherein it was put was cast away, and so he was disabled. Plaintiff replies, the defendant had sufficient salt-petre over and above what was cast away; and upon issue found for the plaintiff, and 300*l.* damages it was moved in arrest of judgment, that there was a variance between the deed and the declaration; for in the declaration the proviso is omitted; but *per cur.* 1st, the action is brought upon the covenant, and not upon the penalty, and the reciting of the penalty is but surplus. 2dly, The declaration is sufficient without recital of the proviso according to Ughtred's case, and the defendant ought to plead the proviso. Raym. 65. Elicot v. Blake, 1 Keb. 424, 426. Mesne case, 1 Lev. 88. Mesne case, Vid. sub. Tit. Excuse.

44. In covenant, if the sum is mis-cast too little, or too much, yet it is amendable and not like to debt, which if alledged less than

On Actions of Covenant.

than in truth it is, not shewing the rest is satisfied, it is ill, and not amendable. 3 Keb. 39. Bolton and Lee, 2 Cro. 247. 2 Lev. 56.

In what other Instances Declarations have been held good, and in what not.

- | | |
|---|---|
| <p>2 Cro. 390. Hicks v. Goats.
 525. Egerton's case.
 537. Bultivant v. Holman.
 644. Harflet v. Butcher.
 3 Cro. 222. Congham v. King.
 285. Major v. Talbot.
 2 Roll's Rep. 466. Seabright v. Beall.
 Owen 127. Halling v. Comand.
 1 Brownl. 21. Crockhay v. Woodward.
 23. Holden v. Taylor.
 1 Lut. 305. Lucke v. Lucke.
 308. Lambert v. Lane.
 333. Aldworth v. Hutchinson.
 338. Tuckerman v. Tuckerman.
 357. Lamplugh v. Shiers.
 1 Lev. 88. Elliot v. Blake.</p> | <p>3 Lex. 246. Hart v. Barton.
 1 Bul. 139. Shordifh v. Faldor.
 2 Bul. 193. Burton v. Palmer.
 258. Genner v. Lucking.
 3 Bul. 155. Farrar v. Snelling.
 1 Leon. 169. Lee v. Maddox.
 2 Keb. 35. Dandy v. Currer.
 92. Buckner v. Cottle.
 400. Stephenfon v. Stephenfon.
 667. Llemale v. Cara.
 801. Large v. Cheshire.
 831. Lucy v. Levinston.
 3 Keb. 41. Procter v. Newton.
 393. Bronker v. Monpesson.
 465. Barfoot v. Frefwell.
 1 Keb. 424. Elliot v. Blague.
 Winch 19. Bull v. Frankefter.
 Lewings v. Marsh. Winch 4.
 Jones Car. 2. 229.</p> |
|---|---|

Of the breach, and where it hath been adjudged to be well assigned and where not.

1. An action of covenant was brought upon a bill of sale, whereby the defendant covenanted, that he was a legal proprietor of wool fold, and had power to sell, &c. the plaintiff alledgeth a breach, that the defendant was not the proprietor, *et sic infregit conventionem*, and doth not go further and say, *et sic non tenuit conventionem*. The defendant pleads *quod tenuit conventionem*; to which the plaintiff demurs, and it was held by the court, that the breach was sufficient, and the *sic infregit conventionem* is but form.
3 Keb. 396. Streeting v. Hind.

2. Charles

Readings and Observations

2. Charles Cook made a jointure to Mary his wife for life, and died without issue, the lands descended to Thomas Cook his brother and heir, who grants an annuity or rent-charge of 200l. per annum, to the plaintiff, in trust for Mary; and this was to be in discharge of the said jointure; *habendum* to them, their heirs, executors, administrators, and assigns, in trust for the said Mary for life, with a clause of distress, and a covenant to pay the 200l. per annum to the said trustees, for the use of the said Mary; the breach assigned was, that the defendant had not paid the rent to them for the use of Mary.

P* 137 * The defendant demurred specially, for that it appears by the plaintiff's own shewing, that here is a grant of a rent-charge for life, which is executed by the statute of uses, and therefore there ought to have been a distress for non-payment, which is the proper remedy by the statute; and this action will not lie in the personalty.

The court were all of opinion, that this rent-charge was executed by the statute of uses by the express words thereof, which executes such rents granted for life upon trust, as this case is, and transfers all rights and remedies incident thereunto, together with the possession of *cestui que use*; so that though the power of distressing be limited to the trustees by this deed, yet by the statute, which transfers that power to Mary, she may distress also; but this covenant being collateral, cannot be transferred.

The clause of distress by the express words of the court is given to the *cestui que use*; but here is a double remedy, by distress or action; for if the lessee assign his interest, and the rent is accepted of the assignee, yet the covenant lies against the lessee for non-payment upon the express covenant to pay; so if a rent be granted to S. and a covenant to pay it to N. for his use, it is a good covenant.

And it was agreed, that the assignment of a breach, according to the words of the covenant, is good enough, and that if any thing be done which amounts to a performance, the other side must plead it; as in this case, the defendant might have pleaded, that the money was paid to Mary; which is a performance in substance; but it shall be intended without pleading it; whereupon judgment was given for the plaintiff, 2 Mod. Rep. 138, 139.

3. If an agreement be, that the plaintiff from thenceforth shall quietly receive all the tithes of such closes without any interruption or molestation; it was adjudged that a suit in equity is a breach of the agreement. Raymond 371. Hunt v. Danvers.

4. A covenant not to assign a chose in action to any person whatsoever; an assignment in equity is a breach of the covenant; for in law no assignment can be of a thing in action; therefore the intent of the covenant must be of such assignment as can be made; that is of an assignment in equity. Kingdon administrator, v. Jones. Skinn. 6.

On Actions of Covenant.

5. *A.* lets to *B.* and covenants that he had a rightful title, and a breach was assigned by *B.* that *A.* had not a legal title, and so broke his covenant; after a verdict for the plaintiff upon a concord pleaded, it was assigned for error, that it is not shewn that he had an estate, nor how it appears that the lessor had not any right, or that a stranger evicted him by title; but all these objections were over-ruled; for the covenant being general, the breach may be assigned as general as the covenant; and it lies not in the plaintiff's knowledge, who hath the rightful estate, but the defendant ought to have maintained that he was seised in fee, and had a good estate to demise; and then it would have been incumbent upon the plaintiff, to have shewn a special title in some other person. 2 Cro. 304. *Salmon v. Bradshaw.* 9 Co. 61. a. Co. Lit. 303. b. 2 Cro. 370.

6. So where *A.* demised to *B.* a messuage, &c. and covenants, that he was lawfully seised in fee, and the breach assigned that he was not lawfully seised in fee; that was held good without shewing that any other person was seised. *Muscott v. Ballet,* 2 Cro. 369.

7. Where the covenant is, that the husband and wife shall quietly enjoy, and the breach assigns an expulsion of the husband only, yet that was held good. *Penning v. Platt.* 2 Cro. 383.

8. It is very plain that 'tis sufficient in every case to assign a breach as generally as the covenant is; and wherever the judges have thought otherwise, such judgment has been afterwards reversed, as may be seen, 2 Cro. 486. *Mills v. Astell.*

9. *A.* lets to *B.* a house, and *B.* covenants, that from and after *P** 138
A.'s repairing the said house, *B.* would well and sufficiently repair; and *A.* assigns the breach, that at the time of the demise, a dove-house, part of the house was in good repair; and that *B.* during the term, voluntarily suffered it to stand uncovered, and afterwards pulled it down; the defendant pleads that he did not voluntarily permit it to stand uncovered, nor pull it down; and after a verdict, it was held that this breach was not well assigned; for the covenant ('tis to be observed) is, that from and after *A.*'s repairing it, that *B.* would maintain it with reparations; so that the defendant was not to repair it till the plaintiff had first repaired it; and judgment was arrested. 2 Cro. 645. *Slater v. Stone.* This case is reported in 2 Roll's Rep. 248. and there said to be the reason of that judgment that the plaintiff might bring an action of waste.

10. Where *A.* covenants, that neither he, or his subtenants shall dig pits of gravel in Dale, demised to him by *B.* and *B.* assigns a breach in an action of covenant brought against *M.* executor to *A.* that *C.* sub-tenant to *A.* dug pits, &c. Now though *C.* was in truth sub-tenant to *J.* who was sub-tenant to *T.* who was sub-tenant to *A.* after a verdict it was held that *C.* was sub-tenant to *A.* mediately, though not immediately, and the breach well assigned. 1 Lev. 144. *Burman v. Aston.*

Readings and Observations

11. In an action of covenant brought for three jointly and severally to pay 100l. in assigning the breach it is sufficient to say, that *A.* against whom the action is brought, hath not paid the money, without saying to them or either of them; but otherwise if the action be brought against the three jointly. Palmer 289.

12. An action of debt upon a bond for performance of all covenants, payments, &c. is an indenture of lease, wherein the defendant for and in consideration of 400l. lent him by the plaintiff, granted the land to him for 99 years, if *G.* so long live, provided if he pay 60l. per annum, quarterly, during the life of *G.* or shall, within two years after his death, pay the said 400l. to the plaintiff, then the indenture to be void, with a clause of re-entry for non-payment.

The defendant pleads performance.

The plaintiff assigns for breach, that 30l. for half a year was not paid at such a time during the life of *G.*

The defendant demurs.

For that the breach was not well assigned, because there is no covenant to pay money, only by a clause, liberty is given to re-enter upon non-payment.

The court inclined that this action would not lie upon this bond, in which there was a proviso, and no express covenant, and therefore no breach can be assigned. 2 Mod. Rep. 37.

13. In a covenant for quiet enjoyment, how the breach must be assigned for a disturbance. Yelv. 30.

14. A man covenants, that upon payment of 10l. by *J. S.* that *J. S.* shall have so many tuns of copperas, and should enjoy it without the lawful disturbance of any person; *J. S.* brings an action of covenant, and shews the payment of 10l. but that he was interrupted and disturbed in the enjoyment of the said copperas; and it was adjudged that this breach was not well assigned, because he does not say by whom, nor how he was disturbed, nor that he was lawfully disturbed according to the very words of the covenant; for although the plaintiff in covenant need not shew a special title of him by whom he was disturbed, because by presumption of law he shall be supposed to be ignorant of it; yet in assigning the breach, he ought to pursue the words of the covenant. Yelv. 30. Chandflower v. Prestly.

P* 139 15. An action of covenant was brought upon the penalty of certain articles, wherein the defendant had agreed to pay so much per chaldron for all coals laden, either at Newcastle, or upon the river Tyne, and *brought to London; and the breach assigned was, that the coals were laden on such a ship *infra portum de Tinmouth*, viz. at North-Shields, and brought from thence to London.

To this declaration the defendant demurred, because it did not appear that Tinmouth was upon the river Tyne, and so the breach is not well assigned; and the court cannot take notice judicially that Tinmouth is upon that river; for this reason they inclined against the plaintiff, but gave him leave to discontinue, upon payment of costs. 5 Mod. Rep. 352.

16. Where

On Actions of Covenant.

16. Where the defendant covenanted he would convey six acres of land, &c. to the plaintiff, or his assigns; and further covenanted that he would offer unto the plaintiff a good conveyance for the assuring the said six acres to him or his assigns; and the breach assigned was, that he had not executed a conveyance to the plaintiff himself, and takes no notice of his assigns; and for this reason it was objected, that the breach was not well assigned; for if it had been conveyed to his assigns, the covenant had been performed.

In the principal case the declaration was held good; for there is a difference where a thing is to be done by a person or his assigns, and to a person or his assigns; for in the first case, the breach must be assigned that it was not done, either by one or the other; but in the last case it shall be intended *prima facie* to be done to the person himself; but if he assigns his interest, then it may be done to the assignee; whereupon judgment was given for the plaintiff. 5 Mod. Rep. 133.

17. Covenant after verdict for the plaintiff: Tanfield moved that the declaration was ill. First, because the plaintiff brings this action as assignee, and doth not name himself assignee; but afterwards in the declaration shews how he is assignee; as where a man brings an action as heir, or executor, he ought to name himself so; and of this opinion was Fenner; but Popham, Clinch, and Gawdy, *contra*. In regard, that in the body of the declaration it is shewn how he is assignee; for the naming himself so is but matter of form, which is not material after a verdict. Secondly, because the covenant is, that the lessee and his assigns shall enjoy it without the interruption of Francis Ewer, and all others claiming under the said Francis; and that the breach assigned is, because he was ousted by J. S. who claims under the title of the said Francis Ewer, and doth not shew how he claims under his interest, nor by what conveyance; but all the court held it to be well enough; for he is a stranger thereto, and cannot shew it certainly; wherefore it was adjudged for the plaintiff. Note, in Pasch. 44. Eliz. this judgment was reversed upon the second exception, by the opinion of all the justices and barons in the exchequer chamber. 1 Cro. 823.

18. Covenant to permit the plaintiff to carry away the trees, and the breach assigned, *quod non permisit sed obstruxit & obstupavit*, and held well enough, upon a demurrer, without shewing how he obstructed the plaintiff. 1 Show. 252. Dye v. Wells. The same point held to be law, in 2 Show. 75. Prescott v. Pemberton.

19. A declaration in setting forth that B. had covenanted for himself, his executors, administrators and assigns, had not repaired the mill; and it was judged to be ill upon a general demurrer, it not being in the disjunctive. Cro. Eliz. 348. Colt. v. Howe.

Readings and Observations

P* 140 In what other instances the breach hath been adjudged well assigned, and in what not.

- | | |
|--|--|
| <p>Cro. Eliz. 916. Lanning v. Lovering.
 Cro. Jac. 227. Barwick and another against Gybson.
 Cro. Jac. 383. Penning v. Platt.
 472. Butwell v. Wood.
 557. Bressley v. Humphrys.
 251. Boulney v. Curteys.
 369. Muscot v. Ballet.
 378. Williamfon v. Hunt.
 Cro. Car. 176. Symms v. Smith.
 T. Jones 186. Bellamy v. Russell.
 Noy 50. Chandflower v. Waterhouse.
 2 Roll's Rep. 399. Person v. Jones.
 Popham 200. Saunders v. Meryton.
 295. Crabbe v. Tooker.
 1 And. 236. Onfley v. Fisk.
 300. Frank v. Foster.
 134. Rich. v. Rich.
 Allen 9. Needler v. Guest.
 Latch 50. Constable v. Clovery.
 1 Brownl. 20. Lane v. Tresham.
 23. Tisdale v. Essex.
 24. Castilion v. Smith.
 1 Lut. 329. Lee v. Johnson.
 360. Brettin v. Vaux.
 1 Leon. 318.
 4 Leon. 248. Hix v. Fleetwood.
 2 Keb. 44. Trevor v. Nurfe.
 145. Barker v. Thorrald.
 288. Ashton v. Martin.
 ——— Trussell v. Mading.
 338. Eccleston v. Claptan.
 878. Proctor v. Newton.
 2 Keb. 142. Dixe v. Long.
 163. Lucy v. Levingston.</p> | <p>3 Keb. 210. Ryder v. Ablet.
 396. Streething v. Hinde.
 811. ——— v. Sherlocke.
 816. Hemingway v. Lad.
 1 Keb. 250. Bouchier v. Coster.
 211. Holland v. Blest.
 490. Smith v. Coniers.
 375. Gilbert and Ux' v. Martin.
 736. Petit v. Conway.
 761. Wadsworth v. Guy.
 776. Palfry v. Plees.
 829. Goldsborough v. Andrews.
 838. Baker v. Berisford.
 Poph. 200. Sanders v. Meryton.
 Winch 32. Anonymus.
 34. Anonymus.
 3 Lev. 293. Watnough v. Holgate.
 2 Jones 186. Bellamy v. Russell.
 1 Mod. 223. Boscawen & al' v. Cook.
 2 Lev. 124.
 1 Lev. 78. Coniers v. Smith.
 1 Jones 218, 219. Symons v. Smith.
 Hard. 132, 133.
 1 Roll's Abr. 872.
 Yelv. 226. Douty v. Fane.
 Cro. Jac. 486. Mills v. Asell.
 446. Sheers v. Britton.
 9 Co. 60, 61. a. Bradshaw v. Salmon.
 Cro. Jac. 298. Barwick v. Gibson.
 Cro. Eliz. 830.
 2 Mod. 176.
 1 Brownl. 23.
 Hardr. 732. Lewes v. Collinson.
 3 Lev. 325. Buckley v. Williams.</p> |
|--|--|

Fifthly, Of the Pleadings in Actions of Covenant.

1. Where there are some covenants that *A.* shall not do a thing and there are others for the performance of a thing to be done by

On Actions of Covenant.

by *A. A.* shall, as to the first, plead that he hath not done it, as to the others that he hath performed it, generally; and if the negative covenants are against law, he may generally say that he hath performed all; as where an under sheriff covenants with the high sheriff, that he will not levy an execution for above 20*l.* or that he will not return a writ of *venire*, without giving the high sheriff notice; that is a covenant against law; and a bond to perform covenants, where some are void, and others are good, shall be void of those covenants that are against law, and be good for the residue; but otherwise it is if some of the covenants are void by the statute law. *Moor. 856. Norton v. Sims.*

2. Where a covenant was that the defendant should pay so much money, the plaintiff making a sufficient estate before such a day, and the defendant pleads that he offered to pay the money, if the plaintiff would make a sufficient conveyance. It is no good replication to say that he was at such a place, and there made and sealed a charter of feoffment, *and was there ready to make livery P* 141 of seisin without notice, because he might have made it by enrolment. *1 Ven. 147. Large v. Cheshire.*

3. Where a plea was held double in covenant, and ill for want of a traverse of the defendant's enjoyment. *2 Ven. 67. Baynton v. Bobbett.*

4. Where it was held that a later covenant cannot be pleaded in bar of a former. *2 Ven. 217, 218.*

5. Where a plea was adjudged ill, because there was a traverse to a matter not alledged. *2 Vent. 79. Killegrew v. Sawyer.*

6. A parol agreement before a breach of it, may be discharged by parol, and so pleaded; but after a breach it cannot be pleaded in discharge without satisfaction also; but a discharge may be pleaded by deed, be the covenant by parol or by deed, after a breach, and without satisfaction. *Stile 8. Fortescue v. Brograve.*

7. A covenant is no duty, nor doth there arise any cause of action till the covenant be broken, and therefore it is not discharged by a release of actions; and when it is broken, the action is not founded merely upon the specialty, as if it were a duty, but favours of trespass, and therefore an accord is a good plea to it, and it ends in damages. *Allen 39. Erls v. Lambert.* But by express words in a release it may. *5 Co. 71. 35 Hen. 8. Dyer 57. pl. 24.*

8. *A.* covenants for him and his assigns with *B.* to repair and maintain the houses with reparations. *A.* assigns his term to *C.* and a breach is assigned for want of repairs. The defendant pleads, that after the decay of the houses he made a concord with the plaintiff, and shews it to be executed; and the plea was held good notwithstanding an objection, that the action being grounded upon a deed, cannot be discharged without a deed; but here it is not pleaded in discharge, but only in discharge of the damages; and it is not like the case of a bond, where there is a duty certain; for there is not a good plea. *2 Cro. 200. Alden v. Blague.*

9. The

Readings and Observations

9. The lessor covenanted with the lessee, that he should enjoy the lease peaceably during the term, and that the lessor would not make any entry upon him during that time; the lessor entered three years afterwards, and the lessee brought an action of covenant, and alledged three breaches of that covenant; the defendant pleads an accord and satisfaction, in the performance and satisfaction of that covenant after the first entry, and before the other two entries. It was adjudged that accord with satisfaction by deed shall be a good plea in discharge of a covenant, as well before the breach as after it; but by Houghton Ch. Justice, an accord with satisfaction is not a good plea in discharge of a covenant without a deed, because it enures as a release of the covenant, which cannot be without a deed; but if it be pleaded to be in satisfaction and performance, it is good; as payment of money is not a good plea in discharge of a bond, but in discharge of the money to be paid upon the bond, it is. Palmer 110, 111. Robards v. Stoker.

10. *A.* lets a house to *B.* for years, and *B.* covenants to repair, and to leave the same repaired at the end of the term, and a breach is assigned that he had not left it repaired at the end of the term; the defendant pleads that *A.* within three days after the date of the indenture, released to the testator all debts, duties and demands, and it was held to be no bar; an exception was taken to the declaration, because the breach was assigned in not delivering up the house well repaired at the end of the term, and does not shew in what instance it was not well repaired; but this exception was not allowed good; for the breach being according to the covenant it is sufficient. But if the defendant had pleaded, that at the end of the term he delivered it up well repaired, then if the plaintiff will
P* 142 assign any breach, he ought * particularly to shew in what point it was not repaired, so as the defendant might give a particular answer thereto. 2 Cro. 170, 171. Hancock v. Field, 1 Cro. 176. 2 Cro. 486. Yelv. 17.

11. Whether a concord shall be a bar to executory covenants. 2 Roll's Rep. 187, 188.

12. If the covenant be to levy a fine, it is a good plea to say, that the fine intended contained more than was conveyed. 2 Roll's Rep. 163. Wilton v. Welch.

13. So if a fine be levied of all his messuages and lands in *D.* and an action is brought for not levying a fine, which is tendered of more than the covenantor had at that time; it is a good bar that the fine was of two messuages, and he had but one at the time of the fine. 2 Roll's Rep. 117, 118. 2 Bulst. 315. James v. James.

14. The plaintiff declares, that the lessee for 40 years let the land to the defendant for 20 years rendering rent, and that the defendant covenanted to pay it; and that afterwards *A.* intituled to
the

On Actions of Covenant.

the reversion of 40 years, assigned his term to the plaintiff, to whom the defendant attorned, and the plaintiff assigns a breach in non-payment of the rent; the defendant pleads, that before any rent became due, the lessor released to him all covenants; and the court adjudged, that they will intend the action to be brought upon the *reddendum*, which is a covenant in law before the statute of H. 8. and passes by the grant of the reversion, which the lessor could not release after assignment, and is not like to Middlemore's case, in 1 Cro. for that was upon a collateral covenant. 2 Lev. 207. Harper v. Burgh.

15. In an action of covenant, the defendant cannot plead, that the plaintiff at the time of the demise, had no estate in the lands, though such plea is good to an action of debt for rent. 2 Vent. 99. Clarke v. Peppin.

16. Where *nil habuit in tenementis* was adjudged no plea. Allen 79. Newton & ux' v. Weeks & ux'.

17. Where *non infregit conventionem* was held a good plea after a verdict. Walsingham v. Comb, 1 Lev. 183.

18. Where performance generally hath been held not a good plea. Noy 53. Allen 72.

19. A man cannot plead performance without shewing the deed. 1 Sid. 425.

20. How to plead performance generally, and when and how to affirmative, and how to negative covenants. Savil 120, 121. Wilmer v. Oldfield.

21. Where it was adjudged, that non-performance of a reciprocal covenant is no bar to an action for the breach of another covenant. T. Jones 216. Shower v. Cudmore.

22. In pleading a performance, the defendant cannot set forth an indenture of his own, and plead to that, but he must crave *oyer* of the indenture declared upon. Mod. cases 154. Foxon v. Mosley.

23. And it is to be observed, that *oyer* of the body of the deed, without *oyer* of the indorsement, is not a compleat *oyer* of the deed, where the deed relates to the indorsement; and in this it differs from *oyer* of an obligation without the condition; for if one craves *oyer* of the obligation only, he shall not have *oyer* of the condition. 6 Mod. 237. Lady Cook v. Remington.

24. A. bargains and sells land to B. which A. had purchased of C. and other trustees; and covenants that he was seised of a good estate in fee, by virtue of an indenture made between him and Wollaston; and assigns a breach, that A. was not seised of a good estate in fee; the defendant pleads, that he was seised of as good an estate as Wollaston and the rest conveyed to him; this was held to be no plea; for the * plaintiff's reference to the conveyance, P* 143 was only to denote the limitation and quantity of the estate. 1 Lev. 40. Cooke v. Founds.

25. If

Readings and Observations

25. If a covenant be for a further assurance by fine, feoffment, recovery, &c. general performance is there a good plea. Lut. 603, 608.

26. If a covenant be, that the vendee shall enjoy lands without interruption, and also be discharged and acquitted from all incumbrances, general performance is not a good plea.

27. Where performance generally was held to be no plea. *Wimbelton v. Holdrip*, 1 Lev. 303. 6 H. 4. 8.

28. Performance of covenants ought to be pleaded specially where they are in the negative or disjunctive, or where it is to do a matter of record; and it is said the law is the same, where the act is to be done by a stranger. *Palmer* 70. *Ley v. Lutterell*.

29. Where a plea was, that the defendant had saved the plaintiff harmless; it was held good upon a general demurrer, without shewing how he saved the plaintiff harmless. *Cutler & al' v. Southern & al'*. 1 Lev. 194.

30. If a deed be razed, the defendant cannot plead that the deed is razed, and so not his deed. *Savil* 71. *Manwood v. Harris*.

31. Where a plea was held ill, it being of the grant of a reversion, and not pleaded to be granted by deed. 3 Lev. 154. *Beely v. Parry*.

32. *Nil debet* was held no good plea to an action of covenant, for non-payment of rent. *Tyndall v. Hutchinson*, 3 Lev. 170.

33. In debt or covenant, for non-payment of rent upon a deed not indented, *nil habuit in tenementis* is a good plea; and for the plaintiff to reply that he had a good and sufficient place in the premises is not a good replication, without shewing what estate he had. 3 Lev. 193.

34. In debt for rent against the assignee of the executor of the lessee; the defendant pleads an assignment over before any rent in arrear, and pleads it without notice; and it was held ill; for until notice, the privity of estate was not destroyed. 3 Lev. 295. *Tongue v. Pitcher*.

35. Where the breach is assigned for not repairing, and the defendant pleads he did repair, he must conclude to the country; and the concluding with an averment was held a fault in substance. 1 Show. 70. *Skinner v. Kilbys*.

36. Where the covenant is for the disturbance of quiet enjoyment, and the plaintiff declares, that the defendant and another by his command did enter; and the defendant in his plea traverses, *absque hoc*, that the defendant and the other did enter *modo & forma*; this traverse is good, without saying that neither they, or either of them did enter. 1 Show. 79. *Coleman v. Sherwyn*.

37. Tender and refusal *& uncore prius*, pleaded to an action of covenant, for the payment of money, and it amounts to payment and performance. 1 Show. 129.

38. Where

On Actions of Covenant.

38. Where there was a covenant by *A.* in consideration of 2250*l.* to transfer to *B.* a quantity of stock, and *B.* covenants to accept the same in the usual manner; the plaintiff avers, that upon that day he was ready, and offered to have transferred; and gave the defendant notice, that the defendant did not accept of the stock, nor appoint any person to receive it, or pay 2250*l.*

The defendant pleads, that the usual manner of transferring, is by writing, entered in a book kept for that purpose, under the hand of the person transferring; and the usual manner of accepting it, is by writing entered in the same book, after such transfer declaring an acceptance. That the plaintiff did not transfer according to that, or any other form, by reason whereof the defendant could not accept. This was held to be no plea, for they are mutual covenants, and each has his remedy, and the defendant ought to have tendered his money, and demanded a transfer. 1 Show. 391. *Smith v. Cudworth.*

* 39. *A.* brought an action of covenant against *B.* upon a co-P* 144
venant, that *B.* would go in such a ship out of the river of *Thames*, to such a place in *Spain*, and that he would depart, proceed on, and not stay, &c. performance generally was held to be no plea; and this diversity is to be observed between a negative covenant, which is only in affirmation of a covenant precedent, and a negative covenant, which is additional; for in the first case, performance generally is good, but not so in the latter. 1 Sid. 87. *Langhwell v. Palmer.*

40. *A.* brings an action against *B.* his lessee, who pleads performance generally; the plaintiff replies, and assigns a breach for non-payment of rent; the defendant rejoins, that the plaintiff ousted him; and it was held to be a departure, and it ought to have been pleaded at first specially. 1 Sid. 77. *Granger v. Hemborow.*

41. In an action of covenant brought by the assignee, upon an indenture of lease, and a breach assigned for eviction; the defendant pleads, that the plaintiff ought to enjoy, paying the rent; and it not appearing that there was any rent due after the assignment, and before the eviction, the plea was held ill; and it was adjudged that the word *paying* here did not make a condition precedent. 1 Sid. 280. *Allen v. Babbington.*

42. To a declaration in covenant, the defendant pleads in bar to a breach for non-payment of rent, a former bargain and sale of the same land to uses, and the statute of uses, without setting forth an entry by the bargainee; and it was adjudged, that an entry was not requisite. *Banks v. Smith*, 1 Sid. 399.

43. An action of covenant was brought upon a lease for nine years, dated the 1st of *June*, 16 Car. 2. which was to save the plaintiff harmless from all evictions during the term; and the breach assigned was an eviction, the 16th of *June*, 17 Car. 2.
which

Readings and Observations

which was after the breach assigned, and pleads besides, that the plaintiff was not evicted after the delivery of the deed; and it was adjudged that the construction of these words, that he shall not be evicted during the term, shall be construed during the term in computation, and not from the time of the delivery of the deed. 1 Sid. 374. *Lewis v. Hilliard*.

44. But in this case where *A.* by an indenture of charter-party, dated the 8th of *September*, 38 *Eliz.* having hired of *B.* a ship for a voyage to *Dantzick*, upon taking the ship it was agreed, that the ship should be laden with corn, and to go to *Dantzick*, and then sail to *Laghorn*; and by this indenture, in consideration the plaintiff had agreed, that the defendant should have a moiety of the corn, that then was, or afterwards should be laden in the said ship in the said voyage, the defendant covenanted to pay the moiety of the money for the corn; and alledges, that in fact the ship was laden with sixty lasts of corn; and for non-performance of this covenant the action was brought; the defendant pleaded, that the deed was sealed and delivered the 28th of *October*, 38 *Eliz.* and that then, or afterwards, there was not any corn laden in the said ship; and traverses the delivery on the 9th of *October*, or at any time afterwards before the 28th of *October*; and it was thereupon demurred; and held by the court, that the plea and traverse in this case were good; for in regard the plaintiff declares upon a deed dated the 9th of *October*, it shall always be intended to be delivered then; and if he afterwards confesses it to be delivered at any other time, it is a departure, which is here done by the demurrer; and the word *time* refers to the time of the essence of the deed, which is from the delivery; for if it were delivered ten months after the date, he shall not have any benefit of the corn laden before the time of the delivery, and consequently shall not be charged with any before. 2 Cro. 263, 264. *Orlsey v. Hicks*.

P* 145 * 45. An action of covenant was brought upon an indenture, upon a special covenant to pay rent at certain days therein specified and reserved; the defendant pleaded, that there was no rent behind. The plaintiff demurs to this plea, and it was held by the court to be no plea; for by this plea the defendant confesses the covenant broken; and this plea tends but to mitigation of the damages. *Hare v. Savil*, 1 Brownl. 19.

46. *A.* conveys a messuage with the appurtenances, to *B.* and his heirs, and also grants him a liberty to enter, and to draw water out of a well, &c. and *A.* covenants with *B.* that he was seised in fee of the premises; it is not a good breach to say that *A.* was not seised in fee of the well; for the covenant that he was seised of the messuage and premises, does not extend to the well. Lut. 603.

47. Where a lessee for years brought an action of covenant against the lessor, on a covenant for quiet enjoyment, and assigned a breach,

On Actions of Covenant,

a breach, that the lessor entered upon him, and ousted him of the premises. The defendant pleads that he entered to distrain, and traverses, that he ousted him of the premises. Upon a demurrer this traverse was held well enough; and if the plaintiff had joined issue upon the matter of the traverse, and proved an ouster of any part, the issue would have been for him. Mod. cales 150. *White v. Bodinam*.

48. A concord is no plea unless it be executed on both sides. 3 Lev. 189. *Ruffel v. Ruffel*.

49. Performance of covenants ought to be pleaded specially where they are in the negative or disjunctive, or where it is to do a matter of record; and it is said the law is the same where the act is to be done by a stranger. *Palmer* 70. *Ley v. Lutterell*.

50. Where the plaintiff declared, that she was possessed of certain houses in *St. Martin's lane*, for a certain term of years; and that she demised the said houses to *Richard Gill* for 21 years, under a certain rent which he covenanted to pay.

That before the sealing of the lease, it was endorsed for the payment of twelve bottles of canary wine every year to *Christian Tovey* the lessor, &c.

That the lessee entered, &c. and made his will, and did thereby constitute *Susan Gill* sole executrix thereof, and soon after died.

That the said executrix proved the will, and entered upon the premises, and assigned the term to the defendant *Thomas Pitcher*, who entered and was possessed, &c.

That he the said *Pitcher* had not performed the covenants, and assigned the breach in non-payment of 24 bottles of Sack, which was due for two years; and also for arrears of rent, after the assignment made to him by the said executrix *Susan Gill*.

The defendant *Thomas Pitcher* pleaded that before the said wine and rent became due, he assigned his interest to *James Mett*, but did not plead notice given to the plaintiff, or that she had accepted the rent. And upon a demurrer to this plea, judgment was given in the Common Pleas for the plaintiff, and a writ of error was brought in *B. R.* and the common error assigned.

The questions both in that Court, and in the King's Bench were,

First, Whether the defendant *Pitcher* ought to have pleaded that he had given the plaintiff *Tovey* notice.

Secondly, If such notice was necessary, yet whether this action would lie against the defendant, after this assignment made by *Mett*, &c.

And after two arguments, judgment was given in *Easter* term following for the defendant in the original action; and the judgment in the Common Pleas was reversed.

* It was held that the assignee was chargeable by reason of the P* 146 land; and when he had parted with his interest, there could be no reason

Readings and Observations

reason given why he should be any longer liable, especially since the executrix of the lessee is still bound to perform the covenants in the lease, so long as she has assets; and that was the true reason of the judgment in Hellier and Casbard's case, as hath been observed; that of Kightly and Bulkly upon the point of notice, &c. was not adjudged upon much debate; and therefore a writ of error was afterwards brought upon it in the Exchequer-chamber; and my Lord Hale, who was then Chief Baron, and my Lord Chief Justice Bridgman were of the same opinion with Justice Twisden, that notice was not necessary.

The pleadings in this case you may see in Justice Ventris's Reports, and the case put, but no part of the arguments on either side. 4 Mod. Rep. 71, 72, 76.

51. Where a covenant goes with the land, there a release by the grantor of the reversion to the lessee before the money becomes due, will not bar the grantee of his action. 2 Lev. 206. *Harper v. Burgh.*

52. Where a plea to an action of covenant upon a charter-party was held not good. T. Jones 216. *Showers v. Cudmore.*

53. Covenant against the lessee, and the defendant pleads performance; the plaintiff replies and assigns a breach in non-payment of rent; the defendant rejoins an entry and eviction; and it was held a departure. 1 Sid. 77.

54. *A. B. and C.* in consideration of such a rent reserved by a deed poll, *concesserunt & dimiserunt* to the plaintiff; and on this covenant in law, the plaintiff brought an action against *A.* and assigned for the breach, that *A.* and another by his command entered on the plaintiff; and he shewed further, that *A. B. and C.* had nothing, but that one *D.* was seised in fee. The defendant comes and traverses, *absque hoc*, that *A.* and another by his command entered; to which the plaintiff demurs.

Holt was clearly of opinion, that covenant lies upon the word *dimisit*. Hob. Holder v. Taylor, Fitz. Nat. Br. tit. Covenant, that an action of covenant lies on a covenant in law, although there be no estate, if the covenantor himself enters; and he cited Treport's case, *A. and B.* join in a lease by the word demise, *B.* hath nothing, an action of covenant does not lie against *B.* if *A.* hath a title to demise; to which it was said, that in the principal case, none of the lessees had any thing. Chief Justice: Then an action ought to be brought against them altogether.

Gould: The breach being laid on a personal act of *A.* is good against him only; and the Chief Justice agreed, that a covenant which is joint in itself, shall be taken severally, when the breach assigned is a separate act of one of the parties. But *A.* the defendant traverseth his entry which is good, although it be *absque hoc*, that he and the other by his command entered, and doth not say *nec aliquis eorum*.

Gould

On Actions of Covenant

Gould insisted that those are several breaches, viz. the entry of *A.* and the other, but (*curia contra*) that is but one breach, and the traverse good; and the Chief Justice took this difference, viz. in a special plea, as here it is not necessary to traverse, *nec aliquis eorum*; but the law is otherwise on a general plea; as in debt on a bond against two, *quod non solverunt*, it is necessary to say *nec aliquis eorum*; so in waste, *non fecerunt vastum seu aliquis eorum fecit*, &c. Comber. 164.

55. In an action of covenant the breach was assigned in this manner; whereas the defendant being lessee for years, covenanted at the end of the term to leave and yield up the tenements well repaired to the plaintiff; that he had not left, &c. the plaintiff pleaded that one *Blunt* was seised in fee, until by the plaintiff dis-seised, who let to the defendant; and after *Blunt* re-entered, who enfeoffed *J. S.* who is yet seised, &c. and it was thereupon demurred; and adjudged a good bar. 1 Cro. 656.

* 56. Covenant upon a demise by indenture, and counts that the defendant by indenture demised and granted the lands to him for twenty years; and that one *W. P.* entered and evicted him by a rightful title. The defendant pleads a plea with an inducement to a traverse; *absque hoc*, that he was possessed by virtue of a lease, &c. and it was thereupon demurred and resolved by all the Justices, that upon the words *demise* and *grant*, without other words, which comprehend any warranty in them, this action well lies; and that a lease by estoppel is a good lease to ground this action upon an eviction; and that a bar with a traverse, that he was not possessed by virtue of a lease, is no plea against this lease by indenture, which is an estoppel, without shewing a particular clause; wherefore without further argument it was adjudged for the plaintiff. 2 Cro. 73. P* 147

57. Where lessee for years covenants to drain such water out of land before such a day, he pleads that before the day the lessor entered, and continued in possession until after the day; and it was thereupon demurred, and adjudged to be no plea, because it is a collateral act to be done by him, unless he had said that the lessor held him out, and hindered him from doing it. 1 Cro. 374.

58. An action of covenant was brought for the arrears of a rent-charge due long before; and it was said by Mr. Justice Powell, that an avowry for the arrears of a rent-charge in 1679, is no estoppel to the bringing an action of covenant for the arrears in 1678; and it was likewise said by him that there is a difference where the acquittal for the last quarter is under the plaintiff's hand and seal, and where it is under his hand only; for in the first case it is an estoppel; in the latter it is but evidence. Comb. 58, 59.

59. The defendant pleads to an action of covenant grounded upon articles, &c. where the breach assigned was for not paying 8ol.

Readings and Observations

80l. out of the estate of *R. W.* according to the form of the articles; that he had expended 810l. about the necessary repairs, and other necessary charges, but does not shew what those repairs were, by which the court might judge whether they were necessary or no; and therefore held ill for that uncertainty. 1 Saund. 49.

60. To an action of covenant for not paying 45l. for liberty to pass over the river; the defendant pleads, that it was a free and common river, and that the plaintiff had no toll for the passage; this plea was held to be double by all but Ventris. 2 Ventris 67.

61. In an action of covenant against an assignee, who pleads an assignment by him before the cause of action; it was held in the Common Pleas by two Justices against Powel, that the plea was naught for want of notice; but this judgment was reversed by the whole court of King's Bench, for that notice need not be alleged, because the assignment was complete without it. 2 Vent. 234.

62. Where the lessee of an house covenants to repair, uphold, &c. and the house is burnt without his wilful act, and the lessee within a convenient time builds it again; this is a breach of the covenant notwithstanding the rebuilding it, for that it is no good bar, because the right of action being once attached, cannot be divested or barred by matter subsequent. Poole and Archer, Mich. 36 Car. 2 B. R. Skin. 210.

63. In an action of covenant for non-payment of rent, the defendant pleaded a former bargain and sale without entry by the bargainee; and held a good plea, and that it amounted to an eviction. 1 Sid. 499.

64. A bargain and sale of a rent-charge was pleaded, without saying it was enrolled according to the statute, or that there was any attornment, and held naught; Carter 221. but note, that this was before the statute for the amendment of the law, of the 4th and 5th of Queen Anne, whereby attornment in most cases is held no longer necessary.

P* 148 * 65. *A.* covenants to gather the rents in *D.* and he pleads that he was interrupted by the plaintiff, and so could not do it, this is a good bar. 13 H. 7. 34. pl. 2.

66. So if the lessee covenants to surrender before the term ends, and a stranger that hath a right enters upon the lessee; this is a discharge, because the lessee is disabled by an act in law. 45 E. 3. 48.

67. In covenant upon a demise by indenture, and an eviction by a stranger by means of another title, it is no bar to traverse the possession of the plaintiff, without a particular cause shewing how the other has title, because it is by indenture. Trin. 3 Jac. Stile v. Hearing, which is a general estoppel without shewing some special matter to avoid it.

On Actions of Covenant.

68. *A.* covenants to make a good estate in copyhold lands to *B.* before *Easter*, during the life of *Cox*; it is no plea to say that it was surrendered to the Lord by his procurement to the use of *C.* if he shews not that he was admitted, for it vests in him to use it till admittance. Mich. 15 Jac. *Stiles v. Smith*, and so the lord was not disabled to perform his covenant.

69. Where a rejoinder in this action was held insufficient, 1 Keb. 95. *Cookes v. Fownes*, 1 Keb. 215. *Grager v. Hemborough*.

70. What hath been adjudged a departure in an action of covenant for not repairing. 1 Keb. 662. *Pain v. Foster*.

71. An action was brought by the plaintiff as executor, on a covenant in an assignment of a lease for quiet enjoyment, and to be free and clear, and freely and clearly discharged, or otherwise indemnified of and from all arrears of rent, &c. and the plaintiff assigned a breach that so much rent was in arrear; the defendant so part pleaded payment to the lessor, and to the rest of the rent alleged to be in arrear, that he left money in the hands of the plaintiff, *ea intentione quod solveret* to the lessor; and upon a demurrer, &c. Mr. Northy objected that the plea was not good, because the intention was not traversable. Holt Chief Justice *contra*. In some cases the intention is traversable; as if *A.* be indebted to *B.* by obligation, and by simple contract, and pays money to *B.* the intention to which debt it shall be applied is traversable; and the court inclined, that the plea was good, but held clearly, that if it had been *reliquit ad solvendum*, it had been good, and that *in reliquit modo et forma*, had been a good traverse. But the court took an exception to the assignment of the breach, for that the plaintiff did not shew a disturbance in the enjoyment, or other special damnification, without which the rent being behind is not a breach of the covenant. Tollard's case, 1 Roll's Abr. 433. and likewise took this diversity, viz. where the counterbond or covenant is given to save harmless from a penal bond before the condition broken, there, if the penal sum be not paid at the day, and the condition not preserved, the party to be saved harmless does not become liable to the penalty, and so is damnified, and the counterbond cannot be sued without a special damnification; so the rent remaining in arrear, and not paid, is not a damage, unless the plaintiff be sued or charged; and if paid any time before the damage incurred by the plaintiff, 'tis sufficient. 1 Salk. 6.

72. In covenant, the defendant pleads generally that he was an infant; the plaintiff replies the custom of *London*, that infants are bound by their covenants, and so maintain his declaration. If it be a departure. 1 Sid. 142.

73. The defendant pleaded that he saved the plaintiff harmless; the plaintiff replies an arrest; the defendant rejoins that it was done *deceptive*, and by the plaintiff's own procurement, and so a departure. 1 Lut. 428.

74. To

Readings and Observations

P* 149 *74. To an action of Covenant, the defendant shewed that the covenant was to return the effects of all goods sent to B. and pleaded performance generally; the plaintiff replies, that of such goods there was no return made; the defendant rejoined that there was no order to return those goods; and it was held a departure, there being no mention of an order in the covenant, if it had been to return by an order, it had been otherwise. 2 Lev. 67. Wood v. Kirkham.

75. To an action of covenant for non-payment of rent; the defendant pleads no rent in arrear, and held ill. 1 Brow. 49.

76. Where a person and lands are to be saved harmless, *non damnificatus* is no plea. 2 Mod. 305.

77. Where A. seised of lands, and lets the same for life, rendering rent, and afterwards devises the reversion to B. his wife for life, and dies, C. takes B. to wife, who is the devisee of the reversion; and afterwards C. sells the reversion to D. and his heirs during his own life; and afterwards grants the rent to E. and covenants that E. shall enjoy the rent during his term without any disturbance by C. or his heirs, or any other person claiming from D. the grantee of the reversion during the life of C. and the breach assigned was in the heir of D. who hath the rent by reason of the grant of the reversion to D. The defendant pleads the grant of the reversion to D. and traverses that the rent and reversion descended to the heir of D. 2. whether instead of traversing the descent, he ought not to have traversed the dying seised. For of every thing descendable, the dying seised is the substance, and the descent is but the effect. And although the grant of the reversion is but for the life of the grantor, yet the estate granted is descendable. 1 Leon. 310.

What other Pleas have been held good, and what not.

Cro. Car. 180. Keyley v. Manning.	1 Leon. 250. Sherewood v. Nones.
2 Roll's Rep. 159. Palm. 70. Ley v. Lutterell.	2 Leon. 5. Nevil v. Cooks.
Owen 66. Dogrell v. Perks.	3 Leon. 90. Bunny v. Bunny.
Hutton 63. Jennings v. Pitman.	2 Keb. 535. Walton v. Johnson.
Popham 161. Latch 12. Constable v. Clobery.	951. Babington v. Allen.
1 And. 64. Diggs v. Chovet.	10. Walsingham v. Combe.
134. Rich v. Rich.	51. Outran v. Rollins.
Latch 202. Manner v. Vesey.	54. Herrick v. Sanderson.
126. Lucas v. Warren.	69. Young v. Gosling.
Bend. 172. Glemston v. Powell.	1 Brown.
1 Brow. 22. Cowling v. Drury.	

On Actions of Covenant.

1 Brownl. 24. Rident v. Took.
 Lut. 316. Brailsford v. Parsons.
 345. Pyke v. Pullyn.
 359. Snow v. Franklin.
 1 Lev. 16. Tompfon v. Noel.
 2 Lev. 216. Morris v. Wilford.
 1 Lev. 83. Nicholas v. Pullin.
 3 Lev. 170. Procter v. Burdet.
 Palmer 243, 247, 248.
 3 Bul. 29. Quick & al'. v. Lud-
 burrow.
 Godb. 29. Barker v. Fletwell.
 120. Anonymus.
 1 Leon. 237. Beal v. Taylor.
 311. Ogelthorp v. Hide.
 309. Maidwell v. An-
 drews.
 2 Leon. 115. Bedell's case.
 2 Keb. 76. Gainsford v. Grif-
 fith.
 99. Man v. Rainsbo-
 rough.
 116. Jevans v. Harwich
 & Ux.
 342. Brightwell v. Dow-
 ty.
 376. Lewis v. Helliar.
 405. Clavell v. Galler.
 444. Banks v. Smith.
 529. The King v. Atkins.
 535. Walton v. Johnson.
 564. Smith v. Yeomans.
 624. Hoky v. Otway.
 640. Chapman v. Can-
 trell.
 3 Keb. 40. Walton v. Water-
 house.
 60. Beten v. Frym.
 128. Feild v. Wood.
 352. Johnson v. Palgrave.
 367. Jenkins v. Armitage
 & Ux.
 477. Motteram v. Jolly.
 685. Squire v. Fullerton.
 814. Morris v. Willford
 Execut' &c.
 Keb. 100. — v. Noell.
 234. Brown v. Brown.
 Vol. II.

1 Keb. 334. Lathwell v. Fisher.
 210. Raymond v. Ma-
 thews.
 232. Anonymus.
 415. Lewis v. Bill.
 510. Hen v. Hamson.
 734. Audly v. Berry.
 751. Armin v. Bows.
 763. Chambers v. Hun-
 ter.
 50. Banbury v. New-
 land.
 58. Glimston v. Aud-
 ley.
 118. Robinson v. Amp.
 513. Prissland v. Cooper.
 Savile 120. Wilmer v. Oldfield.
 2 Saund. 420. Walton v. Wa-
 terhouse.
 2 Mod. 33. Duck v. Vincent.
 Cro. Jac. 359. Halfey v. Car-
 penter.
 Cro. Eliz. 870. Waller v. Creet.
 281. Fox v. Lee.
 749. Mints v. Bethel.
 1 Sid. 215. Sands v. Maleverer.
 1 Leon. 72. Bret v. Andar.
 2 Mod. 240. Goffe v. Elkin.
 Godb. 360. —
 9 Co. 25. a.
 Hob. 107. Lampleigh v. Braith-
 waite.
 2 Bulst. 267. Haulsen v. Car-
 penter.
 Cro. Jac. 339. 1 Roll's Rep. 8.
 Freeman v. Sheen.
 165. Alington v. Yeark-
 ner.
 2 Co. 4. a. Manser's case.
 Kelw. 80. b. 95. b.
 3 Mod. 252. Mather v. Mills.
 295. Harrison v. Hay-
 ward.
 2 Mod. 305. Shaxton v. Shax- P* 150
 ton.
 March 121. Anonymus.
 Cro. Jac. 363. Codner v. Dalby.

Readings and Observations

- | | |
|---|--|
| <p>1 Leon. 311. Oglethorpe v. Hide.
 1 Lev. 303. Wimbleton v. Holdrip.
 Co. Lit. 303. b.
 2 Lev. 7. Watton v. Weddington.
 1 Saund. 8, 9. Jevens v. Harridge.
 2 Ven. 99. Clarke v. Peppyn.
 2 Brownl. 273. Hare v. Savil.
 1 Brownl. 19. Drury v. Allen.
 Dyer 112. b. 279. pl. 6.</p> | <p>Dyer 217. Hall v. Kirby, pleading a release.
 2 Lev. 206. T. Jones 172. Harper v. Burgh.
 3 Lev. 170, 189.
 2 Mod. 311.
 2 Sid. 121.
 Cro. Jac. 634. Horsman v. Obbins.
 1 Keb. 379, 413. Nicholls v. Pullen.
 1 Lev. 831.
 3 Keb. 755. 2 Lev. 194.</p> |
|---|--|

Ninthly, of the Issue, Trial, Evidence and Damages.

1. What hath been held not an immaterial issue. Winch 76. Grafier v. Wheeler.

2. An action of covenant was brought against the mayor and corporation of Berwick, upon a lease, by which the defendant demised to the plaintiff an house in Berwick, with a covenant, that the plaintiff should enjoy without interruption, &c. and one J. S. a stranger entered upon him; the defendant pleaded a special plea, viz. that the said J. S. a stranger entered upon the premises, and the *venue* was in the next county; this issue ought to be tried where the action is laid. Vid. Dowdale's case. If an action be brought upon a matter done out of the kingdom, it is to be tried where it is laid, and Berwick is out of the kingdom. Vid. 12 Eliz. Roll. 650. and 2 Roll. 97. 1 Mod 36. Crisp's case.

3. In an action of covenant in London on bottomry; the defendant pleads, that the ship was cast away at Falmouth in a foreign county, it being a transitory action, and pleads as in Dixon and Williams's case, 2 Sid. 60. where the defendant swore his plea of the departure in London; and judgment for the plaintiff was there affirmed upon a writ of error; Coleman for the defendant by a traverse of the same matter in the declaration, it cannot alter the place; *contra*, if it be new matter, which accords with the count, and arises from the covenant itself; *sed curia contra*; and Dixon's case is unanswerable; the old books are as Coleman's case cited. 1 Keble 816. Collins v. Saunders.

P* 151 4. An action of covenant was brought upon a conveyance of lands, where the vendor covenanted that he was seised in fee, and assigns for breach, that he was not seised in fee, & sic non tenuit *conventionem suam*. *The defendant pleads *non infregit conventionem suam*; and upon issue joined, and a verdict *pro quer*, it was moved in arrest of judgment, that this was not any issue consisting of

On Actions of Covenant.

of two negatives only, (to wit) that he was not seised in fee, & *non tenuit conventionem* of the plaintiff's part, and *non infregit conventionem* of the defendant's part. *Per Cur*: It is an issue, though but argumentative and informal; for, if he had not broken his covenant, he was seised in fee, and if he was not seised in fee, he had broken his covenant; and informal issues are cured by a verdict, though immaterial ones are not. See Pit and Russel's case in an action of covenant, and the breach assigned in not repairing of houses, and several other things; the defendant pleaded *infregit conventionem*; the plaintiff demurs; the plea was ill, because no good issue can be taken upon two negatives; also this way of pleading is too general. 1 Lev. 183. Walsingham and Comb. Sid. 289. 2 Keb. 18, 13, 47.

5. In an action of debt on a bond to perform covenants, not to take or treat for a new lease without the assent of the plaintiff; the defendant pleads he took no new lease *contra formam indentur*; the plaintiff replied he did take a new lease, not said by or without the assent of the plaintiff; the plaintiff demurred. *Per Cur*: The replication is good enough, had the covenant been to take no new lease, and the plaintiff had assigned a breach, that he took a new lease, not saying without the assent of the plaintiff, it had been ill, and not aided by saying *contra formam indentur*; but here the plaintiff is misled by the defendant, and the issue is good enough. 3 Keb. 124. Perry v. Whitledge.

6. Sir J. G. covenanted with C. that whereas he is possessed of a lease of twenty-one years of certain lands, that he will assure, convey, and assign the said lease to N. and there was a bond for a performance in debt against Sir J. G. he pleaded the conditions, and the performance of them; the plaintiff *replicando* said, that the defendant *non assuravit, conveyavit & transposuit*, (Anglice set over) the said lease; upon which they were at issue; at the day of *nisi prius* it was moved that the issue was misjoined; for the defendant pleads, as the covenant itself is, that he had assured, conveyed, and assigned the lease; the plaintiff assigned the breach in this, *quod non assuravit, conveyavit, & transposuit*, (Anglice set over) the court was clear of opinion that the issue was not well joined. 2 Leon. 116. Gray v. Constable.

7. Whether upon a trial in an action of covenant, many matters may be assigned for breaches or not. 2 Bul. 112, 113. Lady St. John v. Piot.

8. What hath been adjudged a *mis-trial* in this action relating to the venue. 1 Keb. 601. Gilbert v. Martin.

9. An action was brought upon a covenant to assure such a copyhold to the plaintiff, if he married with his daughter, *secundum leges ecclesiasticas*, and alledged, that he *rite & legitime* espoused the daughter of the defendant; and issue thereupon, and found for the plaintiff; and an exception was taken, &c. because it ought to be tried by certificate from the bishop, and not by a trial *per pais*; *sed*

Readings and Observations

non allocatur ; for the marriage is only in issue, and not whether he were lawfully espoused; and it was also held, that it was sufficient for the plaintiff to alledge *licet sepius requisitus*, without giving notice of the marriage; for he at his peril ought to procure a court to be holden; wherefore it was adjudged for the plaintiff. 2 Cro. 102.

P* 152 10. In an action of covenant the cause was, that the plaintiff was the apprentice of the defendant, and the defendant had covenanted to instruct him in such a mystery; which covenant was in Middlesex; and for not instructing him, the apprentice brought his action there; the defendant pleaded a departure in London, notwithstanding the breach was laid there; the jurors are bound to find this matter, though a foreign county. 6 Rep. 470 *Per Cur*: The action shall not be removed in this case, they ought to take a writ of inquiry to tax damages in Middlesex. 2 Sid. 60, 118. Dixon and Williams, 1 Keb. 816. cited.

11. An action of covenant was brought against an apprentice upon his indenture, for speaking words *ad damnum magistris*. The defendant moved to change the *venue*, for that the matter of the action is for words, for which an action on the case should be brought; and this action is brought only for the plaintiff to choose his county for the trial, and to oust the defendant of the privilege to change the *venue*; but the court would not change it. 1 Lev. 307. Taylor and Beckett.

12. An action of covenant was laid in London, and the issue was upon a feoffment of lands in Oxfordshire; it was tried in London where the action was laid; and it was objected that the feoffment of lands in Oxon is local, and ought to be tried there; but by Vaughan and the whole court, it is cured by the statute of Jeofails, 17 Car. 2. by the express words of it, being tried in the county where the action was brought. Vide 2 Lev. 165. Addarley and Wife, Jennings v. Hunking, 1 Sid. 157.

13. A man brought an action of covenant in Southampton, and declares upon a covenant there; the defendant pleads a release in Suffex; the replication was, that he that made the release was an idiot; upon which the issue was taken; this shall be tried where the release is pleaded, and not where the action is brought. Dyer 112.

14. An action of debt was brought on an indenture, wherein were divers covenants to be performed on the part of the defendant; the plaintiff alledgeth in this count a breach of all generally; the defendant pleads he performed all; the plaintiff replies, and shews one in specie which he had not; the jury shall be only charged with this covenant. Dyer 297.

15. If an action be brought upon a charter party, and a breach assigned in a foreign kingdom, it shall be tried where the charter party is dated. 1 Vent. 58. Crisp and Jackson against the mayor and commonalty of Berwicke, Raym. 93.

On Actions of Covenant.

16. An action of covenant was brought for non-payment of rent, on a demise of allum-mines; the defendant pleads, that the plaintiff enclosed the mines, so that the defendant could not have ingress to the work; and this was tried in London, where the covenant was alledged to be made; the defendant after a verdict against him, moved in arrest of judgment, that this was a *mis-trial*; but it is aided per stat. 16, 17. Car. 2. called an act to prevent arrests of judgment, T. Jones. 82. Aynsworth and Chamberlain.

17. An action of covenant was brought in the county of B. and a breach was assigned in not repairing an house in the county of H. this is a *mis-trial*, Sid. 157. The case was, an action of covenant was brought in Hampshire, and the breach assigned was for not repairing of an house in Berkshire; and an issue was joined upon *non infregit conventionem*, and a verdict in Hampshire for the plaintiff; and it was moved in arrest of judgment, that this was a *mis-trial*; and of this opinion was all the court, (except Windham) for they said that this was a special issue, upon which nothing may be given in evidence, but the not repairing of the house; and this is in Berkshire; and though the privity remains, this action being brought by them, &c. which are parties to the deed, and not assignees, yet it doth not give to the plaintiff any election in this case; and so it was a *mis-trial*. Sid. 157. Gilbert v. Martin, 1 Keb. 525, 601. the same case.

* 18. L. brought an action of covenant against B. and declared, P* 153 that the defendant being possessed of an advowson in gross for a term of years, covenanted that he would not grant, nor assign his interest to any, without an offer thereof to the plaintiff; and assigns for breach, that he granted the said advowson, and his term therein over, without offering it to the plaintiff; and an issue was joined on *non concessit*, and it was found by a verdict *quod concessit*, and damages 50l. It was moved in arrest of judgment, that it was not alledged that the grant on which the issue is joined, was by deed, and then no breach is assigned; but that was averred by the verdict, and it shall be intended upon the evidence, that a deed was shewed, as upon issue joined on a grant of a reversion, where it was not alledged it was by deed, or that the tenant attorned, yet if it be found it shall be good. Hutt. 54. Lightfoot and Brightman.

19. A recital of a lease in a release is good evidence against the releasor, and all claiming under him. 6 Mod. 44.

20. If a lease of a term be acknowledged before a Master in Chancery, it is good evidence of a term, without shewing the original lease. 3 Lev. 388.

21. If one makes a title to the grant of an office in reversion, after the determination of a former estate by a patent, which recited the former grant, it is no evidence without producing the original grant. 2 Lev. 108.

22. What good evidence to prove a fine levied. Plow. 410. b. 23. The

Readings and Observations

23. The copy of a deed was read as evidence, though not proved to be examined by the original, that being proved to be burnt by the fire in London. Mod. Rep. 4.

24. An *inspeximus* of an inrollment in Chancery cannot be given in evidence, unless a deed of bargain and sale be enrolled there. Stile 445.

25. Upon an issue of the time of a surrender, or copyhold court, the court-rolls are evidence, but may be contradicted. 4 Leon. 215.

26. Upon *non dimisit*, the defendant may give it in evidence, that the lessor had nothing in the lands at the time of the lease. Dyer 122. b.

27. Where an action was brought for not making a lease, and the plaintiff shews, that the defendant had no estate, whereof he could have made a lease; though this was an insufficient plea, yet it was held that the verdict was good. 2 Bul. 41. Glas v. Gill.

28. A plea of *non infregit conventionem* is said to be cured by a verdict, though it would be ill upon a demurrer. 1 Lev. 114. Gilbert v. Martin.

29. In an action of covenant, the plaintiff declared *inter alia* upon a covenant made for repairing all the pales of the garden demised, (except the pales on the West side) and assigned a breach in not repairing of the pales, *contra formam conventionis*, but did not shew that the defect was in the pales not excepted; the defendant pleaded that he had repaired the pales according to the covenant; and an issue thereupon, and a verdict for the plaintiff; in arrest of judgment it was moved that the plaintiff was not sufficiently assigned, for the defect might be in the pales excepted; *sed non allocatur*; for it shall be intended after a verdict, which hath given damages to the plaintiff, that the defect was in the pales to be repaired by the covenant; and the rather, for that the issue was on the repair, according to the covenant, which does not extend to pales excepted; but it was agreed, that if the defendant had demurred, judgment ought to have been for him. T. Jones 125. Anonymus.

30. In an action of covenant for repairing a mill, with the appurtenances; the plaintiff in the declaration assigned a breach for not repairing the pool of the mill, and does not alledge where the pool stands; *it shall be intended after a verdict, that it was where the mill was situate. 2 Roll's Rep. 144.

P* 154

31. It was assigned for error, because the plaintiff had assigned three covenants to be broken, and the jury assayed damages, *ratione fractionis conventionis*, to 10l. so that the damages are assayed only for the breaking of one covenant in the singular number, and that is not shewn for what covenant. Gawdy held that it is no error, for the damages shall be intended to be assayed for every covenant by him broken; so the damages go entirely for all the three covenants.

covenants

On Actions of Covenant.

covenants broken, regarding every one severally by itself to be broken; and the first judgment was affirmed. Noy 63.

32. In an action of covenant to pay a yearly rent; if the breach is assigned for non-payment of a certain sum at such a day, and which does not amount to so much as is demanded, yet it is said it will be well enough; because in covenant damages are not to be recovered according to the evidence, and not as the party hath summed it up; but my Lord Coke said in debt it was otherwise. 5 Mod. 213.

33. In an action of covenant, if the plaintiff counts that upon a bargain for certain lands between the plaintiff and defendant, the defendant covenants that if there were not so many acres upon the measurement, as the defendant had said to the plaintiff upon the sale, when the land was sold, that he would make reparation for every acre that should be wanting of the number 111. and alledgeth, that upon the measurement so many acres in certain were wanting, which amounts, &c. and the jury found for the plaintiff, and gave 400l. damages. This issue is well found for the plaintiff; for although it be found, that by this so many acres are wanting, yet they are in this case as Chancellors, and may give so much damages as the case requires in equity, in as much as all is to be given in damages. 2 Roll's Abr. 708. Sir Baptist Hicks v. Goates.

34. If more be found in the breach of the covenant assigned, than was contained in the covenant itself, and so damages given for more than they ought, it is erroneous. Stile's Rep. 12. Needler v. Guest.

35. A man made a lease for years, and the lessee covenanted to make reparations, the lessor granted the reversion to another, and the lessee for years made his wife executrix, and died. *Per Cur'*: the grantee of the reversion shall not recover damages but from the time of the grant, and not for any time before. 3 Leon. 51.

36. *A.* covenants with *B.* his heirs and assigns for quiet enjoyment, and this is touching an estate of inheritance, *B.* is evicted by *A.* *Per Cur'*: the eviction being of *A.* when he dies he cannot have any heir, or assignee of the land, but the damages shall be recovered by the executor, though not named in the covenant, for he represents the person of the testator. 2 Lev. 26. Lucy and Levington.

37. The jury gave less damages than covenanted for. 1 Roll's Rep. 25, 257.

38. An action of covenant was brought against two, and judgment by default against one, and the issue found for the other, the plaintiff never shall have judgment; as where an action of covenant was brought against two upon an indenture, by which they covenanted artificially to erect an house, &c. The one makes default, by

Readings and Observations

P* 155

by which judgment is against him; the other pleads, that they two had artificially erected the house, upon which they are at issue, and found *pro def.* and it was moved for the plaintiff, notwithstanding this verdict, to have a writ of enquiry against that defendant, against whom judgment is given by default; because here the act to be done, ought to be done by both, and one is convicted of not doing it by the judgment. But it was held *per Cur.*, that no writ of inquiry shall issue, nor shall the other defendant * be charged with any damages; for it appears by the verdict, that the covenant is performed, and the other defendant shall have costs against the plaintiff. Sid. 76. Boulter and Ford. And Windham Justice held in this case, that if the defendant had pleaded, that the house was artificially erected by him, without saying by them two; and the jury found it so accordingly, that this is a good performance of the covenant, because the thing required to be done is accordingly performed; and therefore there is a difference between this case and the case where two covenant to go to York; there one cannot plead that he went, but ought to plead that they two went to York, because there is a personal act to be done; and one cannot go to York by a deputy, as he may erect an house. Sid. Ibid. This case precedent is in 1 Lev. 63, by the name of Porter and Harris; and here it is said, that though in trespass one may be guilty, and the other not; yet in covenant, debt or other contract, which is joint, one may not be convict without the other; and here by the verdict for one defendant, who pleads that the covenant is performed, it appears now that the plaintiff has not any cause of action, and therefore shall not have judgment; as Tillies v. Woodie's case, 7 Ed. 4. 31. And the defendant shall have costs upon the verdict against the plaintiff, and no costs and damages can be had against the other.

Tenthly, of the Judgment and Execution.

1. Where a judgment was arrested because given on a breach of covenant, that is not in the lease in the manner as the same is there assigned. Stile 5. Wingfield v. Sherwood.
2. Where damages were given for more than ought to be by the covenant itself, the judgment is ill; as a covenant to pay so much for every quire of paper wrote by the plaintiff; and the jury gave damages for five quire and a half, that judgment is ill. Stile 12, Needler v. Guest.
3. Where judgment was arrested upon a covenant to pay so much money into the Exchequer, and the plaintiff does not alledge where the Exchequer is. Tench v. Cletheroe, Stile 59.
4. It is said in Cro. Eliz. 3. in Swann's case, that in covenants perpetual, if there be one broken, and an action of covenant be brought

On Actions of Covenant.

brought, and a recovery be had upon it; if other covenants are afterwards broken, a *scire facias* may be had upon that judgment without a new action.

5. Where there was not a date of the indenture in the bill upon the file but blanks, judgment was reversed. *Highgate v. Diggs*, 1 Cro. 286.

6. Where *A.* declared upon an indenture of demise made to the testator of the defendant by husband and wife of the wife's lands; and the breaches assigned were, that 160l. rent reserved was in arrear, and that the messuage, &c. were out of repair; and that the testator had cut down certain trees, and an outlawry of the husband is pleaded in bar; the plaintiff shall have judgment for all the breaches, because as the damages to be recovered by the breach of not repairing, they were not forfeited by the outlawry. *Lut. 1510. Clerk v. Scroggs.*

7. Where a covenant was brought against two, and judgment by default against one, and the other pleads performance, which is found for him, the plaintiff shall have no judgment against the other. 1 Lev. 63. 1 Sid. 76.

8. Elizabeth Bridgman was sued as executrix to her husband, for a breach of a covenant made by the testator, but the breach was by the executrix, in assigning over a lease without giving notice thereof to the lessor; the judgment being for the plaintiff, was *de bonis testatoris si * &c. Et si non, &c. de propriis bonis*. And for this cause the error was assigned, for that it ought to have been *de bonis testatoris*, for the damages; but for the costs it ought to have been *de bonis propriis*. But it was urged, that in regard this was a breach by the executrix in her time, and a wilful and not a negligent breach; therefore the judgment should be *de bonis propriis*, and of that opinion was Lea Chief Justice at the first; but Chamberlain, Doderidge and Houghton of the contrary; because it is a charge only by the act and covenant of the testator; and although she herself breaks it, yet she is not chargeable but in regard of the deed of the testator; wherefore she shall be charged but *de bonis testatoris*, and that in no case an executor shall be chargeable *de bonis propriis*; but where he pleads *ne unque Execut'*, and found against him; for he thereby estrangeth himself from the testator, and by his own falsity and folly hath made his own goods chargeable, *si non sint de bonis testatoris*; also where he pleads a false release made unto himself, because it is a falsity in his own knowledge, and ought to pay a fine unto the king; therefore he shall answer *de bonis propriis si non, &c.* And in maintenance of this point, they relied upon 15 Eliz. Dyer 324. and on a case adjudged 20 Jac. betwixt Winterbourn and Bull, for not repairing of an house in Canterbury in the executor's time, &c. And Lea Justice changed his opinion, and agreed with them; wherefore the judgment was reversed; and the Lord Hobart, Justice Jones, and Baron

Readings and Observations

Baron Denham, being informed thereof, agreed with them in opinion, that the judgment ought to be *de bonis testat. ris*; and that the judgment in the Common Bench passed *sub silentio*, without any motion of that point unto them. 2 Cro. 671, 672.

9. The defendant brought a writ of error upon a judgment in C. B. in an action of covenant, and assigned for error the want of an original; upon which the plaintiff had a *certiorari*, and had an original certified, which was that *teneant conventionem*, whereas there was but one defendant which was held to be error; but if want of an original had not been assigned, the curfitor might have amended the original. 1 W. & M. Rodley v. Cook.

10. It was held in Andrews's case, 2 Leon. 104. where an action is brought by the lessee, upon a *dimissit & ad firmam tradidit*, for an entry upon the lessee by the lessor, that the lessee shall recover the term, and not damages only.

11. In an action of covenant, the breach assigned was in two covenants, and it appeared that for the one he had no cause of action, and for the other a good cause; and issue was joined upon both, and found for the plaintiff in both, and damages entirely assessed; the plaintiff could not have judgment. 1 Cro. 685.

12. An action of covenant was brought in *Lmdon* for not repairing of hedges, and for not plowing of the land in the county of *Hertford*; and upon *nil dicit*, a writ was awarded to the Sheriff of *London*, to enquire of the damages, and the damages were found, and the writ returned; and it was moved, that the writ issued erroneously, because it was not directed to the Sheriff of *Hertford*, where the lands lay, and where the damages were properly inquirable; *sed non allocatur*; because the covenant is founded upon a writing made in *Lmdon*; wherefore it was adjudged accordingly. 2 Cro. 142. Smith v. Batten.

P* 157 * And Lastly, What Relief the Parties have in a Court of Equity.

1. There was a covenant, that if the estate was to be sold, the mortgagee should have the benefit of pre-emption, but not being claimed before the estate was sold, the benefit of the covenant was lost. Mod. Cases in Law and Equity 2. Pt. 2.

2. A man covenanted for himself, and his heirs, to surrender copyhold estate to such uses, and died before it was done; but a bill against the heir for a specific execution of the covenant, was decreed accordingly. Mod. Cases in Law and Equity 11. Pt. 2.

3. Lessee for year covenants not to alien without licence of lessor, under penalty of forfeiting the lease; if he after alien without licence, a court of equity will not relieve him. Mod. Cases in Law and Equity 112. Pt. 2.

On Actions of Covenant.

4. If an heir sells a reversion in the life of his father at an under-value, a court of equity will not, in favour of such a purchase, decree the heir specifically to perform a covenant for a further assurance. 1 Vernon 271.

5. A man buys at an under-rate, and has a covenant and a collateral security for quiet enjoyment, the lands are evicted, the purchaser shall recover back only the consideration money, and not the full value of the land. 1 Vernon 320.

6. A. on the marriage of his son covenants to purchase lands, and to settle them for the use of his son for life, remainder to the heirs male of his body; the son dies, leaving issue a son, who brings a bill against the executor of A. for a performance of this covenant. The bill was dismissed in regard the plaintiff's father would have been tenant in tail, if the estate had been settled, and might have barred it. 1 Vernon 485.

7. The husband by articles before marriage, covenants to add 500l. to his wife's portion of 500l. and that it should be laid out in land, and settled on the wife, and the issue of the marriage; the husband without the trustees consent, lays out the money in a fine house and garden; and it was allowed to be a sufficient performance of the covenants. 1 Vernon 345.

8. Tenant in tail, with a power to make a jointure, covenants to make a jointure, but dies before execution, without issue, the remainder man makes a jointure to his wife. The administratrix of the first wife brings a bill for an account of the profits agreed to be settled; but the bill was dismissed. 1 Vernon 406.

9. There was an agreement on a marriage, that 2000l. should be laid out in lands, and settled to the use of the husband and wife, and their issue, remainder to the right heirs of the husband; provided that if the husband died without issue, the wife might elect within six months, whether she would have the land, or the money; the husband dies, leaving the wife *ensient* of a daughter, which dies within the six months, and the wife is administratrix of both, the wife cannot have her election, the husband at the time of his death having issue, though since dead; and the money bound by the articles, and must be laid out for the benefit of the heir of the husband, and shall not go to the administratrix. 1 Vernon 298, 299, 471.

10. A man articles on the marriage of his eldest son, to settle lands on the son for life, remainder to the wife for her jointure, remainder to the first, and other sons in tail, remainder to the right heirs of the son. The father brings a bill to be relieved against the articles, alledging, that he was surprised, and intended, that upon the failure of issue male of his eldest son, the remainder should have been limited to *his younger son, charged with portions for the daughters of the marriage; the court would not relieve him against his covenant, but dismissed the bill. 1 Vernon 153

Readings and Observations

11. A man covenants with his intended wife, that she should have power to dispose of 300l. out of her estate. This covenant was improvidently taken in the name of the wife, whereas it ought to have been in the name of the trustees; and though it should be admitted that the marriage in strictness of law, had discharged the covenant, yet whether a court of equity should suffer such a trust to be defeated was the question; the court were inclined to dismiss the bill, which was brought by the husband, in whose hands the 300l. was. 1 Vernon 409.

12. A settlement for a jointure is made in pursuance of articles, wherein was a covenant that the lands in jointure were of such a value; but this covenant is omitted in the settlement, yet the covenant in equity is subsisting, and the defendant was decreed to perform the covenant in *specie*. 1 Vernon 218.

13. Where there is a covenant for the lessee to repair, and he makes an under-lease to J. S. who is in possession, the under-lessee is not liable to that covenant, either in law or equity, unless the first lessee becomes insolvent, and yet even then *quere*. 1 Vernon 87.

14. A lessee for years under a certain rent, covenants to repair, and makes 100 under-leases, the premises not being in repair, and the rent unpaid, a re-entry is made, and the original lease is avoided; six of the under-lessees having brought a bill against the head landlord, and the first lessee, and others. By the court, it was held, that there could be no decree to apportion the head landlord's rents, nor any relief for the plaintiffs, but on their payment of the whole rent, and repairing the premises; but having so done, they might compel the rest of the under-tenants to contribute. 2 Vernon 103.

15. The plaintiff by his bill demands 600l. due to him for his wife's portion, with interest for non-payment, according to the purport of certain articles of agreement, dated in August 1664, and mentioned to be made between old Sir Robert Carr the defendant's father, his lady and son, the now defendant, and Lucy Carr his daughter on the one part, and the Lord Hollis, and Sir Francis his son, the now plaintiff, on the other part.

The articles mention an agreement of a marriage to be had between the said Sir Francis Hollis and Lucy Carr, with covenant on the plaintiff's side to settle a jointure, &c. and on the other side to pay 6000l. and it is agreed in the articles, that a fine was intended to be levied of such lands, &c. and for securing the payment of 6000l. &c.

The Lord Chancellor after the arguments on each side, delivered his opinion, that upon the whole frame of the articles, there was a covenant to levy a fine; for wherever there is an agreement under hand and seal, an action of covenant lies, that in this case there was a plain covenant, if the first article of giving further

securing

On Actions of Covenant.

security, be coupled to that paragraph of intending to levy a fine, for that is the farther security intended; so that the meaning of the parties runs thus; I do intend to levy a fine, which is for the securing of 6000l. and this appears to be their agreement.

And therefore the party having provided himself of real, as well as personal security, by these articles, he said he would not deprive him of it, especially when it might be more trouble to bring an action of covenant, for the not levying of the fine; for upon that many questions may arise, as who should do the first act, &c. for which reasons he decreed the execution of the fine in *specie*. 2 Mod. Rep. 86, 87, 91, 92.

* 16. A lessee for years covenants not to plow pasture land, P* 159 and if he does, to pay 20s. per acre every year that he so plows; the court of equity will not grant an injunction to stay the tenants plowing; the parties themselves having agreed the damage for plowing; nor will the court relieve the lessee against the penalty if he plows. 2 Vern. 119.

17. A bill was brought for a specific performance of articles for a lease of lands in *Norfolk*, where by custom the landlords repair. But the rent reserved on the lease appeared to be under the value. It was decreed the tenant should covenant to repair. 2 Vernon 231.

18. A lessee of a church-lease makes an under-lease, and would have the under-lessee to surrender, in order to enable the original lessee to renew with the church; there being no covenant in the tenant's lease to surrender, equity cannot compel him to do it. 2 Vern. 283.

19. Where rules are made at the foundation of an hospital, that no lease should be made for above twenty-one years, and the hospital make a lease for twenty-one years, with a covenant by a renewal to make it up sixty years; this covenant is not binding in equity, as being equally prejudicial to the hospital, as a lease for sixty years. 2 Vernon 211.

20. Upon a bill brought against an assignee of a lease to pay the rent, and perform covenants therein, the original lessee ought to be a party, because he is still liable; but if the assignee has divided his interest in the lease, into a great number of shares, it is not necessary to make all the sharers parties. 2 Vernon 422,

21. If A. covenants on his marriage to purchase lands of 2000l. in year, and settle them for the jointure of his wife, and to the first, &c. sons of the marriage, and he purchases lands of that value, but makes no settlement, and on his death the lands descend on his eldest son; if the son brings a bill for a specific performance of the agreement, the lands descended will be decreed a satisfaction of the covenant. Trin. 1706, between Wilcocks and Wilcocks, 2 Vernon 558.

Where

Readings and Observations

Where the Person or Estate will be made liable to a Covenant or Agreement.

1. If a man hath lands subject to the payment of a rent-charge, and grants part of the lands to B. and covenants that that part should be discharged of the rent; yet this is not such a real covenant that shall run with the land, and charge the other lands with the whole: but it is only a personal covenant, which must charge the heir only in respect of assets. Mich. 1656, between Cook and Arundel, decreed in *Scaccari*, 1 Chanc' Ca. 212. Like point decreed *cont'*.

2. A purchaser of the crown-lands in the time of the late wars, sells part to the plaintiff, and covenants to make further assurance; and he on the king's restoration had a lease for years made to him under the king's title; and he was decreed to assign his term in the part he sold Hill. 27 Car. 2. between Taylor and Debar, 1 Chanc' Ca. 274. 2 Chanc' Ca. 212.

3. If a man covenants to settle lands, or an annuity out of lands, and he afterwards purchases lands, having no lands before, and devises it, and dies; these purchased lands shall notwithstanding be liable to the covenant. Pasch. 1689, between Tooke and Hastings, 2 Vern. 97.

P* 160 4. A. and K. his wife being seised in right of the said K. of two pieces of ground by indenture, the 25th of January, 1622, did grant a water-course to one J. H. and his heirs, through the said two pieces of ground; and by a deed did covenant for them, their heirs and assigns, from time to time, to cleanse the same; and that all fines and recoveries levied and suffered, or to be levied or suffered of the said grounds, should be, and enure to the strengthening and confirming the said water-course, according to the said grant; and afterwards a * recovery was had, and a deed executed, declaring the uses to be as aforesaid; the water-course by mesne assignments came to the plaintiff, and the said two pieces of ground to the defendant, who built on the same, and much heightened the ground which lay over the said water-course, and made it much more chargeable and inconvenient to repair; and as it was alleged, and in part proved, the building had much obstructed the said water-course; so the bill was for establishing the enjoyment of the said water-course, and that the defendant, and all claiming under him, might from time to time cleanse the same accordingly; 'twas objected, that the said covenant being a personal covenant, was not at all strengthened by the recovery, and that the plaintiff, and those under whom he claimed, being sensible of it, had for forty years cleansed the same at their own charges. But the court was of opinion, that this was a covenant which runs with the land, and was made good by the recovery; and that though the plaintiff has cleansed the same at his own charge, whilst it was

easy

On Actions of Covenant.

easy to be done, and of little charge; yet, since the right was plain upon the deed, and the cleansing made chargeable by building, it was reasonable the defendant should do it; and it was decreed accordingly, and gave the plaintiff his costs. Hill. 1691, between Holmes and Buckley.

Where there may be relief when the Agreement is not strictly performed.

1. *J. S.* having purchased lands in fee, under the title of the *Usurper*, sold the same to the defendant's testator, and covenanted that he was lawfully seised, &c. the church being restored, and the estate made void, *J. S.* was relieved against this covenant. There being some proof, that at the time of sealing, the plaintiff *J. S.* declared he undertook for his own act only, Mich. 14. Car. 2. between Dr. Caldcot and Hill, 1 Chan. Ca. 15. And a like case said to have been decreed about six months before. *A.* sells to *B.* with covenants only against *A.* and all claiming by, from, or under him, *B.* secured the purchase money; but before the payment the land was evicted, but not by any title under *A.* but a title paramount; *B.* sued to be relieved, that he might not be forced to pay, seeing the land was lost, and was relieved. Anonymous, 31 Car. 2. Chan. Ca. 19. reported *ex relatione Churchill.*

2. If a lessee for a long term of years covenants to lay out 200*l.* upon the premises, within the first ten years, and lays out 30*l.* and after thirty years of the lease are expired, the lessor brings an action of covenant, and recovers 150*l.* damages, equity will neither relieve against the damages, nor decree the money to be now laid out in improvements; for per Lord Chancellor, tho' the damages seem excessive, yet the jury were proper judges; and to decree it to be laid out, now the lease is almost expired, is not proper; for it is probable, the lessee would not be so careful in laying out in lasting improvements, as he would be were it laid out at first. Pasch. 1685, between Barker and Holder, 1 Vern. 316, 317.

REFEREN-

THE HISTORY OF THE

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

... of the ...

R E F E R E N C E S (P 161)

T O

PRECEDENTS IN COVENANT.

Declarations.

UPON a bargain and sale. Hern 263. Ro. Ent. 167. Wi. Ent. 122. Bro. Vad. Me. 128.

Upon an indenture made between the plaintiff and defendant. Tho. 97. Ro. Ent. 163, 164, 170, 174. Wi. Ent. 116, 127, 151. 1 Bro. 134, 142. 1 Saund. 321. Bro. Red. 145, 162, 163. 2 Ven. 272. Cl. Man. 191, 196. Clift 213. Mo. Intr. 131. Bro. Met. 91, 92. Mo. Intr. 204.

Upon an indenture made between the plaintiff and the defendant, and another. Wi. Ent. 127, 132. 1 Bro. 132. Hern 273.

The like where one of the parties is outlawed. Bro. Vad. Me. 121.

Upon an indenture tripartite. 3 Bro. 31. Ra. Ent. 333. Vid. 126. Bro. Red. 167.

Upon an indenture of assignment of letters patents. Han. 67.

Upon articles of agreement. Co. Ent. 110. 3 Bro. 29, 2 Ven. 59.

Upon a written agreement. Clift 204, 209, 215, 216. Bro. Met. 103. 2 Ven. 97.

Upon indented articles. Vid. 136. Wi. Ent. 119, 158. 2 Bro. 54. Bro. Red. 165.

Upon articles tripartite. 1 Saund. 40.

Upon a bill of lading. Mo. Int. 129.

Upon a charter-party. Tho. 102. 1 Bro. 126. Vid 129, Han. 69. Bro. Red. 140, 159, 161. Cl. Aff. 298. Lev. Ent. 34. Clift 207.

Upon an indented writing between the parties. Bro. Red. 248.

Upon a written agreement sealed by the parties. 2 Ven. 97. Bro. Red. 144, 152. Clift. 204, 218, 220.

Upon a letter of attorney to receive money upon two bonds. 1 Bro. 133.

The like upon one bond. Han. 71.

Upon an indenture made between the plaintiff's father and the defendant. 2 Saund. 415.

VOL. II.

Upon

References to Precedents

Upon a written agreement for the delivery of goods, and rendering an account thereof to the plaintiff, when the ship should arrive from her intended voyage. Vid. 141, 143.

Upon a deed poll. Han. 73.

By and against whom.

By Corporations.

For the president and scholars of a college in Cambridge against an assignee. 1 Bro. 131.

For a dean and chapter upon a demise of a rectory and tithes. 1 Saund. 104.

Against Corporations.

Against a dean and chapter. Wi. Ent. 159.

By trustees upon a deed of uses for a rent charge. Bro. Met. 84.

By a Devisee.

By the devisee of the reversion against the assignee of the term for not repairing. Lill. Ent. 132.

By the Lessor and Lessee.

For a lessor against the assignee of the executor of the lessee. 1 Saund. 104.

For an executor against an assignee. 1 Bro. 131. Bro. Rep. 163.

For a lessee against the guardian of an infant, who demised the tenements to the plaintiff, during the minority of the infant. 1 Bro. 144.

By a lessor against a lessee, for not keeping the house in repair. 2 Mo. Int. 204.

By a surviving lessor against tenant for years, for rent in arrear. Lill. Ent. 130.

For a lessee against his assignee. 1 Bro. 145.

For a lessee against the assignee of the reversion, who had not put the house in sufficient repair according to the lessor's covenant. Pl. Gen. 221.

(P* 162) *Against an assignee for rent. Vide postea.
Breach for non-payment of rent.

Against an assignee by the rector and churchwardens, and a breach assigned for not repairing a tenement. Pl. Gen. 224.

By the Assignee.

For an assignee. Reg. 165. Wi. Ent. 122. 1 Saund. 236. 361. 1 Bro. 13. Mo. Int. 135. 2 Mo. Int. 201.

In Covenant.

For an assignee against an executor. Wi. Ent. 112. Vid.

119.

By the assignee of the reversion against the assignee of the term for rent in arrear. Lill. Ent. 135.

For an assignee of an assignee against the executor of the lessee. 2 Ven. 117.

For an assignee. Wi. Ent. 122. 1 Saund. 230, 361. 1 Bro. 132. Mo. Int. 135. 2 Mo. Int. 201.

By an assignee for rent, vide Tit. Breach for non-payment of rent, postea.

By an assignee against an executor for not repairing an house and utensils contained in the schedule. Vid. 117.

By the Grantee.

By the grantee in fee against the grantor, for not discharging lands from all incumbrances. 1 Bro. 134. the like against a lessee. 3 Lev. Rep. 231.

By Husband and wife.

By a husband and wife against one, upon a demise by the wife while she was sole. Ra. Ent. 136.

Upon a covenant made between the plaintiff and his wife, and the two defendants, and the wife of one of them. Hern 281.

For an husband and wife executrix. Co. Ent. 114.

For an husband and wife upon an indenture of a grant of an annuity which was in arrear to the testator contrary to the covenant. Co. Ent. 114.

Against Husband and Wife.

Against husband and wife upon a lease made by the wife, cum sola. 2 Bro. 144.

For a Survivor.

For a surviving lessee. Wi. Ent. 144.

For the surviving lessee against the executor of the lessor.

Against a Survivor.

Against the wife after the death of the husband, upon a warranty made by them by fine. 2 Saund. 175.

By Executors.

For an executor upon an indenture. Bro. Meth. No. 93.

For an executor upon a written agreement made between the testator and the defendant. 2 Ven. 97. Bro. Red. 154. 1 Saund. 155.

For

References to Precedents

For an executor against the grantor of lands, which were parcels of lands held in capite, whereby the body of the ward, as well as the lands were seised by the Queen. 2 Bro. 55, 57.

For an executor of a bishop, the next successor of the late bishop, against the executor of the assignee of the executor of the lessee, upon a demise of the rectory and tithes. 2 Ven. 51.

For an executor against an assignee. 1 Bro. 131. Bro. Red. 163.

For an executor against the lessee. Clift 220.

By an executor of the lessee against an executor of an executor. Mo. Intr. 121.

For an executor of an executor in the king's bench. Ash. 150.

For an executor against an executor. Reg. 165, 166.

For an executor against an assignee. 1 Bro. 73.

Against Executors.

Against executors. 1 Bro. 146. Bro. Red. 143, 147.

Against the executor of the assignee of the lessee. 1 Saund. 104.

Against executors for money due for an heriot. 2 Saund. 161.

Against the executor of an executor under an equitable right. Lill. Ent. 134.

Against an executor, where the testator engages to take south-sea stock at such a price, on such a day. Lill. Ent. 139.

By Administrators.

For an administrator against the mother of an infant upon a lease made by the mother. Ro. Ent. 171.

For an administrator, and an husband and wife co-administratrix, against an executor, upon a deed made between the intestate and the testator. 1 Bro. 128.

(P* 163) *For an administrator of an assignee of the lessee of the Queen. Wi. Ent. 137.

Against Administrators.

Against an administrator upon a deed made between the plaintiff and the intestate. Bro. Va Me. 128.

Against an administrator of an assignee of a lessee. Bro. Red. 158.

Against an administratrix, on an indenture made to the intestate. Lill. Ent. 132.

By the Heir.

For the heir against the lessee. 2 Saund. 415.

The like against the assignee. Vid. 133, 135. Mo. Int. 117.

In Covenant.

For a son and heir upon a covenant made to his father. 2 Saund. 415.

For an heir against an heir. Reg. 165.

For an heir, upon an indenture made between his father and the defendant, and another defendant. Co. Ent. 111.

For an heir of an heir against one, upon an indenture executed between his grandfather and the defendant, his wife and sons, for want of repairs upon a lease for life. Hern 286.

By the Master against his apprentice or servant.

Against an apprentice who went away from his master before his time was out, and had wasted his master's goods. Vid. 80. Mo. Int. 127.

The like reciting the custom of London. Bro. Red. 138. Mo. Int. 137.

The like where the defendant received several sums of money which he squandered away. Wi. Ent. 135. the like Priv. Lond. 328, 331, 335.

Against the father of an apprentice, who covenanted to pay the plaintiff all such sums of money as the apprentice should squander away, and the breach assigned for embezzling and consuming several sums of money. Wi. Ent. 150.

The like, and for committing fornication, and frequenting taverns. 1 Brow. 129. Priv. Lond. 315, 321, 326. Hern 285.

Against a covenant servant for deserting his master's service without leave. Read Decl. 176.

Against an apprentice, who disorderly wasted goods delivered by his master. Vid. 79.

Against an apprentice who went away from his master's service before his time. Hern. 271. and where he wasted his master's effects. Ra. Ent. 133.

The like where the defendant received money, and converted it to his own use, that he committed fornication, and frequented taverns. Hern 285.

By an apprentice or servant against the master,

Against a master who turned away his apprentice from his service, reciting the custom of the city of London. Vid. 83. Priv. Lond. 342.

Against an executor of a master, for his not instructing the apprentice when alive. Bro. Met. 96.

For a servant to the plaintiff who had served him a long time, and a breach assigned for not providing him with sufficient meat and drink, and for not paying his salary. Vid. 139.

Another against a master for not providing his apprentice with sufficient meat, drink, and clothes. Clift 210. Read's Decl. 173.

Breaches

References to Precedents

Breaches assigned.

Breaches relating to Lands.

For that the defendant did not well and sufficiently plow and sow the plaintiff's arable land, nor carry his coals, &c. Bro. Va. Me. 149.

That the tenements were not of such a yearly value. Co. Ent. 635.

That the defendant had not left the lands at the end of the term. 3 Bro. 33. Her. 279.

That the defendant had not made the plaintiff an executor, a new lease for years at the end of a former term. Ash. 152. Ra. Ent. 134.

That the defendant had not left the possession of a meadow at the end of the term; a replication that he left it before the end of such a feast; demurrer. Co. Ent. 110.

Breaches assigned for not making a good title, or further Assurance.

Upon a covenant to levy a fine against tenant in capite, a license being first obtained from the King for that purpose. Pl. Gen. 225.

Upon a covenant to put the plaintiff immediately into possession of lands. Ro. Ent. 174.

Upon an indenture of bargain and sale of a manor, Ro. Ent. 167.

(P^r 164) *That the defendant had not an authority to demise the lands according to his covenant. Wi. Ent. 120.

That the defendant had not a power to lease the lands according to his covenant. Co. Ent. 117. Her. 264.

That the defendant levied a fine with render, whereby he disabled himself from making a demise for years according to his covenant. Co. Ent. 245.

That the plaintiff requested the defendant to come to a court-baron, to surrender the reversion of lands to the use of the plaintiff, that the defendant had not done it. Co. Ent. 135.

That the defendant refused to seal an indenture. Dyer 218. the like of a release of lands. 1 Bro. 72.

The like to levy a fine before justices of assize 265.

Breach assigned for non-payment of money.

Upon a written agreement that the plaintiff should have 40l. a year paid to him out of the profits of the prerogative office, until such time as he should be established in one of the clerk's places there. Bro. Red. 144.

That

In Covenant.

That the defendant had not paid his proportion of the charges of repairing banks according to his covenant. Vid. 126.

Upon articles to render to the plaintiff an account, and to pay money; and the breach assigned, that the defendant received 800*l.* and had not rendered an account thereof, nor paid the money. 1 Saund. 44.

Upon articles to pay the plaintiff 4*l.* a year, till a greater gratuity should be given him by another. Bro. Red. 144.

A breach of covenant for the non-payment of an annuity. Vid. 142.

Upon articles for the sale of wood, a breach assigned for non-payment of the money. Bro. Red. 152.

For not paying principal and interest upon a purchase of lands in an indenture, Clift 212.

Upon articles of marriage to pay the plaintiff 100*l.* till the marriage should take effect, or the defendant's son should attain his age of twenty-one years, which should first happen. Wi. Ent. 158.

A breach assigned for not paying money which was part of a jointure, and continued in the defendant's hands by the tenor of the articles, and a bar by an agreement to pay, and receive some money down, and a bond for the rest; a replication, alledging by way of protestation, that there was no such agreement, nor bond given, for a reply, that the defendant did not pay the money down; a demurrer by the defendant. Clift 217.

That neither the defendant, or C. had paid several sums of money according to a covenant made for that purpose. 1 Bro. 128.

That the defendant not signifying his intention to leave the premises before such a feast, had not paid the money due at such a feast according to his covenant. 1 Bro. 145.

That the plaintiff upon the purchasing of lands had paid to the defendant 2530*l.* and it was agreed between the parties, that if the purchase should not amount to that sum, at the rate of 11*l.* per acre, upon the measurement thereof, that the defendant would pay so much as should be wanting thereto; and a breach assigned, that upon the measurement thereof, the purchase amounted but to 1760*l.* and that it wanted 770*l.* of the said 2530*l.* which the defendant had not repaid. Win. Ent. 127. Bro. Vad. Me. 123.

Breach assigned upon a covenant, that the defendant, upon the death of another, would render the best beast in the name of an heriot, or 50*s.* in lieu thereof, and that the plaintiff chose the money, but the defendant had not paid it. Bro. Red. 145. 2 Saund. 163.

Upon articles to pay the plaintiff yearly 4*l.* until a better gratuity should be given to him. 3 Bro. 28.

That the defendant and another named in the indenture, or one of them, should pay to the plaintiff at two days, for barley sold according to a covenant. Hern. 273.

Upon

References to Precedents

Upon a writing, whereby the defendant covenanted to pay money to the plaintiff upon request, if another should not pay it in 16 days. *Ash.* 154.

Upon articles, whereby the defendant covenanted to pay the plaintiff 40*l.* for his labour and expences at the day of sealing the articles, and other money, upon obtaining a grant from the king, and a breach assigned for not paying the 40*l.* *Ash.* 155.

Upon an indenture of a grant of an annuity, which was in arrear to the testator, contrary to the covenant. *Co. Ent.* 114.

(P* 165) Upon a covenant whereby the defendant covenanted to pay all charges *and assessments upon the lands demised; and a breach, that he had not paid 150*l.* taxed upon lands by the commissioners, for a subsidy granted to the king by the Parliament. *Ra. Ent.* 136. *Co. Ent.* 113.

Breach assigned relating to repairs.

That the lessor had not repaired a parlour, a malt-house, and dairy, whereby the lessor could not enjoy the use and benefit thereof, with a demurrer thereto. *Winch's Entries* 140.

For not repairing, but permitting to be out of repair a leaden gutter, and a pair of stairs, two chimnies, part of a messuage which were broken down, and in great decay. *Vid.* 128.

That a messuage became uncovered for want of tiling, that the glass-windows were out of repair for want of glazing, that the conduits were broken and destroyed. *Bro. Red.* 157. *Ra. Ent.* 162.

For permitting a barn to be out of repair, and in decay, and so ruinous, that the timber thereof became rotten. *Bro. Red.* 143.

The like of a house and stable. *Her.* 287.

That the defendant as lessee permitted the house to be uncovered, that he had not repaired, but permitted it to fall to ruin, and tumble down. *Thom.* 98.

For permitting a messuage to be out of repair, and so to remain. 2 *Saund.* 418.

That the defendant as lessor permitted the pump to be out or repair, broken down and totally destroyed, and the well, and water of the pump to be filled with filth, whereby the plaintiff as lessee lost the use and occupation of the pump. 1 *Saund.* 321. Demurrer thereto, and judgment for the plaintiff.

For permitting the house, buildings and chancel to be ruinous for want of covering, and two hundred perches of hedge and ditch to be in decay. 1 *Bro.* 137.

For

In Covenant.

For permitting a house and barn to be ruinous for want of repair, and so to remain; and that he had not repaired the house-walls, nor spread the dung upon the fallow lands, and that he had not kept so many sheep on the common by way of foldage, and manuring the fallow lands, as the common was sufficient to maintain. 1 Bro. 143, 144.

For want of several reparations, and for converting pasture into tillage, &c. Clift 206.

Upon a writing to build and repair, which writing, the defendant after sealing, took and detained. 2 Inst. Cl. 294.

For permitting the chancel to be uncovered, and the walls, doors, and pavements to be ruinous, and the glass windows to want glazing, whereby the glass-windows became rotten; and also the barn to want repairs, whereby the great timber thereof became rotten and fell to the ground, and left it thus ruinous, and in decay at the end of the term. 2 Vent. 54. Clift 214.

For that the defendant did not mend, and keep in repair the mill, and other the premises according to his covenant. 2 Inst. Cl. 278. Cl. Man. 191.

That the defendant did not require timber to repair the premises, but permitted them to fall down, and left them at the end of the term in several places out of repair. Bro. Red. 161.

That the defendant the lessor had not repaired a wall and two chambers, whereby the plaintiff the lessee could not dwell therein. Ra. Ent. 136, 162. Vet. Int. 36.

That the defendant the lessee had not put several houses in repair according to his covenant. Hern 269.

That the defendant had permitted a house to be untiled, that he had not repaired it, but permitted it to fall down. Ra. Ent. 162.

The like of a barn and stable describing the quantity of the contents. Hern. 287.

The like of bars, gates, pales and hedges. Hern 287.

The like of a hall, kitchen, chambers and buttery, part of a messuage. Hern. 288.

The like of a mill, and the timber, and wood work thereof. Hern. 276.

That the defendant had caused a water-course running to a mill to be obstructed. Co. Ent. 67.

By an executrix of a lessee for years against the executors of an executrix, who was the assignee of an assignee, for want of several repairs in rooms. Mo. Intr. 121:

By an executrix, for not repairing the premises after a re-entry. Bro. Met. No. 98.

Against an executrix, for not repairing an house and barn. Bro. Red. 143.

By a man and his wife, she being an assignee to the tenant in fee, against a lessee for years, for want of repairs of fences. Mod. Int. 135.

That

References to Preeedents

(P* 166) *That the chancel was out of repair, and the doors thereof broken, and the windows, walls, and other premisses in great decay for want of reparations. 1 Saund. 107. 2 Vent. 54.

That by the ebbing and flowing of the sea, the walls that defended the same were broken down, that the defendant as lessor had not repaired them, by which the plaintiff as lessee lost the profit of the lands, and that the defendant would not recompense to the plaintiff the damages which he had sustained on that occasion. Winch. Ent. 144. Vid. 124.

For permitting a messuage to be out of repair for want of repairing the foundation, door-posts, rafters, covering, glazing, and white-washing. Vid. 135. Clift 214.

That part of the house was uncovered, that the chamber-floors were decayed for want of glazing the windows, that the doors were broken, that the wharf was broken for want of planks, that the pales and hedges were broken down for want of repairs, that the vessels, cisterns, and pipes were in decay, and out of repair, and so remained. Vid. 121.

That the defendant as assignee of the lessee, had not put the house in repair according to his covenant. Pl. gen. 224. Mod. Int. 120.

Breaches assigned relating to the disturbances of possession.

That the bishop of E. having a right, entered upon the plaintiff's possession, and ejected him, whereby the plaintiff could not enjoy the premisses quietly. Bro. Red. 167.

Upon an Habendum in an indenture of demise, where the defendant had made a former lease to another who ejected the plaintiff. Bro. Red. 162.

Upon articles of agreement for quiet enjoyment of lands, and the breach assigned, that the plaintiff by him and his servants, put cattle into the land, which fed the grass there growing, by reason thereof C. before the end of the term impleaded the plaintiff in an action of trespass, and recovered judgment against him, which damages the plaintiff was obliged to pay, and so did not quietly enjoy his lands. 2 Vent. 60.

Upon a covenant, that the plaintiff should enjoy the possession of part of a building until he was ejected by law; and breach assigned, that he disturbed the plaintiff before. Bro. Red. 153.

Upon a covenant for quiet enjoyment, and a breach assigned that the plaintiff was ejected, and driven out by a stranger within the term. Rob. Ent. 171. 2 Inst. Cl. 291.

Upon a warranty of lands by fine, and a breach assigned, that H. S. ejected him, and ill, because he did not shew what estate H. S. had. 1 Saund. 176.

Upon a covenant to permit the plaintiff to make a drain to carry off waste water; Breach, that the defendant being possessor

In Covenant.

seised of a piece of land, between the plaintiff's house and the channel, demised to one J. who would not suffer the plaintiff to make the drain. 2 Ven. 274.

Breach upon a demise of tithes, that the defendant entered upon the possession of the plaintiff within the term, and disturbed him. 2 Inst. Cl. 283. Cl. Man. 196.

Breach, that the defendants had not saved harmless, and indemnified the plaintiff from all former leases according to their covenants, after Oyer of the indenture, the defendant demurred specially. Wi. Ent. 159.

Breach assigned in lands, that the defendant had not discharged the plaintiff of the yearly rent of 7l. and the arrears then due. Rob. Ent. 170.

That the manor was held in capite, whereby, as well the body as the lands, were seised in the King's hands, who granted to W. who ejected the plaintiff. 2 Bro. 57. Rob. Ent. 173.

That the plaintiff could not quietly enjoy the premises demised to him, for that the defendant exhibited his bill in the high court of Chancery, suggesting that the lease was made to the plaintiff upon trust, to try the title of the premises with one M. who claimed a right to the premises by virtue of a demise made to him by the father of the defendant; demurrer thereto, and judgment for the plaintiff. Win. 118.

That the husband and wife demised to the plaintiff, who was possessed, that the husband died, and the wife entered and demised to H. upon whom the plaintiff re-entered, and H. brought an ejectment, and recovered; and the plaintiff brought an action against the husband, and assigns breach, that by virtue of the judgment and recovery, the plaintiff could not enjoy the premises demised to him according to the covenant. Wi. Ent. 112.

That the premises sold were extended by virtue of a statute staple, and by means whereof the *conuzee entered upon the plaintiff, and him. Wi. Ent. 129.

That one T. entered upon the plaintiff's possession, and drove him out of the messuage demised to him by the defendant; a demurrer and judgment against the plaintiff. Wi. Ent. 119.

That the tenements were held in capite, and that the plaintiff was obliged to pay 10l. for rent unpaid, that F. claiming two parts of the premises, sued out a writ of partition against the plaintiff, in defending which the plaintiff expended 24l. and was compelled to pay 10l. to get a release of the title, that the father and grandfather of the defendant alienated without license, whereby several writs issued out of the court of Exchequer against the plaintiff to get discharged, of which he expended 4l. whereby he did not enjoy the said tenements indemnified. 1 Bro. 137.

For

References to Precedents

For that the defendant denied the plaintiff a passage thro' his ground, for him, his servants, horses, and carts, to carry their bark, timber and other wood. Bro. Va. Me. 129, 141.

That the defendant drove out the plaintiff from the tenements demised to him. Ra. Ent. 135, 136. The like. 1 Bro. 134.

Upon the habendum in an indenture of lease, where the defendant made a former lease to another, who drove out the plaintiff. 1 Bro. 71.

That before the indenture of lease in the declaration, there was a feoffment made to uses; and that the plaintiff after the death of the tenant in tail was an intruder, and made a lease to the plaintiff, and that tenant in tail entered, and drove out the plaintiff. Hern 281. Ash. 156.

Breach assigned for the defendant's doing somewhat which he ought not to do.

For permitting an estranger to use and occupy a hand-mill, contrary to the purport of an indenture. Bro. Red. 155.

Breaches assigned for the non-performance of somewhat agreed to be performed by the covenant.

That the defendant had not provided sufficient straw and oats for the plaintiff's horses, according to his covenant. 1 Bro. 132. Bar, that he had provided, &c.

For not delivering of barley according to an agreement. Clift 204.

Upon articles to receive 100l. one moiety thereof in money, and the other in woollen or linen clothes; and that the defendant had not delivered the same according to his covenant. Bro. Red. 154.

That the defendant had not educated T. A. F. and S. B children of the plaintiff, with proper instructions according to his covenant. Rob. Ent. 170.

That the defendant had not procured a decree in the court of Exchequer, for the quiet enjoyment of the premises, and had not procured a lease from the parson of the parish of the tithes within a year after the covenant, with a proper averment. Hand. 67.

That the defendant had not procured a discharge, called a quietus from the pipe-office, whereby the testator was obliged to pay several sums of money. Tho. 122.

Upon a covenant to buy all the wine of the plaintiff, that the defendant should make use of in his inn; a breach, that the defendant had bought several vessels and hogheads of wine, of persons named in the declaration, and expended the same in his inn; a plea, protesting that he had not bought any of the person there named, for plea, that he had not sold the said wine in his inn, to which the plaintiff demurred. Wi. Ent. 142.

That

In Covenant.

That the defendant refused to seal a release of the lands:
Bro. Red. 163: Clift 215.

Upon a writing, whereby the defendant covenanted to do no act towards the revocation of a letter of attorney, or to release a bond which had been made to him. Hand: 72.

For that the defendant had not kept the plaintiff indemnified from a yearly rent of 7l. and the arrears thereof, pursuant to his covenant. 2 Infr. Cl. 282.

That part of the premises granted to the plaintiff, by a commission of pious uses, was found to be given to the use of the poor, in an hospital in the same town; and it was decreed by the said commissioners, that the plaintiff and his heirs should permit the feoffees of the premises, quietly to enjoy the same to the use of the poor, and that the plaintiff should pay 100s. for the arrears, every year he had enjoyed the premises, and a demurrer thereto. Wi. Ent. 122.

Upon a writing, whereby the defendant covenanted that the plaintiff should receive from another for his own use, 4l. a breach, that the defendant *had received it, and a bar that he had not received it. 1 Bro. 134. 3 Infr. Cl. 386. (P* 168)

Upon an agreement for a chattel lease under a rent, and covenants, and a breach assigned for non-performance of the agreement, to which the defendant pleaded nil habuit in tenementis. 2 Ven. 98.

Breaches assigned relating to the non-payment of rent.

For non-payment of rent for tithes. Clift 210.

For rent reserved upon an assignment of letters patents, of the office of secretary of the island of Barbadoes. Bro. Met. 91.

For several rents in arrear, for several parcels of land for a whole year, which should have been paid at several feasts, or at twenty-one days after. Wi. Ent. 151.

Several other breaches assigned for non-payment of rents. 1 Saund. 230. 2 Saund. 263. Wi. Ent. 151. Vid. 128. 1 Saund. 235. Vid. 142. Clift 206. Ro. Ent. 164. 2 Vent. 231, 232. Vid. 143, 128. Clift 220. Hern 275, 261.

By an executor for non-payment of rent, and for arrears of rent. Bro. Met. 102.

Against an assignee of a lessor for non-payment of rent. Mod. Int. 120.

By assignee of a lessor against a lessee, for non-payment of rent. 2 Mod. Int. 201.

For not paying the rent for tithes reserved upon articles Clift 250.

The like for rent of a brew-house. Clift 220.

Breaches of covenants relating to things mercatorial.

For that the ship was not well victualled, manned, or apparelled, and not fit to proceed in the voyage, but foundered and

References to Precedents.

and was sunk, and the plaintiff lost the benefit of the voyage, &c. *Clift* 209.

For not paying the plaintiff bounty-money, allowed by act of parliament, for shipping of corn, which the defendant was authorised to receive for the plaintiff, by writing, &c. *Bar*, that he received no bounty-money. *Ibid.* 219.

Breach, that the defendant nor the master of the ship had completed the voyage, either within the first year or the second year, nor returned the ship; but that after two years, the ship, by the appointment of the defendant, was carried into a port in Ireland, where, by the default of the defendant, the ship was lost, and all her tackle and furniture, through the defendant's default. *Vid.* 132, 141.

Breach, that the defendant had not paid the freight for the ship, according to the rate of 4l. per ton, for the goods loaden in the ship, (to wit) one half in thirty days, and the remainder in fifty days, after the unloading of the said ship. *Thompson* 104. *Cl. Aff.* 307.

That the defendant within three days after the return of the ship, did not account with the plaintiff, for and concerning the expences of the loading of the ship, nor pay his reasonable expences. *Vid.* 187.

Breach, that the defendant had not paid his freight for the goods loaden in the ship amounting to 100l. within thirty days after producing the certificate, signifying the ship was unloaded. *Hand.* 71.

Breach; the defendant had not paid the plaintiff for 100 hogheads of wine delivered to him at Maderas, by the plaintiff's factor. *Brownl. Red.* 141.

Breach, that bills of exchange were not paid according to covenant. *Bro. Red.* 140.

Breach, that the defendant had not paid money on a bill of exchange, and the damages occasioned by reason of the non-payment thereof. *Bro. Red.* 158.

Breach, that the ship could have carried seventy hogheads, of which the defendant had notice, and had not loaded her with so many, which she could carry, but with fifty-two only. *Bro. Red.* 161.

That the defendant had not paid the mariner's salary. *Ibid.*

That the ship was not ready to set sail, nor depart at the day, nor proceeded on her voyage with that speed that she might have done. *Cl. Aff.* 309, 310, 311. 3 *Inst. Cl.* 430.

Upon an indenture of charter-party, that the defendant had not paid for a moiety of the port-charges, or of the freight of the ship, according to his covenant. 1 *Bro.* 126.

The like for hire and demurrage. *Lev. Ent.* 34.

Upon an indenture made on hiring a ship for a voyage, and a breach assigned, that notice was given after six months of the ship's safe arrival, and 300l. due for freight, 150l. at unloading.

In Covenant.

ing the ship, and 150l. within six days after, which the defendant hath not paid; and that the defendant did not pay the mariner's wages; and that the ship was brought back into the port of London; and that the ship was not delivered *with her (P* 169) furniture at the end of the voyage. *Hern.* 266.

General Bars.

That the plaintiff did not demise as to part, and a demurrer to another part. 1 *Saund.* 104. 2 *Mo. Int.* 205.

Where the defendant pleads, that he, or any of his tenants have broke the covenants. *Bro. Vad.* 142.

Where the defendant pleads that he hath not broken the covenants in such manner and form an issue thereon. *Ro. Ent.* 170. 3 *Inst. Cl.* 385.

A general plea of performance of covenants. 3 *Inst. Cl.* 385, 398. *Bro. Met.* 130.

Plea, that the indenture is not the defendant's deed. 3 *Inst. Cl.* 387. The like in *Ro. Ent.* 164.

A bar by a release, and the tenor follows in these words, 3 *Inst. Cl.* 387. the like, and a demurrer thereto. *Ro. Ent.* 166. *Co. Ent.* 116.

Bar by surrender, and an issue thereupon. 3 *Inst. Cl.* 393. 2 *Mo. Int.* 207.

By a concord. *Co. Ent.* 117.

A plea, that the goods were delivered to the defendant to render an account, and that he and the plaintiff accounted; and the plaintiff accepted the account, and received the money of the defendant in full satisfaction. *Vid.* 80.

That the testator had nothing in the tenements, and a demurrer thereto. 2 *Ven.* 98. 3 *Inst. Cl.* 416.

That there are not any such covenants to be performed, contained in the indenture. *Bro. Red.* 153. and a demurrer thereto.

Special Pleas.

After oyer of the indenture, the defendant pleaded, that neither the plaintiff, nor A. named in the indenture, was not in but out of possession of the premises; and that the indenture was made by the plaintiff's intestate by illegal maintenance; and therefore the indenture is void. *Bro. Red.* 143.

To part, acknowledging the action, a demurrer to the residue, and an award of one taxation of costs, and a ceasing of a writ of execution, till the matter put in issue be determined. 2 *Ven.* 233.

As to part of the tithes demised to the plaintiff, that the Queen was seised thereof, who demised to J. and T. who rejected, &c. with several averments. *Ro. Ent.* 174.

To an action brought upon a bargain and sale by the heir, the defendant pleaded, that the first devisee for life being heir at law, released with warranty. 3 *Inst. Cl.* 419.

That one R. gratis gave the plaintiff a rectory for life, which was of a greater value than the annual payment given by the defendant; pleaded to an action of covenant, whereby the defendant

References to Precedents

defendant was to pay so much till he should be preferred to some-
what better gratis. Replication, that R. granted the rector
upon an agreement for money to be paid, and a traverse that he
granted it gratis. Bro. Red. 165.

That the defendant lessee, before the grant of the reversion
by the lessor surrendered; which surrender the lessor accepted
of. 1 Saund. 235. a verdict for the plaintiff.

A plea, that the mayor, bailiffs, &c. were seised in fee,
until disseised by the plaintiff. Replication, that King James
was seised in right of the dutchy of Cornwall, and granted the
premisses to the plaintiff, and traverse the seisin of the corpo-
ration, and issue upon the traverse. Lill. Ent. 141, 143.

Pleas by the servant to an action brought by the master upon
indentures of apprenticeship.

A plea, that the plaintiff turned away the defendant from
his service, and until such time the defendant served until such
time. Privileg. Lond. 324.

After oyer of the indenture, and several protestations, the
defendant pleads for his defence, that he did not embezzle any
money or goods, and issue thereupon. Wi. 155. Hob. 217.

Plea by an apprentice in bar, that he had performed the co-
venants, and traverse the several breaches in the count. 3 Inst.
Cl. 389. Replication, maintaining the count thereupon and issue.

To a declaration in London, the defendant pleads a judg-
ment in the mayor's court, upon the custom of the city, for an
apprentice that was not enrolled the first year, to depart from
his master before the judgment. Vid. 150.

(P* 170) A plea, that he departed with the leave of his master, and
that he disposed of the goods for, and with the leave of his
master; and a traverse, that he knew what damages had been
done, and issue; and that he had not committed fornication,
and issue; that he had not played at unlawful *games, and
issue; that he went to taverns to fetch wines, and a traverse;
a replication maintaining the declaration, and issue upon the
several traverses. 1 Bro. 130.

A plea by protestation, &c. for his defence pleads, that the de-
fendant offered to serve the plaintiff for the whole time; and that
the plaintiff refused him, and a traverse, that he refused to serve
the plaintiff. Bro. Red. 140. demurrer thereto. 3 Inst. Cl. 388.

Plea by the statute of the fifth of Eliz. that it was not lawful
for any one of such a trade to take an apprentice, unless it was
his own son, (except) it be certified by three justices of peace
under their seals; that the father or mother of such an appren-
tice had 40s. a year; replication, that the father at the time of
making the indentures, was seised in fee in land of the value of
40s. which was certified and inrolled according to the statute;
rejoinder, that the father of the defendant was not seised of
such lands with a special demurrer, that it was a departure from
the plea. Wi. E. 137. Privileg. Lond. 338. Robinson. Ent. 193.
Plea.

In Covenant.

Pleas by the master to an action brought by the servant upon indentures of apprenticeship.

A plea by the master, that the plaintiff departed his service without leave; and that the defendant refused to take him again, and traverse, that he turned him away from his service; a demurrer, and joinder in demurrer, and judgment for the plaintiff. Vid. 84.

A plea, that the defendant found the plaintiff with meat and drink; and that the plaintiff did not continue in his service the time in his indentures, but left the defendant in service a month before his time was out; replication to that part of the plea, relating to meat and drink; and to the other part, the plaintiff maintains his declaration; and that he left the service of the defendant. Vid. 140. The like. 3 Inst. 389.

That the plaintiff departed from the defendant's service, and a traverse, that the defendant turned him away from his service, with a special demurrer. Vid 84. Previl. Lond. 345.

Bars to actions brought relating to things mercatorial.

A plea alledging by protestation, that the ship was not found enough for her voyage; for plea the defendant saith, that the Spaniards had not offered any hostility to the ship, so that the ship could not have a free trade. 1 Brow. 127. 2 Inst. 430.

That the defendant is, and always was ready to account with the plaintiff, but that the plaintiff refused; and a traverse, that the plaintiff was ready to account. Vid. 138.

That the ship was not ready to sail or depart at the day, nor did she proceed on her voyage with that expedition that she might. Cl. Ass. 309, 310, 311. 3 Inst. Cl. 490.

After Oyer of the indenture, the defendant pleads, that he deposited the money for wine in the hands of A. to the use of the plaintiff, where it now remains, and a demurrer thereto. 3 Inst. Cl. 415.

Pleas to actions of covenant for the performance of somewhat by the defendant.

Plea, that the defendant is and always was ready to account with the plaintiff, but that the plaintiff refused, and then the defendant takes a traverse, that the plaintiff was ready to account. Vid. 138.

Plea, that the defendant offered to deliver the barley, and the plaintiff refused, and that the defendant is still ready to deliver it; replication, that he did not tender it, and issue thereon. 3 Inst. Cl. 296.

That the defendant educated the plaintiff's children, (viz.) T. B. until he came of age; and A. and T. till such a time,
P when

References to Precedents.

when they died, and J. B. till the time of suing out the writ; replication, that the defendant did not educate them modo & forma. Rob. Ent. 171.

That the defendant was ready to account with the plaintiff, and traverse, that the plaintiff was ready to account with him: 3 Inst. Cl. 431.

That the defendant offered to deliver the barley to the plaintiff, and the plaintiff refused to accept it; and that the defendant is yet ready, &c. Ra. Ent. 134.

Pleas to actions of covenant for the payment of money.

After oyer of the indenture, the defendant pleads, that he disposed of the money by the direction of the plaintiff, for wine now remaining in the hands of A. for the use of the plaintiff; a demurrer thereto. 3 Inst. Cl. 415.

(P* 171) Breach assigned for the non-payment of money, and a plea, that the *defendant paid the money; replication, that he did not pay it, and an issue thereupon. 3 Inst. Cl. 417.

The defendant confesses the receipt of 800l. but before the receipt thereof he expended about 810l. in repairs and other necessaries; whereupon he retained the said 800l. towards satisfaction thereof; a demurrer thereto, and judgment for the plaintiff. 1 Saund. 15. 3 Inst. Cl. 414.

A plea to an action upon a covenant to pay 4l. yearly, until the plaintiff should be better provided for by P. that P. gratis gave the plaintiff a rectory for life; replication, that it was given upon a contract for money, which was paid, and a traverse, that it was granted gratis. 3 Bro. 30.

Pleas to actions of covenant for the non-payment of rent.

That the rent being in arrear, the plaintiff entered into the lands, by which the rent became extinct, and the indenture void. Vid. 143.

As to part the defendant confesses the action; and as to the residue, that before any rent became due, the defendant assigned his lease to another, demurrer thereto. 2 Ven. 23.

That the defendant assigned the premises, and that there was no rent in arrear before the assignment, to which the plaintiff demurred, because he had not alledged any notice of the assignment. 3 Lev. 231.

That the defendant within the term assigned to M. of whom the plaintiff received rent. Wi. Ent. 143. 2 Saund. 298. 3 Inst. Cl. 412. Vid. 129. 2 Ven. 232. Hern 276.

Pleas to declarations in covenant for want of repairs.

Where the defendant alledging by way of protestation, that at the time of the demise, &c. the premises were not sufficiently repaired; for his defence he alledges, that he did repair as
often

In Covenant.

often as there was occasion; and traverses that he left them unrepaired, and an issue taken upon the traverse. *Mod. Int.* 140.

The defendant pleads that he repaired the sea-walls as soon as he could, but doth not say when the time of repairing was, nor make any answer as to the recompence of the damage, to which the plaintiff demurs. *Wi. Ent.* 147.

Plea, that he maintained the premisses during the term, and being so repaired, rendered them to the plaintiff at the end of the term. *3 Inst. Cl.* 403.

That the defendant within the term assigned to R. of whom the plaintiff accepted the rent, that the chimnies were taken down by the company of the plaintiff, and that the leaden gutter was taken up to build a shed, that the defendant intended to make a new gutter, but before he could finish it, the plaintiff entered and ejected the defendant: that the brick-walls by the violence of the tempest were broken down; which the defendant amended at his own charges, as soon as he could. *Wi. Ent.* 144.

That the barn before the end of the term was broken down by the appointment of the plaintiff, and the materials thereof disposed of by the plaintiff, and that the plaintiff had kept the rest in good repair. *Bro. Red.* 143.

As to want of repairs to the chancel, that the plaintiff did not demise; a demurrer thereto. *1 Saund.* 108.

That the messuage was not uncovered for want of tiling, and an issue thereupon: that the glass windows were broken, and out of repair for want of glazing, and issue thereupon; and so of other things. *Bro. Red.* 157.

That the house was sufficiently repaired at the end of the term; and a traverse, that it was uncovered for want of tiling; that the walls were unrepaired, and traverse, that they were broken, and the like of other things. *Vid.* 122. The like, and issue thereupon on every breach. *3 Inst. Cl.* 410.

That he did sufficiently repair all the houses during the whole term, and so left them at the end thereof; that he did not permit the pavement of the yard, nor the walls and the doors to be decayed for want of repairs until the end of the term; and that he did not permit the tiles, the windows,ricks and walls, to be broken down, nor to be decayed, for want of repairs, nor did he leave them so at the end of the term; and an issue tendered as to all; a demurrer to the first part of the plea, and an issue as to the residue. *2 Vent.* 124. Judgment to the plaintiff upon a demurrer.

That he did repair according to his covenant. *Ra. Ent.* 6. *Vet. Int.* 36. *Hern.* 271; 288.

References to Precedents

(P* 172) *Pleas to actions of covenants for a disturbance in the possession of lands.

A plea by way of protestation, alledging, that the defendant had kept his covenant in warranting the premises; and likewise that H. had not a legal right for a defence, that H. did not eject him. 2 Mod. Int. 209.

A plea by way of protestation, that the defendant did not enter into the manor for plea, that J. and M. did not eject the plaintiff. Rob. Ent. 174.

A plea, that the indenture became forfeited, for that the rent was in arrear, for which reason the plaintiff re-entered; Replication, that the former estate, after the determination of which the plaintiff ought to enjoy, was in esse at the time of exhibiting the bill; to which the defendant demurred. Vid. 143.

That the defendant demised to the plaintiff another messuage for the same term therein mentioned, in full satisfaction for all damages sustained by the plaintiff, by reason of his being ejected by the bishop; Replication, that he did not demise the said messuage in full satisfaction, and an issue tendered thereon. Bro Red. 149. 3 Inst. Cl. 397.

That the defendant drove out the plaintiff from the tenements demised to him. Ra. Ent. 135, 136.

That the defendant did not hinder the plaintiff from taking possession. Co. Ent. 65.

That the plaintiff being the defendant's lessee, surrendered his term to the defendant the lessor, whereby the defendant expelled the plaintiff out of the premises. Ra. Ent. 136.

That the lands were not charged with prior incumbrances. Co. Ent. 65.

That the defendant performed all the covenants till such a feast; that then one P. having a better title to the lands, entered and ejected the defendant. Bro. Red. 158. 3 Inst. Cl. 406.

That the plaintiff peaceably and quietly held and enjoyed the wood and trees, without interruption by the defendant according to his covenant. 3 Inst. Cl. 420.

A plea by the defendant, protesting, that H. S. had no right; for plea he avers, that H. S. did not eject the plaintiff. 2 Ven. 274. a demurrer thereto.

Pleas to actions of covenants for the assurance of lands.

That the father of the defendant was seised in fee, and had full power to sell, and an issue tendered thereon; but the plaintiff demurred. Wi. Ent. 135.

The

In Covenant.

That the defendant immediately after making the said indenture, put the plaintiff in possession of the premises; replication, that he did not so put him, and an issue thereon. Rob. Ent. 174.

That the defendant's father was seised in fee, and had power to sell, and an issue thereupon tendered, and a demurrer. Wi. Ent. 135.

A plea by the performance of the condition; replication, that the plaintiff required the defendant to levy a fine, and that the defendant refused. 3 Inst. Cl. 419.

To a declaration upon a covenant to make a further assurance upon request; a plea, that the plaintiff made no request. 3 Inst. Cl. 418.

A plea, that the plaintiff did not request the defendant to make him a release of the lands. Bro. Red. 163. 1 Bro. 72.

That the defendant was ready to make the plaintiff a release, Co. Ent. 65.

To a Covenant to leave Lands.

To a declaration upon a covenant to leave lands to the plaintiff at the end of the term, which was demised by the plaintiff to the defendant, the defendant pleads, that before the end of the demise, the plaintiff disseised J. of the lands which he demised to the defendant, and that J. re-entered and enfeoffed H. from whom they descended to T. who were seised at the end of the term, so that he could not release them. Bro. Red. 163. 3 Bro. 30.

Where the Defendant pleads Statutes in Bar.

Where the defendant pleads the statute of Ed. 6. Cap. 16. against selling offices. Bro. Met. 114. Demurrer thereto, and judgment for the plaintiff.

The defendant pleads the statutes of 13th and 18th of Eliz. for avoiding the covenants made in a lease to the plaintiff, to which the plaintiff demurred, and judgment for the plaintiff on the 14th of Eliz. Wi. Ent. 149.

Other select Precedents that are not herein before inserted. (P 173)

An action of covenant upon an indenture of bargain and sale, wherein was a covenant to discharge from incumbrances, to deliver up all evidences, muniments, &c.——Setting forth that the covenantor was seised in fee, and that he had a power to sell.——A breach assigned, that counsel devised a note of a fine to be levied.——That the plaintiffs required the defendants to acknowledge the fine, and they refused. Lut. 284, 285, 286. A plea denying the request.

A

References to Precedents

A declaration in covenant, setting forth, that in consideration of marriage, the testator covenanted to stand seized of the manor of C. to the use of him and his heirs, till the marriage.—— And then to the use of himself for life, remainder to M. for life for her jointure, with remainders over.—— And a covenant, that the premises were of the yearly value of 400l. besides repairs.—— That the marriage took effect.—— And sets forth the death of the testator, and that M. survived him.—— A breach, that the premises were not of the yearly value of 400l. for that they were only of the yearly value of 165l.—— A plea, of nothing by default.—— A replication, that the plaintiff, and the said M. Y. after the death of the testator, sued the defendant by original, upon which there was judgment by default, and an award of several writs of enquiry by Vic' non misit breve.—— And that after the last continuance, M. Y. effoined and died.—— That the plaintiff had not notice of it till the thirtieth of January, 3 Car. 33. whereupon the plaintiff purchased a new writ by Journeys Accounts.—— Upon which a nil was returned, and a capias awarded, and the sheriff non misit breve—— the parties appear, and the plaintiff avers, that the defendant at the time of suing out the first original, had assets by descent, an averment of the identity of the action.—— A rejoinder, that the first writ was discontinued; a demurrer, and a joinder in demurrer. Lut. 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297.

Upon a covenant, that the lessee should not assign his lease. A breach assigned, that the lessee without leave of the lessor, assigned all the premises, whereby the plaintiff lost a heriot. Lut. 300, 301.

A declaration upon a deed of covenants, whereby the defendant covenanted with the plaintiff, that in case the defendant, by the means and procurement of the plaintiff, obtained or purchased an estate in the county of M. that then he would upon demand make to the plaintiff, a lease for fifty years of some of the rooms in the house particularly named.—— And the defendant obliged himself in 200l. for the performance of covenants. And that the defendant by means of the plaintiff, had obtained a term of sixty years, and a breach, that he had not made the plaintiff a lease, &c. Lut. 307, 308.

A breach assigned, that two barns, part of the demised premises, for want of the necessary reparations of the defendant, in thatching, walling, &c. And not for the default of the principal timber, were ruinous and in great decay, and in danger of falling. A plea, by protestation, that the barns were not ruinous. For plea, that such a day the defendant was ready to have repaired, &c. that there were two pieces of timber of such dimensions necessary, and that the plaintiff had notice of it, and had not delivered

In Covenant.

delivered it.——A demurrer, and a joinder in demurrer. Lut. 315, 316.

A breach assigned upon a covenant, in a deed of assignment of a lease.——That before making the deed of assignment J. E. and R. G. had a good title to part of the lands assigned to the plaintiff, setting forth the particulars for a term of years, by virtue of a demise made to them by the defendant, before the assignment to the plaintiff, with an averment, that the parcels demised to E. and G. are part of the tenements assigned *to the plaintiff,——

A plea, as to a parcel called P. that E. and G. had not any title by, or under the defendant.——And as to the residue, that the plaintiff had notice at the time of the assignment of the demise to E. and G. and that after making the assignment, G. being the survivor, attorned to the plaintiff at his request, and did not withhold, &c. from the plaintiff; a demurrer, and a joinder in demurrer. Lut. 321, 322, 323. (P* 174)

A declaration upon an indenture of demise, made by the intestate of the plaintiff to the defendant's testator, (except the use of the house of the two first years)——Habendum for twenty one years under such a rent, which the lessees covenanted jointly and severally to pay.——That the lessor made his will, and made D. his executrix, that he died possessed of the reversion, and D. proved the will.——That the lessee made his will, and the defendant executrix, who proved the same.——Sets forth the death of Deb. intestate, and administration granted to the plaintiff, during the minority of R. W.——the marriage of the defendant Eliz. with the other defendant——And the rent in arrear, with an averment, that R. is within age.——A plea after the last continuance, that R. W. had attained his age of twenty-one years. Lut. 338, 339, 340, 341, 342.

Two breaches assigned against the assignee. 1. For non-payment of rent. 2. Upon a covenant immediately to make a ditch and fence, and maintain it in good repair.——That the said fence was ruinous, and in decay, and that neither the lessee, or his assignee after the death, had kept the fence in good repair.——A plea, that after the death of the lessor the defendant as assignee had repaired, &c. Verdict for the plaintiff, and the judgment arrested because there were entire damages; and as to the breach in the time of the lessor the assignee was not liable. Lut. 362, 363.

A. conveys a messuage, with the appurtenances to B. and his heirs, and also grants to him liberty of ingress, and to a well to draw water. And A. covenants with B. that he was seised in fee of the premises. It is not a good breach, that A. was not seised in fee of the well, for the covenant, that he was seised in fee of the premises, did not extend to the well. Lut. 603, 608.

References to Precedents

A declaration upon an indenture of demise made to the testator of the defendant by husband and wife, plaintiffs, of the wife's lands.——Breaches assigned, 1. That 160l. rent reserved in the lease were in arrear,——2. That the messuage, &c. demise, &c. were out of repair,——3. That the testator had grubbed up certain trees,——Bar by outlawry in the plaintiff's husband, upon a suit in the court of Common Pleas; judgment upon a demurrer for the plaintiff, as to all the breaches, because the damages to be recovered by the breach of covenant for repairs were not forfeited by the outlawry. Lut. 1510, 1513.

A covenant by a devisee against an assignee of a term for not repairing. Lilly 132.

By a surviving lessor, against a tenant for years for rent in arrear, Lilly, 130.

Against the executor of an executor for an equitable right by the assignee of the reversion against the assignee of the term.—Lilly 134.

Against an administratrix upon an indenture made by the intestate, whereby the intestate covenanted to pay the sum of 39l. with interest.——And a breach assigned in the non-payment, &c. Lilly 132.

A declaration in covenant for rent in arrear, setting forth,——the demise;——an exception in the lease of a way,——and an exception of the game, and all trees.——Habendum for twenty-one years, rendering rent.——A breach assigned in non-payment of the rent.——A plea, that the mayor and commonalty of the city of C. were seised in fee, till disseised by the plaintiff;——the plaintiff's being seised by disseising, made the lease, and that the plaintiff entered; and the mayor and commonalty re-entered upon him, and ousted him.——

(P* 175) A replication, that King James the Second seised, in right of the Duchy of Cornwall, by his letters patents, *made a lease for years.——The entry and possession of the plaintiff, and a traverse of the seisin in fee of the corporation; an issue upon the traverse; and the bailiffs being sheriffs of the city of Coventry, and partners in the action; and the coroner of the city is one of the commonalty, and therefore also a party; a venire is prayed to be directed to indifferent persons, &c. Lilly, 141, 142, 143.

A breach assigned on a bill of sale of goods, that the defendant at the time of the bill of sale had no property; a demurrer with special causes, and a joinder in demurrer. Lill. 139.

A declaration in covenant for the assignee of the reversion against the assignee of the term, setting forth,——The lease for years,——The covenant for the payment of the rent,——The entry by virtue of the demise.——That the lessor granted the reversion by lease and release.——The statute of

In Covenant.

of uses.——The seisin of the reversion, and that one jointenant died, and the other survived.——The breach assigned in non-payment of the rent.——The imparlance.——There being two defendants, one appeared, and the other suffered judgment. An unica taxatio damnorum.——The defendant that pleads confesses the seisin and demise, the jointenancy——and a severance of the jointenancy, with the assent of the assignee of the reversion;——And that the partnership determined, that one jointenant became sole possessed, and acceptance of the rent of the sole tenant. Lilly 135, 136, 137, 138.

For nonpayment of rent, declaring that D. P. was seised in fee, &c. and demised to the defendant that there was a covenant to pay the rent; and that afterwards D. by indenture (for the considerations therein mentioned) granted the reversion to the plaintiff in fee, to whom the defendant attorned, and that rent was in arrear; and a breach assigned in non-payment thereof: The defendant pleads that such a day he assigned his term before the plaintiff had any title to the premises, but does not plead an acceptance of rent by the plaintiff of the assignee, nor notice of the assignment; a general demurrer and judgment for the plaintiff. 3 Lev. Rep. 229, 230, 231, 232, 233. Vide 1 Sid. 338.

JUDGMENTS

Judgments in Covenant.

JUDGMENT for the plaintiff upon a demurrer, and a writ of inquiry awarded. Co. Entr. 113, 116. Jud. 212. 1 Saund. 46. 2 Mo. Intr. 212.

The like upon a verdict at the nisi prius. 1 Saund. 109, 237. 2 Mo. Intr. 211, 237.

Judgment where the defendant relinquisheth his plea, and acknowledges the action; whereupon a writ of inquiry is awarded, and judgment given thereon. Co. Entr. 114.

Where the defendant as to part, acknowledges the action, and there is a demurrer to the residue, with a *unica fiat taxatio dampnorum*, and a *cessat emanatio* of the writ of inquiry, till the matters put in judgment by the demurrer are determined. 2 Ven. 133.

A judgment by *non sum informatus*. Mo. Intr. 141.

The like by *Nil dicit*. Mo. Intr. 142.

Where there was an issue and a demurrer, and the issue is first tried, and a verdict for the plaintiff, and judgment upon the *postea* for the plaintiff upon the demurrer, and an enquiry awarded. 2 Tho. Judgments 54.

The like where the plaintiff remits the damages upon the demurrer, and takes judgment only upon the verdict. Ibid.

(P* 176) *Judgment against the defendant upon an inquiry of damages, to be levied upon the goods of the testator. Idem 55.

Judgment for the plaintiff upon a verdict against an executor, upon one covenant broken by the testator, and another by the executor. Idem.

Judgment against an executor upon a verdict. 2 Tho. Judgment 55, 56.

Where the defendant relinquishes his plea of *nul tiel record*, and acknowledges the action; and a writ of inquiry of damages awarded, and judgment for the plaintiff thereupon. Co. Entr. 114.

DEBT.

*Debt.

(P* 177)

Devon. ff. **W** S. executor of the last will and testament of *R. T.* marshal, &c. of a plea that he render to him six pounds fourteen shillings of lawful money of *Great Britain*, which he unjustly detains from him, &c. for this cause, (*to wit* :) That whereas the aforesaid *E.* on the first day of *May*, in the fifth year of the reign of our Sovereign Lord *George* the Second, King of *Great Britain*, &c. at *Southmolton* in the county aforesaid, bought of the aforesaid *Richard*, in his life-time, *two pair of brass candlesticks for ten shillings, one quart pot for two shillings and sixpence, three dozen of pewter plates, for forty-two shillings, and ten pewter dishes for four pounds*, of lawful money of *Great Britain*, to be paid to the said *R.* by the said *E.* whenever he should be thereto required, which said several sums of money amount in the whole, to the aforesaid sum of six pounds fourteen shillings and sixpence; nevertheless the said *E.* (altho' often required) &c. hath not paid the said sum of six pounds fourteen shillings and sixpence, or any part thereof, either to the said *R.* in his life-time, or to the said *W.* after the death of the said *R.* but hath altogether refused to pay the same to the said *R.* in his life-time, and to the said *W.* after his death, and doth yet refuse to pay the said monies to the said *W.* and unjustly detains the same, in delay of the due execution of the said last will and testament of the said *R.* and to the damage of the said *R.* twenty pounds; and therefore he brings his suit, &c. and he brings into court the letters testamentary of the said *R.* by which the said *W.* sufficiently appears to this court to be executor of the last will and testament of the said *R.* and thereof to have the administration, &c.

A declaration in debt upon an emisset brought by the plaintiff as executor against the defendant for goods sold by the testator.

London, ff. *A. B.* late of *London*, yeoman, was summoned to answer to *G. H.* executor of the testament of *T. C.* and to *T. S.* and *M.* his wife, co-executrix with the said *G.* of the testament of the said *T.* late executor of the testament of *P. J.* of a plea that he render to them forty-pounds, which he unjustly detains from them, &c. And whereupon the said *G. T. S.* and *M.* by *W. G.* their attorney, declare, that whereas the aforesaid executrix of an executor of the first testator.

A declaration in debt upon a mutuatus by an executor, and the husband and wife co-executrix of

Debt.

(P* 178) aforeſaid *A.* on the twentieth *day of *S.* in the year of our Lord one thouſand ſeven hundred thirty, at *London*, in the pariſh of *St. Mary le Bow*, in *Cheap* ward, had borrowed of the aforeſaid *P. J.* in his life-time, the aforeſaid forty pounds, to be repaid to the ſaid *P.* when he the ſaid *A.* ſhould be thereunto required; nevertheless he the ſaid *A.* though often required, hath not paid the aforeſaid forty pounds to the aforeſaid *P.* in his life-time, or to the ſaid *T. C.* after the death of the ſaid *P.* or to the ſaid *G.* and *M.* after the death of the ſaid *T.* while ſaid *M.* was ſole, or to the ſaid *G. T. S.* and *M.* after the eſpouſals celebrated between the ſaid *T. S.* and *M.* but hath hitherto reſuſed to pay it, and ſtill doth reſuſe to pay to, and unjuſtly detains the ſame from the ſaid *G. T. S.* and *M.* whereupon they aver that they are injured and endamaged to the value of five pounds; and therefore they bring proof; and they bring into this court, as well the letters teſtamentary of the ſaid *J. P.* by which the ſaid *T. C.* appears to this court to be executor of the teſtament of the ſaid *J. P.* as alſo the letters teſtamentary of the ſaid *T. C.* by which the ſaid *G.* and *M.* appear to this court to be executors of the teſtament of the ſaid *J. C.* and to have the adminiſtration thereof, &c.

Declarati-
on in debt
upon a
bond;

Devon, ſſ. *A. B.* late of *Southmolton* in the county of *Devon*, mercer, otherwiſe called *A. B.* of *Southmolton* in the county of *Devon*, mercer, was ſummoned to answer to *C. D.* of a plea (or in action) that he render to him twenty pounds of lawful money of *Great Britain*, which he owes to and unjuſtly detains from him, &c. And whereupon the ſaid *C.* by *William Umſonville* his attorney, complains, that whereas on the firſt day of *March*, in the year of our Lord one thouſand ſeven hundred twenty-two, at *Triverton* in the ſaid county, the ſaid *A.* by his writing obligatory, (commonly called a bond) bound himſelf to the ſaid *C.* in the ſaid ſum of twenty pounds of lawful money of *Great-Britain*, to be paid to the ſaid *C.* whenever after the ſaid *A.* ſhould be thereto required; nevertheless the ſaid *A.* (although often required) hath not paid to the ſaid *C.* the ſaid ſum of twenty pounds, or any part thereof, but hitherto altogether hath and ſtill doth reſuſe to pay the ſame, to the damage of the ſaid *C.* ten pounds; and thereof he brings proof, and hath good proof of the premiſſes when the court will conſider thereof; and he brings into this court the ſaid writing obligatory, which gives ſufficient teſtimony of the ſaid debt, the date whereof is the day and year above-mentioned.

A declara-
tion in an
action of
debt upon
a bond
brought by the ſurviving obligee,

Suffolk, ſſ. *A. B.* late of *Ipswich*, in the county of *Suffolk*, mariner, (otherwiſe called *A. B. de Gippo in Comitatu Suffolcia Nautam*) was ſummoned to answer to *C. D.* of a plea (or in an action)

Debt.

action) that he render to the said C. fifty pounds, which he owes to, and unjustly detains from him: And whereupon the said C. by *Robert Hamby* his attorney, complains, That whereas the said A. on the first day of *July*, in the year of our Lord one thousand seven hundred thirty-two, at *Ipswich*, aforesaid, by his writing obligatory (commonly called a bond) bound himself to the said C. *and to one D. now deceased, (*whom the said C. survived*) in the said sum of fifty pounds, to be paid to the said C. a d D. or to one of them, whenever after the said A. should be thereto required; nevertheless the said A. (*although often required*) hath not paid the said sum of fifty pounds to the said C. and D. or either of them, in the life-time of the said D. or to the said C. after his decease, but hath ever since, and now doth refuse payment of the same to the said C. wherefore the said C. declares he is injured and endamaged to the value of twenty pounds; and thereupon he brings his suit, and hath good proof of the premisses, when the court will consider thereof; and the said C. brings here into this court the said writing obligatory, which testifies the said debt; the date whereof is the same day and year above-mentioned.

(P* 179)

Devon, fl. A. B. late of *Southmolton* in the county of *Devon*, Gent. son and heir to C. B. (*otherwise called C. B. of Southmolton in the county of Devon, Gent.*) was summoned to answer to D. E. and S. his wife, executrix of the last will and testament of F. G. and to H. J. co-executrix with the said S. of the said last will and testament of the said F. in an action that he render to them one hundred pounds, which he unjustly detains from them, &c. And whereupon the said D. E. and S. his wife, and the said H. by *John Cock* their attorney, complain, That whereas the said C. (*whose heir the said A. now is*) in his life-time, (that is to say) on the first day of *June*, in the year of our lord one thousand seven hundred thirty-two, by a certain writing obligatory, (*commonly called a bond*) suffered himself to be bound to the said F. in the said sum of one hundred pounds, to be paid to the said F. whenever after he the said C. should be thereto required: And in order to make a due payment of the said one hundred pounds, the said C. by the same writing obligatory bound himself and his heirs; nevertheless the said C. in his life-time, or the said A. son and heir to the said C. after his decease (*although often required*) hath not paid the said sum of one hundred pounds, or any part thereof, either to the said F. in his life-time, or to the said S. and H. or either of them, after the decease of the said F. and before the espousals celebrated between them the said D. and S. or to the said D. S. and H. after the said espousals celebrated between the said D. and S. but the said C. in his life-time, and the said A. after his decease, have hitherto refused to pay them or either

A declaration upon a bond in an action brought by husband and wife as co-executrix of the last will and testament of the obligee, and the other co-executrix, against the heir of the obligor.

of

Debt.

of them the said one hundred pounds; whereupon the said *D. S.* and *H.* declare, they are injured and endamaged, to the value of twenty pounds, and in delay of the execution of the said will and testament of the said *F.* and thereupon they bring their suit, &c. and they the said *D. S.* and *H.* bring into this court, as well the said writing obligatory, which gives a sufficient testimony of the said debt, the date whereof is the day and year above mentioned; as also the letters testamentary, by which they the said *S.* and *H.* sufficiently appear to this court, to be executrixes of the said last will and testament of the said *F.* and to have the administration thereof.

A declaration upon a bill penal for sixty pounds by the administrator of *Rook* against the defendant, as aunt and heir of *Elizabeth Clealand*, daughter and heir of *Benjamin*

Norfolk, ff. E. C. late of *Sparham* in the county aforesaid, widow and executrix of the last will and testament of *Edward Crouch*, (late called *Edward Crouch* of *Tedingham* in the county of *Norfolk, Gent.*) was summoned to answer to *Robert Crouch* of a plea that he render to the said *Robert Crouch*, ten pounds, which he unjustly detains from him, &c. And whereupon the said *Robert*, by *Andrew Broreton* his attorney, declares, that whereas the said *E.* in his life-time, viz. on the thirteenth day of *July*, in the year of our Lord one thousand seven hundred thirty-two, at *Catten*, by his certain writing obligatory, acknowledged himself to be bound to the said *Robert* in the aforesaid ten pounds, to be paid to the said *Robert*, whenever after the said *E.* should be thereto requested; nevertheless the said *Edward* in his life-time, or the said *Elizabeth*, after his death, although often requested, have not paid the same to the said *Robert*; but the said *Edward* in his life-time, and the said *Elizabeth* after his death, hitherto altogether have, and the said *Elizabeth* now doth refuse so to do; wherefore he declares that he is injured and endamaged to the value of twenty pounds; and therefore he brings his suit, &c. and he brings here into this court the aforesaid writing, which testifieth the said debt; the date whereof is the same day and year above mentioned, &c.

A declaration upon a bill penal for sixty pounds by the administrator of *Rook* against the defendant, as aunt and heir of *Elizabeth Clealand*, daughter and heir of *Benjamin*

Devon, ff. Hester Clealand, of *Ashprington* in the county aforesaid, spinster, aunt and heir of *Elizabeth Clealand*, who was daughter and heir of *Benjamin Clealand*, (lately called *Benjamin Clealand* of *Cherstow* in the county of *Devon*, yeoman), was summoned to answer to *Elizabeth Rook*, administratrix of the goods and chattels which were of *George Rook*, who died intestate, in an action that she render (or pay) to her sixty pounds, which she unjustly detains from her, &c. And whereupon the said *Elizabeth Rook*, by *Henry Legafick* her attorney, declares, That whereas the aforesaid *Benjamin* (whose daughter and heir she the said *Elizabeth Clealand* was, and whose aunt and heir to the said *Elizabeth* the said *Hester* now is) in his life-time, (viz.)

Debt.

On the second day of *August*, in the year of our Lord, one thousand six hundred eighty-three, at *Madbury*, by his certain writing obligatory, which the said *Elizabeth Rook* sealed with the seal of the said *Benjamin*, in his life-time, brings into this court, the date whereof is the same day and year, obliged himself, his heirs, executors, administrators, and every of them, jointly and severally, in the aforesaid sixty pounds of lawful money of *England*, to pay to the said *George Rook*, his executors or administrators the full sum of thirty pounds eighteen shillings of like money, at or upon the third day of *February* next following the date of the aforesaid bill; and the said *Elizabeth Rook*, in fact avers, that the aforesaid *Benjamin*, in his life-time, did not pay to the aforesaid *George* in his life-time the aforesaid thirty pounds eighteen shillings, at or upon the third day of *February* next following the date of the aforesaid bill, which he ought to have done according to the intent and purport of the said bill; whereby an action accrued to the said *George* in his life-time, and to the said *Elizabeth* after his decease, to demand and have of the said *Benjamin* in his life-time, the said sixty pounds; nevertheless the aforesaid *Benjamin* in his life-time, and the aforesaid *Elizabeth Clealand*, after the death of the said *Benjamin*, and the aforesaid *Hester*, after the death of the said *Elizabeth*, *(although often required) have not, nor either of them hath paid the said sixty pounds, or any part thereof, to the said *George* in his life-time, or to the aforesaid *Elizabeth*, after the death of the said *George*, (to which said *Elizabeth Rook* administration of the goods and chattels which were of the said *George*, at the time of his death, by *Francis Fulwood*, doctor of divinity, archdeacon of the archdeaconry of *Totness*, lawfully constituted, to whom the commission in this behalf belonged, on the tenth of *August*, one thousand six hundred eighty, at *Madbury* aforesaid, was granted in due form of law) but hitherto altogether have, and the said *Hester* still doth refuse to pay the same to the aforesaid *Elizabeth Rook*; wherefore she declares that she is injured and endamaged to the value of ten pounds; and therefore she brings this suit; and she brings into this court the letters of administration of the aforesaid archdeacon, which testify the commission of the administration aforesaid, in form aforesaid; which is dated the day and year above written, &c.

That the said Benjamin, whose daughter and heir the defendant is, on Aug. 2, 1683, obliged himself, &c. in 60^l. for the payment of 30^l. 18s. on the third of February then next. Lut. 503. N.L. 154.

(P* 181)

Suffolk, H. *Thomas Thorp*, late of *Stowmarket* in the said county, woollen-draper, was summoned to answer to *William Whichurch*, Gent. assignee of *Toby Bloss*, Esq. the late sheriff of the county of *Suffolk*, according to the form and effect of the statute, in such case made and provided, in an action that he render to the said *William* forty pounds of lawful money of Great

A declaration upon an assignment of a bail-bond against the principal defendant, at the suit

Debt.

of the assignee of the sheriff, by force of the statute in that case made and provided; letting forth that the plaintiff sued out a *Capias*. The tenor thereof,

Great Britain, which he owes to and unjustly detains from him: And whereupon the said *William*, by *Thomas Evans* his attorney, complains, that whereas on the twelfth day of *February*, in the year of our Lord one thousand seven hundred twenty-eight, he the said *William* sued and prosecuted out of the court of common pleas of our said Sovereign Lord the King, his said Majesty's writ called a *capias*, against the said *Thomas*, at the suit of him the said *William*, returnable before his said Majesty's justices of the said court of common pleas, directed to the then sheriff of the said county of *Suffolk*: by which said writ his said Majesty commanded the sheriff of *Suffolk*, that he should take the said *Thomas*, if he was to be found in his bailiwick, and safely keep him, so that he might have his body before his said Majesty's justices at *Westminster*, in fifteen days from the feast-day of *Easter*, to answer to the said *William* in an action of *Trespass*; and also to answer to the said *William*, according to the custom of his said Majesty's court, in an action of *Trespass upon the case* on promises and undertakings, to the damage of the said *William* forty pounds; which said writ afterwards and before the return thereof (that is to say) on the tenth day of *March*, in the said year of our Lord one thousand seven hundred twenty-eight, at *Stowmarket* in the said county, was delivered to the said *Toby Blofs*, then sheriff of the said county of *Suffolk*, to be executed in due form of law: by virtue of which said writ the said *Toby* afterwards, and before the return of the said writ, (that is to say) on the said tenth day of *March*, in the said year of our Lord, at *Stowmarket* aforesaid, took and arrested the said *Thomas*; and during the time the said *Toby* so had the said *Thomas* in his custody, by virtue of the said writ, he the said *Toby* then and there took bail for the appearance of the said *Thomas*, at the return of the said writ; (that is to say) the said *Thomas* himself, and *Joseph Selgood* of *Stowmarket* aforesaid, chapman, and *Timothy Trueman* of the same place, shoemaker: And the said *Thomas* did on the same tenth day of *March*, in the said year of our Lord, by his writing obligatory, commonly called a bail-bond, permit himself to be bound to the said *Toby*, by the name of *Toby Blofs*, sheriff of the county of *Suffolk*, in the said sum of forty pounds, to be paid to the said sheriff or his assigns, whenever after he the said *Thomas* should be thereto required, with a condition thereunder written, that if the said *Thomas* should appear before his said Majesty's justices at *Westminster*, in fifteen days from the feast-day of *Easter* then next following, to answer to the said *William* in an action of *Trespass*, and also in an action of *Trespass upon the case* on promises and undertakings, to the damage of the said *William* forty pounds; that then the said writing obligatory should be void and of none effect, or else should be and remain

that it was delivered to the sheriff;

and thereupon the defendant was arrested. That he with others gave (P* 182) a bail-bond,

with a condition to appear at the return of the writ.

Debt.

in full force, power and virtue, as it doth and may by the said writing obligatory and condition thereunder written, relation being thereunto had, more fully and at large appear. And the said *William*, in fact declareth, that the said *Thomas* did not appear before his said Majesty's justices at *Westminster*, within the said fifteen days from the said feast-day of *Easter*, mentioned in the said condition, according to the form and effect of the said condition, whereby the said bond became forfeited to the said *Toby Bloss*, as theriff of the said county: And the same being so forfeited, he the said *Toby* afterwards, (*that is to say*) on the twentieth day of *April*, in the said year of our Lord, at *Stowmarket* afore said, (at the request of the said *William*, plaintiff in that suit) by his indorsement in writing upon the said bond, in the presence of two credible witnesses (*that is to say*) *Burrell Keeble* and *William Chaplyn*, assigned the said bond to the said *William Whitchurch*, according to the form of the statute in such case made and provided, (the said sum of forty pounds, or any part thereof, not having been paid) of which said indorsement the said *Thomas* afterwards on the said twentieth day of *April*, had notice (*that is to say*) at *Stowmarket* in the said county: by reason of which said premises, and by force of the statute in such case made and provided, an action accrued to the said *William*, as assignee to the said *Toby Bloss*, sheriff of the said county of *Suffolk*, to require and have from the said *Thomas* the said sum of forty pounds; nevertheless the said *Thomas* (although often required) hath not paid the said sum of forty pounds, either to the said *Toby Bloss* or to the said *William*, but hitherto always hath and still doth refuse to pay the said sum to the said *William*, to the damage of the said *William* ten pounds; and therefore he brings his suit, and hath good proof of the premises when the court will consider thereof; and the said *William* brings here into this court the said writing obligatory, together with the said indorsement made thereon as above; the respective dates whereof are the same days and years above for that purpose respectively mentioned.

Note; *All the difference between the declaration against the bail, instead of the principal, is no more than when you shew the plaintiff paid out a writ that it was against such a one (the defendant therein) at the suit of the plaintiff; and then shew that he did not appear thereto, which may be readily changed without a useless repetition of the whole form to shew the difference.*

Norfolk, ff. A. B. late of Thetford in the county of Norfolk, (P 183) yeoman, was summoned to answer to C. D. in an action that he render to him forty pounds of lawful money of Great Britain, which he owes to and unjustly detains from him, &c. And*

Q

whereupon rent upon a lease parcel laid two several ways.

with a condition to appear at the return of the writ. An averment that he did not appear. That the bond became forfeited, and the same was assigned to the plaintiff,

whereby an action accrued, &c.

A declaration in an action of debt for rent upon

Debt.

whereupon the said *C.* by *Robert Martin* his attorney, complains,
 That whereas the said *C.* on the twentieth day of *March*, in
 the year of our Lord one thousand seven hundred thirty-one,
 at *Thetford* afore said, did demise and to farm let to the said *A.*
 one messuage, one garden, ten acres of land, ten acres of
 meadow, and ten acres of pasture, with the appurtenances
 situate, lying, and being in the parish of *Shipdham* in the said
 county, for him the said *A.* and his assigns, to have and occupy
 the said tenements with the appurtenances, from the feast of
 the annunciation of the blessed Virgin *Mary* then next follow-
 ing, unto the full end and term of one whole year from thence
 next ensuing, and fully to be compleat and ended, and so from
 year to year, as long as both parties should please: yielding
 and paying therefore to the said *C.* yearly and every year, so
 long as the said *A.* should have and occupy the said tenements
 with the appurtenances, by virtue of the said demise, the yearly
 rent or sum of forty pounds of lawful money of *Great Britain*,
 at the four most usual feasts or days of payment in the year
 (that is to say) on the feasts of the annunciation of the blessed
 Virgin *Mary*, *St. John* the Baptist, *St. Michael* the Archangel,
 and the birth of our Lord Christ, in every year, by even and
 equal portions; the first payment thereof to begin and be made
 on the feast day of *St. John* the Baptist then next ensuing:
 By virtue of which said demise, the said *A.* entered into the
 said tenements, with the appurtenances to him demised, in the
 manner as above set forth; and had, held, and occupied the
 same until the feast of the annunciation of the blessed Virgin
Mary, in the year of our Lord one thousand seven hundred
 thirty-two; and the sum of twenty pounds (part of the above
 mentioned forty pounds) was due at the said feast of the
 annunciation of the blessed Virgin *Mary*, in the said year of
 our Lord one thousand seven hundred thirty two, and still is in
 arrear for half a year's rent of the said annual rent, for the
 said tenements with the appurtenances; and the same is yet
 unpaid to the said *C.* whereby an action accrued to the said *C.*
 to require and have of the said *A.* the said sum of twenty
 pounds, part of the said forty pounds above mentioned.
 And whereas also the said *C.* afterwards, (that is to say) on
 the twenty-fifth day of *March*, in the year of our Lord one
 thousand seven hundred thirty-one, at *Thetford* afore said, de-
 mised and to farm let to the said *A.* one other messuage, one
 other garden, ten other acres of land, ten other acres of mea-
 dow, and ten other acres of pasture, with the appurtenances
 situate, lying and being in the said parish of *Shipdham*, in the
 said county of *Norfolk*, for him the said *A.* and his assigns, to
 have and occupy the same unto the full end and term of one
 whole year from thence next ensuing, and fully to be compleat

That the
 plaintiff
 demised
 the pre-
 mises

for a year
 certain;
 and so
 from year
 to year, &c.

under the
 rent of 4*l.*
 per Ann.
 payable
 quarterly;

that the
 defendant
 held and
 occupied,
 &c.
 That 20*l.*
 was due
 for half a
 year, &c.

laid ano-
 ther way.

That the
 plaintiff
 demised,
 &c.

Debt.

and ended ; and from and after the expiration of the said one whole year, as long as both parties should please ; yielding and paying to the said *C.* therefore yearly and every year, so long as the said *A.* should have and occupy the said tenements with the appurtenances, at and according to the rate of forty pounds a year : By virtue *of which demise last mentioned, the said *A.* entered into the said last mentioned tenements with the appurtenances, and held and occupied the same until the twenty-fifth day of *March*, in the year of our Lord, one thousand seven hundred thirty-two ; and the sum of twenty pounds (residue of the above mentioned forty pounds) was due on the said twenty-fifth of *March*, in the said year of our Lord one thousand seven hundred thirty-two, and still is in arrear for half a year's rent, for the said tenements with the appurtenances last mentioned to have been demised, and yet is unpaid to the said *C.* whereby an action accrued to him the said *C.* to require and have of the said *A.* the said last mentioned twenty pounds, residue of the said forty pounds ; nevertheless the said *A.* although often required, hath not rendered to the said *C.* the said several sums of twenty pounds and twenty pounds, or any part thereof, but hitherto altogether hath, and still doth refuse to pay the same ; to the damage of the said *C.* ten pounds ; and therefore he brings his suit, &c.

Trin. 11 Geo. 1.

Middlesex, ss. *Robert White*, late of *Hatton Garden* in the said county, taylor, was summoned to answer to *Thomas Wilkins* of a plea (or in an action) that he render to him fifteen pounds, which he owes to and unjustly detains from him. And whereupon the said *Thomas*, by *George Wheeler* his attorney, declares, That whereas the said *Robert* (otherwise called *Robert White* of *Hatton Garden* in the county of *Middlesex*, taylor) on the twentieth day of *January*, in the year of our Lord one thousand seven hundred and twenty, personally came before *Robert Tracy*, Esq. one of his Majesty's justices of the court of common pleas, at his chambers situate in *Serjeants-Inn* in *Fleet-Street*, and became bail for *John Bayley*, in the sum of fifteen pounds, that the said *John Bayley* should appear in his proper person in his said Majesty's court of common pleas (that is to say) at *Westminster*, or by his attorney sufficient in law, to answer an original writ at the suit of the said *Thomas*, of a plea (or in an action) of *Trespass on the Case*, to the damage of the said *Thomas* fifteen pounds, to be sued out and prosecuted by the said *Thomas* against the said *John* in this same court, before the morrow of the *Ascension-day* then next following, to answer to the said *Thomas* in the same action ; and also that if judgment

A declaration upon a recognizance upon a Habeas Corpus, after judgment in the common pleas, affirmed in the King's bench upon a writ of error. That the defendant entered into a recognizance, to appear in an action of trespass, &c. and that if judgment should be given for

Debt.

the plain-
tiff against
the defend-
ant, he
should pay
the money
or render
himself to
the Fleet,
or the mo-
ney to be
levied of
the goods
and chat-
tels of the
convictor.

(1* 185)

That the
recogni-
zance was
delivered
into court
by the
Judge to
be enrolled

That in
this action
of trespass
a plaint
had been
levied in
the sheriff's
court.

That be-
fore the
said mor-
row of the
Ascension,
the plain-
tiff sued
out an
original.

Ret.
15 Pascha.

That the
defendant
appeared
thereto,

should happen to be given in the same court for the said *Thomas* against the said *John* in the said action, that then the said *John* should make satisfaction to the said *Thomas*, for the damages that should be recovered by and awarded for the said *Thomas* against the said *John* in the said action; or that he the said *John* should on that occasion render his body to his Majesty's prison of the *Fleet*; which said sum of fifteen pounds acknowledged to the said *Thomas*, in the manner as above, he the said *Robert* willed and granted to be made of and levied upon the lands and chattels of the said *Robert*, to the use and behoof of the said *Thomas*, if it should happen that default should be made by the said *John*, in any of the premises, and he should be in a legal manner convicted thereof; which said recognizance taken and acknowledged as above, before the said justice, *the said justice afterwards (that is to say) on the twenty-third day of *January*, in the sixth year of the reign of his said present Majesty, delivered here into this court with his own hands, to be enrolled here in this court of record; and then and there the same was and now stands enrolled of record in this court of the term of *St. Hillary* in the said year, before Sir *Peter King*, Knt. and his brethren his said Majesty's justices of his court of common pleas at *Westminster*, as it doth and may by the record thereof now remaining here in this his said Majesty's court before his said Majesty's justices at *Westminster*, more plainly appear. In which action of trespass upon the case, a certain plaint had been before that time levied in his said Majesty's court before *A. B.* then being one of the sheriffs of *London*; and the same plaint was by the command of his said Majesty, by his writ sent and transmitted hither at *Westminster*, as it doth and may by the record thereof now likewise remaining here in this his said Majesty's court at *Westminster* manifestly appear: And the said *Thomas*, by the name of *Thomas Wilkins*, afterwards and before the said morrow of the ascension of our Lord next following the said twenty-third day of *January*, in the said year of our Lord one thousand seven hundred and twenty (that is to say) on the tenth day of *February* in the said year, sued out an original writ against the said *John*, by the name of *John Bayley*, late of *London*, Gent. out of his Majesty's high court of chancery; the same then being at *Westminster*, in the said action of trespass upon the case, to the damage of the said *Thomas* fifteen pounds, directed to the then sheriffs of *London* for the time being, returnable (and afterwards returned) at *Westminster* before his said Majesty's justices of this court, in fifteen days from the feast-day of *Easter*; to which said original the said *John* appeared by *Newton Stagg*, his attorney, according to the tenour of the said recognizance: And although the said *Thomas* afterwards (that is to say) in *Easter* term, in the said sixth year of the reign of his said present

Debt.

present Majesty, in this his said Majesty's court, before Sir Peter King, Knt. and his brethren then his said Majesty's justices of the said court of Common Pleas, recovered in the said action against the said *John* twenty-four pounds, which were awarded to the said *Thomas* here in this his said Majesty's court of Common Bench at *Westminster*, for his damages which he had sustained, as well by reason of the said trespass upon the case, committed by the said *John* against the said *Thomas*, as above-mentioned, as for his expences and costs laid out by him about his suit in that behalf, whereof the said *John* is convicted as by the record and proceedings thereof, (which our said Sovereign Lord the King, by virtue of his said Majesty's writ for correcting errors sued out by the said *John*, of and upon the premisses caused to be brought before himself, and which is now remaining in his said Majesty's Court before the King himself, in all things affirmed) it doth and may more fully and at large appear; which said *John Bayley* mentioned in the said recognizance, and the said *John Bayley* mentioned in the said plaint original, and judgment thereupon had as above, are one and the same and not different persons; nevertheless the said *John* had not made satisfaction to the said *Thomas* for the said damages, nor rendered his body to his Majesty's prison of the Fleet, according to the form of the said recognizance, whereby an action *accrues to the said *Thomas*, to require and have of the said *Robert* the said fifteen pounds, by him acknowledged in the manner as above, according to the force form and effect of the said recognizance; nevertheless the said *Robert*, altho' often required, hath not paid the said fifteen pounds, or any part thereof to the said *Thomas*; but hitherto altogether hath, and still doth refuse to pay the same, whereby the said *Thomas* declares that he is injured and endamaged to the value of twenty pounds; and therefore he brings his suit, &c.

and the plaintiff recovered judgment.

That the judgment was removed by writ of error. An averment of the identity. The breach.

(P* 186)

Mich. 11. W. 3. Roll 454.

DENTON against EVANS.

Middlesex, ff. *John Evans*, late of *London*, yeoman, was summoned to answer to *John Denton*, in an action that he render to him fifty pounds, which he owes to and unjustly detains from him, &c. And whereupon the said *J. D.* by *T. L.* his attorney declares, That whereas the said *J. D.* heretofore, (that is to say) in *Michaelmas* term, in the tenth year of the reign of our Sovereign Lord the King, in the court of our said Sovereign Lord the King, before the King himself, then being at *Westminster* in the county of *Middlesex*, by the judgment of the

A declaration upon a judgment in the King's Bench. Lutw. 600. N. L. 192.

Debt.

the same court, recovered against the said *J. E.* fifty pounds, which were adjudged to the said *J. D.* for his damages which he had sustained, as well by reason of a certain trespass upon the case, lately done by the said *J. E.* to the said *J. D.* as also for his expences and costs laid out by him about his suit in that particular, (*or in this cause*) whereof he is convicted, as it doth by the record and proceedings thereof now remaining in the court of our said Sovereign Lord the King, before the King himself, manifestly appear; which said judgment is now in its full force, not reversed, annulled or satisfied: And the said *J. D.* hath sued out no execution upon the judgment, whereby an action accrued to the said *J. D.* to require and have of the said *J. E.* the said fifty pounds; nevertheless the said *J. E.* (altho' often requested) hath not paid to the said *J. D.* the said fifty pounds; but hitherto altogether hath and still doth refuse to pay the same; whereupon he declares that he is injured and endamaged to the value of ten pounds; and therefore he brings his suit, and hath good proof of the premises when the court will consider thereof.

A declaration upon a bond against the devisee, pursuant to the statute of the 3d and 4th of King W. Lilly Ent. 145.

Middlesex, ff. Benjamin Joseph, debtor to our Sovereign Lord the King, now on the twenty-fourth day of *October* in this same term, comes before the Barons of his Exchequer, by *T. A.* his attorney, and complains by a bill against *Thomas Orby*, Esq. and *Charlotte* his wife, *James Hamilton*, Esq. Duke *Hamilton*, of the kingdom of *Scotland*, and *Elizabeth* his wife, and *John Irlington*, Gent. which said *Charlotte*, *Elizabeth*, and *John*, are coheirs of *Fitton* the late Earl of *Macclesfield*, late brother and heir of *Charles* late Earl of *Macclesfield*, (otherwise lately called) the Right Honourable *Charles* Earl of *Macclesfield*, the said *Charlotte* being one of the sisters of the said late Earl; the said *Elizabeth* being a daughter *and heir of *Elizabeth*, the late Lady *Gerrard* of *Bromley*, late another of the sisters of the said Earl; and he the said *John* being the son and heir of *Anne Irlington*, late also another of the sisters of the said Earl; and against *Charles* Lord *Mohun*, devisee of the said *Charles*, the late Earl, of several lands, tenements and hereditaments which were the said Earl's at the time of his death, according to the form of the statute in such case made and provided: And the same day (he being jointly with them present here in court) in an action that they render to the said *Benjamin* eleven thousand pounds of lawful money of **England*, which they owe to and unjustly detain from him, for this cause, (*that is to say*) That whereas he the said *Charles* the late Earl, in his life-time, on the fourth day of *March*, in the year of our Lord one thousand six hundred ninety-five, at *Westminster* in the said county of *Middlesex*, by his writing obligatory which he the said *Benjamin*

* which must be now called of Great-Britain.

Debt.

Benjamin brings into this court, sealed with the seal of the said *Charles* the late Earl, in his life-time; the date whereof is the same day and year, acknowledged himself to be bound to the said *Benjamin* in eleven thousand pounds, to be paid to the said *Benjamin*, whenever after he the said *Charles*, the late Earl, should be thereto required, and well and truly to make such payment, he the said Earl *Charles* bound himself and his heirs by the said writing obligatory; nevertheless the said Earl *Charles* in his life-time, or the said *Charles* Lord *Mohun*, (to whom and to whose heirs the said Earl *Charles* by his last will in writing, duly made and executed at *Westminster* aforesaid, after the twenty-fifth day of *March*, in the year of our Lord one thousand six hundred ninety-two, devised and bequeathed his lands, tenements and hereditaments, whereof he was then seised at the time of his death, in his demesne as of a fee) or the said Earl *Fitton*, brother and heir of the said *Charles*, or the said *Thomas Orby*, and *Charlotte*, *James Hamilton*, and *Elizabeth* his wife, and *John Irlington*, after the decease of the said Earl *Fitton*, altho' often required, have not, nor either of them hath paid to the said *Benjamin* the said eleven thousand pounds; but have hitherto refused to pay the same; whereupon the said *Benjamin* declares that he is injured and endamaged to the value of one thousand pounds, whereby he is less, &c. and therefore he brings his suit, &c.

Trin. 18 Car. 2. Roll 133.

JEVENS against HARRIDGE and his Wife.

1 Saund. 1.
2.
2 Keb. 118.
1 Sid. 308.
Debt against an administrator for rent in arrears, as well in the time of the intestate, as in the time of the administrator.
Declaration (P* 188)

Middlesex, ss. Be it remembered that heretofore, in *Easter* term last past, *Nicholas Jevens* came before our Sovereign Lord the King at *Westminster*, by *R. P.* his attorney, and then brought there into this court of our said Sovereign Lord the King, his bill against *Rowland Harridge* and *Johanna* his wife, (administratrix of all and singular the goods and chattels, rights and credits which were of *Reve Livermore*, who died intestate, (as it is said) otherwise lately called *R. L.* of the parish of *St. Martin's* aforesaid, Gent.) being in the custody of the marshal, &c. in an action of debt, and there are pledges of prosecuting namely, *John Doe* and *Nichard *Roe*; which said bill follows in these words: *Middlesex*, ss. *N. J.* complains of *R. H.* and *J.* his wife, (administrators of all and singular the goods and chattels, rights and credits which were of *R. L.* who died intestate, as it is said, otherwise lately called *R. L.* of the parish of *St. Martin's* aforesaid, Gent.) being in the custody of the marshal of the *marshalsea* of our Sovereign Lord the King, before

Debt.

the same court, recovered against the said *J. E.* fifty pounds, which were adjudged to the said *J. D.* for his damages which he had sustained, as well by reason of a certain trespass upon the case, lately done by the said *J. E.* to the said *J. D.* as also for his expences and costs laid out by him about his suit in that particular, (*or in this cause*) whereof he is convicted, as it doth by the record and proceedings thereof now remaining in the court of our said Sovereign Lord the King, before the King himself, manifestly appear; which said judgment is now in its full force, not reversed, annulled or satisfied: And the said *J. D.* hath sued out no execution upon the judgment, whereby an action accrued to the said *J. D.* to require and have of the said *J. E.* the said fifty pounds; nevertheless the said *J. E.* (altho' often requested) hath not paid to the said *J. D.* the said fifty pounds; but hitherto altogether hath and still doth refuse to pay the same; whereupon he declares that he is injured and endamaged to the value of ten pounds; and therefore he brings his suit, and hath good proof of the premises when the court will consider thereof.

A declaration upon a bond against the devisee, pursuant to the statute of the 3d and 4th of King W. Lilly Ent. 145. *Middlesex, ff. Benjamin Joseph, debtor to our Sovereign Lord the King, now on the twenty-fourth day of October in this same term, comes before the Barons of his Exchequer, by T. A. his attorney, and complains by a bill against Thomas Orby, Esq. and Charlotte his wife, James Hamilton, Esq. Duke Hamilton, of the kingdom of Scotland, and Elizabeth his wife, and John Irlington, Gent. which said Charlotte, Elizabeth, and John, are coheirs of Fitton the late Earl of Macclesfield, late brother and heir of Charles late Earl of Macclesfield, (otherwise lately called) the Right Honourable Charles Earl of Macclesfield, she the said Charlotte being one of the sisters of the said late Earl; the said Elizabeth being a daughter *and heir of Elizabeth, the late Lady Gerrard of Bromley, late another of the sisters of the said Earl; and he the said John being the son and heir of Anna Irlington, late also another of the sisters of the said Earl; and against Charles Lord Mohun, devisee of the said Charles, the late Earl, of several lands, tenements and hereditaments which were the said Earl's at the time of his death, according to the form of the statute in such case made and provided: And the same day (he being jointly with them present here in court) in an action that they render to the said Benjamin eleven thousand pounds of lawful money of *England, which they owe to and unjustly detain from him, for this cause, (*that is to say*) That whereas he the said Charles the late Earl, in his life-time, on the fourth day of March, in the year of our Lord one thousand six hundred ninety-five, at Westminster in the said county of Middlesex, by his writing obligatory which he the said Ben-*

(P* 187)

* which must be now called of Great-Britain.

Debt.

Benjamin brings into this court, sealed with the seal of the said *Charles* the late Earl, in his life-time; the date whereof is the same day and year, acknowledged himself to be bound to the said *Benjamin* in eleven thousand pounds, to be paid to the said *Benjamin*, whenever after he the said *Charles*, the late Earl, should be thereto required, and well and truly to make such payment, he the said Earl *Charles* bound himself and his heirs by the said writing obligatory; nevertheless the said Earl *Charles* in his life-time, or the said *Charles* Lord *Mohun*, (to whom and to whose heirs the said Earl *Charles* by his last will in writing, duly made and executed at *Westminster* aforesaid, after the twenty-fifth day of *March*, in the year of our Lord one thousand six hundred ninety-two, devised and bequeathed his lands, tenements and hereditaments, whereof he was then seised at the time of his death, in his demesne as of a fee) or the said Earl *Filton*, brother and heir of the said *Charles*, or the said *Thomas Orby*, and *Charlotte*, *James Hamilton*, and *Elizabeth* his wife, and *John Irlington*, after the decease of the said Earl *Filton*, altho' often required, have not, nor either of them hath paid to the said *Benjamin* the said eleven thousand pounds; but have hitherto refused to pay the same; whereupon the said *Benjamin* declares that he is injured and endamaged to the value of one thousand pounds, whereby he is less, &c. and therefore he brings his suit, &c.

Trin. 18 Car. 2. Roll 133.

JEVENS against HARRIDGE and his Wife.

1 Saund. 1.

2.

2 Keb. 118.

1 Sid. 308.

Debt against an

admini-

strator for

rent in ar-

rear, as

well in the

time of the

intestate,

as in the

time of the

admini-

stratrix.

Declarati-

on

(P* 188)

Middlesex, ff. Be it remembered that heretofore, in *Easter* term last past, *Nicholas Jevens* came before our Sovereign Lord the King at *Westminster*, by *R. P.* his attorney, and then brought there into this court of our said Sovereign Lord the King, his bill against *Rowland Harridge* and *Johanna* his wife, (administratrix of all and singular the goods and chattels, rights and credits which were of *Reve Livermore*, who died intestate, (as it is said) otherwise lately called *R. L.* of the parish of *St. Martin's* aforesaid, Gent.) being in the custody of the marshal, &c. in an action of debt, and there are pledges of prosecuting namely, *John Doe* and *Nichard *Roe*; which said bill follows in these words: *Middlesex*, ff. *N. J.* complains of *R. H.* and *J.* his wife, (administrators of all and singular the goods and chattels, rights and credits which were of *R. L.* who died intestate, as it is said, otherwise lately called *R. L.* of the parish of *St. Martin's* aforesaid, Gent.) being in the custody of the marshal of the *marshalsea* of our Sovereign Lord the King. before

Debt.

fore the King himself, in an action that they render to him ten pounds of lawful money of *Great Britain*, which they owe to and unjustly detain from him, For this cause: (*that is to say*) That whereas the aforesaid *N.* on the twenty-sixth day of *November*, in the fifteenth year of the reign of our Sovereign Lord *Charles II.* now King of *England*, &c. was seised of a messuage in the parish of *St. Martin's in the Fields*, in the county of *Middlesex* aforesaid, in his demesne as of a fee; and being so seised, the said *N.* by his indenture, bearing date on the same twenty-sixth day of *November*, in the fifteenth year of the reign of our said Sovereign Lord the King, made at the parish of *St. Martin's in the Fields* aforesaid, in the county aforesaid, between the said *N.* by the name of *N. J.* of the parish of *St. Martin's in the Fields* aforesaid, in the county aforesaid, coachman, of the one part, and the aforesaid *R.* in his life-time, by the name of *R. L.* of the parish of *St. Martin's in the Fields* aforesaid, of the other part; which other part sealed with the seal of the said *R.* in his life-time, the said *N.* brings here into this court, the date whereof is the same day and year, demised to the said *R.* in his life-time, one messuage with the appurtenances, by the name of all that brick messuage or tenement, with the yard or backside thereto adjoining, as the same heretofore was, in the occupation of the said *N. J.* and then was in the possession of the said *R. L.* or his assigns, situate and being in *Little Bridge's-street* near *Vinegar-yard*, in the parish of *St. Martin's* aforesaid, together with all the lights, easements, profits, commodities and appurtenances whatsoever to the said premises belonging, or in any ways appertaining: *To have and to hold* the said messuage or tenement, with the yard and premises aforesaid, with the appurtenances to him the said *R. L.* his executors, administrators and assigns, from the Feast of the Nativity of our Lord Christ then next following the date of the said indenture, for the full end and term of seven years from thence next ensuing, and fully to be compleat and ended; *Yielding and paying* therefore yearly and every year, during the said term, to the said *N. J.* his executors, administrators and assigns, the yearly or annual rent of twenty pounds of lawful money of *England*, at the four most usual feasts or times of payment in the year; to wit, on the Annunciation of the Blessed Virgin *Mary*, the Feast of *St. John* the Baptist, *St. Michael* the Archangel, and the Birth of our Lord Christ, by even and equal portions, as it doth and may by the said indenture (amongst other things) more fully and at large appear: By virtue of which demise, the said *R.* in his life-time afterwards, (to wit) on the fifteenth day of *December*, in the fifteenth year of the reign of our Sovereign Lord the King, entered into the messuage aforesaid, and was thereof possessed;

that *N.* was
 seised in
 fee, 26 Nov.
 15 Car. 2.

and demised
 the premises
 to the inter-
 state

for seven
 years,

at 20l. per
 ann. rent.

Debt.

possessed; and being so possessed, the said R. afterwards, (to wit) on the seventeenth day of September in the seventeenth year of the reign of our said Sovereign *Lord the King, died intestate as aforesaid, possessed of the premises as aforesaid; after which decease of the said R. (to wit) on the last day of September, in the said seventeenth year of our said Sovereign Lord the King, administration of all and singular the goods and chattels, rights and credits which were of the said R. at the time of his death, was in a due manner granted to the said J. by Gilbert, by Divine Providence Archbishop of Canterbury, Metropolitan and Primate of all England, at the parish and county aforesaid; and afterwards (to wit) on the day and in the same year last mentioned, the said R. and J. entered into the said premises as aforesaid, and were thereof possessed by virtue of the demise aforesaid; and by virtue of the commission of administration aforesaid; and the aforesaid ten pounds were in arrear and unpaid at the feast of the Annunciation of the Blessed Virgin Mary last past; to the said N. by which an action accrued to the said N. to require and have of the said R. and J. the aforesaid ten pounds, whenever they should be there-to required; Nevertheless the aforesaid R. and J. (altho' often required, &c.) have not paid to the said N. the said ten pounds, but hitherto altogether have and still do refuse to pay the same, to the damage of the said N. five pounds; and therefore he brings his suit, &c.

(P* 189)

That by virtue of the lease the intestate entered and 17 Sept. 17 Car. 2. died intestate, and administration was granted to the defendant's wife, whereby they entered and were possessed, and ten pounds were in arrear. Breach.

The case. 1 Saund. 67.

To this declaration the defendant pleaded the statute of 32 H. 8. cap. 16. (to wit) That all leases of any dwelling-house or shop within this realm, or any of the King's dominions, made to any stranger, artificer, or handicraft-man, born out of the King's obedience, not being a denizen, from and after the Feast of St. Michael next coming, shall be void and of none effect; and then avers, that the intestate L. was a stranger and artificer born out of the obedience of the King, and not a denizen (to wit) at Paris, in the Kingdom of France: Upon this there was a demurrer to the plea, and it was insisted upon by the plaintiff, that the intent of this act of Parliament was to hinder any artificers from keeping of shops, or exercising their trades, to the prejudice of the public; but if any artificers would live here like gentlemen upon their estates, and take leases of stables or coach houses, or other convenient houses to dwell in, that it was not within the intention of that act of Parliament; and although 'tis called a messuage in the lease, yet that does not prove that it was a dwelling-house: And as in a præcipe, a barn or a stable may be demanded by the name of a messuage, by much greater reason will they pass in a lease by the name of a messuage, which is the contract of the parties; and therefore Twisden and Windham held the plea ill for uncertainty; but Keeling otherwise; and Moreton hesitated; it seems there was no judgment given, but the parties agreed.

Trin.

Debt.

(P* 190)

*Trin. 3 Jac. 2. Roll 723.

Lut. 478.

NICHOLS against TYMMS.

A declaration in debt for rent, by the grantee of the reversion, against a tenant that came to the tenements by several mesne assignments That 16th Apr. 4 Car. 1. P. M. was seized in fee; and the same day demised it to T. W.

Habendum for 99 years, if the lessee and T. B. and A. his wife should so long live

rendering 20s. per ann. rent. which must now be called of Great Britain.

That on the 1st day

Stafford, (to wit): *John Tymms*, late of *Aston* in the said county, yeoman, was summoned to answer to *Anthony Nicholls*, Gent. as assignee of *Ralph Macclesfield*, in an action that he render to him nine pounds, which he owes to and unjustly detains from him: And whereupon the said *Anthony*, by *R. W.* his attorney, declares, That whereas one *Peter Macclesfield*, Esq. in his life-time, (to wit) on the sixteenth day of *April*, in the sixth year of the reign of our late Sovereign Lord *Charles I.* late King of *England*, was seized of a messuage with the appurtenances, situate and being in *Aston* in the county aforesaid, together with all and singular the edifices, buildings, barns, stables, &c. to the same messuage belonging and appertaining, in his demesne as of a fee; and being so seized, the said *Peter Macclesfield*, in his life-time afterwards, (to wit) on the aforesaid sixteenth day of *April*, in the sixth year aforesaid, at *Aston* aforesaid, in the county aforesaid, demised, granted, set, and to farm let to one *Thomas Walton*, all that the aforesaid tenements, with the appurtenances, situate and being in *Aston* aforesaid, and in which the said *Thomas Walton* then inhabited and dwelt; and all and singular the edifices, buildings, barns, &c. to the said messuage or tenement belonging or appertaining, or at any time before used, enjoyed or occupied, then in the tenure or occupation of the said *Tho. Walton*, or his assigns: To have and to hold the said messuage or tenement, and all and singular the premises aforesaid, with their and every of their appurtenances to the said *Thomas Walton*, his executors, administrators and assigns, for and during the space of ninety-nine years from thence next ensuing, and fully to be complete and ended: If the said *T. W. T. B.* son of *T. B.* of *Bridgemare*, in the county of *Chester*, blacksmith, and *Anne* the wife of the said *T. B.* the son, or either of them should so long live (voluntary waste to all manner of tenantable commodities and profits excepted): Yielding and paying therefore yearly and every year during the said term, twenty shillings of lawful money of *England*, at the Feasts of the Annunciation of the Blessed Virgin *Mary*, and *St. Michael* the Archangel, or within twenty days after each of them by even and equal portions; by virtue of which said demise, the said *T. W.* entered into the premises with the appurtenances, and was thereof possessed, (the reversion thereof belonging to the said *Peter* in his demesne as of a fee); And the aforesaid *Peter Macclesfield* being so seized of the

Debt.

said reversion of the tenements with the appurtenances, the said *Peter Macclesfield* afterwards, (to wit) on the first day of *April*, in the twentieth year of the reign of our late Sovereign Lord *Charles II.* late King of *England*, &c. at *Aston* aforesaid, in the county aforesaid, died seized of the same reversion of the aforesaid tenements with the appurtenances; after whose death the reversion of the aforesaid tenements with the appurtenances, descended to one *Ralph Macclesfield*, grandson and heir of the said *Peter*, (to wit) son and heir of *Ralph *Macclesfield*, who was son and heir of the said *Peter*, by which the same *Ralph Macclesfield* the grandson, became seized of the aforesaid reversion of the said tenements with the appurtenances, in his demesne as of a fee; and the said *Ralph*, the grandson being so seized, he the said *Ralph Macclesfield* the grandson, afterwards, and within the aforesaid term of ninety-nine years, (determinable as aforesaid, granted to the said *Thomas Walton* as aforesaid) (to wit) on the thirteenth day of *October*, in the twentieth year of the reign of our Sovereign Lord *Charles II.* at *Aston* aforesaid, in the county aforesaid, by his indenture then and there executed, which the said *Anthony* brings here into this court, sealed with the seal of the said *Ralph*; the date whereof is the day and year last above-mentioned, for and in consideration of a certain sum of money in hand paid to the said *Ralph Macclesfield*, by the said *Anthony*; bargained and sold to the said *Anthony* the reversion of the said tenements aforesaid, with the appurtenances: *To have and to hold* to the said *Anthony*, and his assigns, from the day next before the date of the said indenture, for the term of one year thence next ensuing, as by the said indenture (amongst other things) it doth and may more fully appear: By virtue of which bargain and sale, and force of a certain act made and published in the Parliament of his late Majesty *Hen. 8.* late King of *England*, at *Westminster* aforesaid, in the county aforesaid, on the fourth day of *February*, in the twentieth year of his reign, for transferring the same into possession, the aforesaid *Anthony Nichols* was possessed of the aforesaid tenements with the appurtenances; and being so possessed, the aforesaid *Ralph Macclesfield* the grandson, being seized of the reversion aforesaid, in his demesne as of a fee, he the said *Ralph Macclesfield* the grandson, afterwards and within the aforesaid year, and also within the aforesaid ninety-nine years, determinable as aforesaid, granted to the said *Thomas Walton* in the manner aforesaid, (to wit) on the fourteenth day of the same month of *October*, in the 28th year of the reign of our said late Sovereign Lord *Charles II.* at *Aston* aforesaid, in the county aforesaid, by his indenture then and there executed, which the said *A. N.* brings here into this court, sealed with the seal of the said *R. Macclesfield* the grandson; the date whereof

of Apr. 20.
 Car. 2. the
 lessor died
 seized of
 the rever-
 sion; that
 it descend-
 ed to R.M.
 his grand-
 son and
 heir.

(P* 191)

That on
 the 13th of
 Oct. 28 Car.
 2. by an in-
 denture for
 a certain
 sum of mo-
 ney, bar-
 gained, and
 sold the re-
 version to
 the plain-
 tiff,
 to hold for
 a year from
 the date;
 that by vir-
 tue thereof,
 and by
 force of the
 statute, the
 bargainee
 became
 possessed;

and 14th of
 Oct. grant-
 ed the re-
 version in
 fee.

is

Debt.

Is the day and year last above-mentioned, for the consideration of a certain sum of money in hand paid to the said *Ralph Macclesfield* by the said *Anthony Nichols*, bargained and sold to the said *A. N.* the said last mentioned reversion of the tenements aforesaid, with the appurtenances: *To have and to hold* to the said *A.* his heirs and assigns, to the use and behoof of the said *A.* his heirs and assigns for ever, as it doth by the said indenture last mentioned (amongst other things) more fully appear: By virtue of which said grant the said *A. N.* was and now is seized of the reversion of the said tenements with the appurtenances, in his demesne as of a fee; and the said *Anthony* in fact avers, that the interest and residue of the term of years aforesaid, of the said *Thomas Walton*, of and in the tenements aforesaid, with the appurtenances, yet to come and undetermined within the aforesaid term of ninety-nine years, determinable as aforesaid, (to wit) on the tenth of *October*, in the twenty-eighth year of the reign of our said late Sovereign Lord King *Charles* II. at *Aston* aforesaid, in the county aforesaid, by several mesne assignments, came to the said *John Tymms*, and the said *John Tymms*, by virtue of the several mesne assignments thereof as aforesaid, then and there entered into the tenements aforesaid, with the appurtenances, and was thereof possessed, and held, and occupied the same tenements with the appurtenances, until at and after the Feast of *St. Michael* the Archangel, in the first year of the reign of our Sovereign Lord the King that now is, and nine pounds due and payable to the said *Anthony* for nine years rent of the aforesaid tenements with the appurtenances, ending at the Feast of *St. Michael* the Archangel, in the said first year of the reign of our said Sovereign Lord the King, that now is, after the said grant of the reversion of the said tenements with the appurtenances to the said *A. N.* and after the entry and assignment of the aforesaid *John Tymms*, in that behalf as aforesaid made, were in arrear and are yet unpaid; by which an action accrued to the said *Anthony*, to demand and have of the said *John Tymms* the aforesaid nine pounds; nevertheless the aforesaid *John Tymms* (although often required) hath not paid the said nine pounds, but hitherto altogether hath and still doth refuse to pay the same, to the damage of the said *A.* forty pounds; and therefore he brings his suit, &c. together with this, that the said *A.* is ready to verify that the said *T. B.* the son, after the aforesaid Feast of *St. Michael* the Archangel, in the first year aforesaid, was and still is alive and in good health, (to wit,) at *Aston* aforesaid, in the county aforesaid.

(P* 192)
 1 hat there-
 sidue of the
 term came
 to the de-
 fendant by
 several
 mesne as-
 signments.
 The entry
 of the de-
 fendant.

The rent
 in arrear.
 The
 breach.

Debt.

Hill. 19 and 20 Car. 2. In the Common Pleas. Roll 1512.

Took against GLASCOCK.

1 Saun. 250
Cart. 208.

Essex, ff. *John Glascock*, late of the parish of *Southwold*, in the county aforesaid, miller, was summoned to answer to *Margaret Took*, widow, of a plea that he should render to her five pounds, which he owes to and unjustly detains from her, &c. And whereupon the said *Margaret*, by *John Sharpe* her attorney declares, That whereas one *Crafford Gibbens* being seized in his demesne as of a fee, of and in the reversion of a certain messuage and four acres of land, and of a windmill, with the appurtenances, immediately expectant after the death of *George Gibbens*, Gent. his father, who was seized of the tenements aforesaid, as of a freehold, as a tenant thereof, by the curtesy of *England*; and the said *Crafford* being so seized of the reversion of the tenements aforesaid, with the appurtenances, the aforesaid *Crafford* afterwards, (to wit) on the sixth day of February, in the twentieth year of the reign of his late Majesty *Charles I. King of England*, at *Southwold* in the county aforesaid, by his certain indenture made between the same *Crafford*, by the name of *Crafford Gibbens of Grainsted*, in the county of *Essex*, Gent. of the one part, and one *John Letton* of *Southwold*, in the county aforesaid, miller, of the other part; which other part sealed with the seal of the said *John Letton*, the same *Margaret* brings here into court; the date of which is the same *day and year, demised, granted, and to farm let to the said *John Letton* the tenements aforesaid, with the appurtenances, by the name of one messuage or tenement, with a garden and backside, and two parcels or closes of land to the same adjoining, containing by estimation four acres, be the same more or less, and also a windmill with the appurtenances, commonly called by the name of *Bentley-mill*, next adjoining to the said messuage or tenement; which said messuage and premisses were situate, lying and being in *Southwold* aforesaid, and late were in the tenure or occupation of *Rob. Holloway*, and before that time of *Rob. Holloway* the elder, or his assigns, to have and to hold the aforesaid tenements with the appurtenances to the said *John Letton*, his executors, administrators and assigns, from and immediately after the death and demise of *George Gibbens*, Gent. father of the aforesaid *Crafford*, unto the full end and term of twenty-one years then next following, and fully to be compleat and ended: Yielding and paying therefore yearly, during the said term to the aforesaid *Crafford*, his heirs and assigns ten pounds, to be paid at the two

Debt for rent brought by the devise of the grant of a reversion against the lessee of a tenant by the curtesy that *Crafford Gibbens* was seized in fee of the reversion, expectant on an estate for life; and being so seized on the 6th day of February, 20 Car. 1. by an indenture.

(P* 193)
demised the tenements to *John Letton* for 21 years, to commence after the death of the tenant for life,

most

Debt.

for the rent of ten pounds. most usual Feasts or times of payment in the year (to wit) at the Feast of the Annunciation of the Blessed Virgin *Mary*, and *St. Michael* the Archangel, by even and equal portions, by virtue of which demise the aforesaid *John Letton* was possessed of the interest of the aforesaid term, after the death of the said *George* and the said *John Letton* being possessed as aforesaid of the interest of the aforesaid term; and the aforesaid *Crafford* being seized of the reversion thereof expectant after the death of the said *George*, he the same *Crafford* afterwards, (to wit) on the eighteenth day of *March*, in the twentieth year of the reign of his late Majesty *Charles* the First, late King of *England*, &c. at *Southwold* aforesaid, by his certain indenture of bargain and sale, made between the aforesaid *Crafford*, by the name of *Crafford Gibbens*, of *Clifford's-Inn*, son and heir of *Winifred Gibbens*, late wife of *George Gibbens* of *Southwold* in the county of *Essex*, Gent. which said *Winifred* was daughter and heir of *Arthur Crafford*, Esq. of the one part, and *Gilbert Kinder*, by the name of *Gilbert Kinder* of *Southwold* aforesaid, Gent. of the other part; which other part sealed with the seal of the said *Crafford*, (whose date is the same day and year) and afterwards within six months, (to wit) the nineteenth day of *March*, in the twentieth year of the reign of the said late King, in the court of Chancery, of the said late King in due manner inrolled according to the form of the statute in that case made and provided, for and in consideration of the sum of eighty-seven pounds and ten shillings of lawful money of *England*, to the said *Crafford* in hand paid by the said *Gilbert*, at or before the sealing and delivery of the same indenture, whereof the said *Crafford*, by the same indenture, acknowledged the receipt, and himself therewith to be fully satisfied, and thereof and of every part and parcel thereof, acquitted, exonerated, and discharged the aforesaid *Gilbert*, his heirs, executors, and administrators, and every of them for ever, by the same indenture gave, granted, bargained, sold, enfeoffed, and confirmed to the said *Gilbert*, his heirs and assigns for ever, the aforesaid tenements with the appurtenances, by the name of all that messuage or tenement, garden and backside, with their appurtenances, situate and being in *Southwold* aforesaid, *in the said county of *Essex*, then or late in the tenure or occupation of *John Letton*, and thentofore in the tenure or occupation of *Robert Holloway*, or his assigns; and all those two parcels closes of pasture land in *Southwold* aforesaid, containing estimation four acres; and adjoining or near to the said messuage, backside and garden, or to any of them, late also in the occupation of the said *Robert Holloway*, or his assigns, and the of the said *John Letton*; and also all that windmill, called *Bentley-mill*, in *Southwold* aforesaid, then before in the occupation

That *John Letton* entered by virtue of his lease. That the 18th of *March*, 20 Car. 1. *Crafford* by a bargain and sale

inrolled the 19th of *March*, 20 Car. 1. fo. 87l. 10s.

bargained and sold the premises to *Gilbert Kinder*.

(P* 194)

Debt.

pation of the said *Robert Holloway*, and then or late in the oc-
 cupation of the said *John Letton*, and all the going geer and
 appurtenances belonging to the said mill: And also all that
 close or parcel of meadow and pasture, commonly called or
 known by the name of *Wrenn's Park*, containing by estima-
 tion one acre, be the same more or less, situate, lying and being
 in the parish of *Southwold* aforesaid, and late in the occupa-
 tion of *Henry Stretton*, or his assigns; all which premises
 were parts and parcels, or reputed to be parts and parcels of
 the manor of *Bawds*, (otherwise *Downe-Fields*;) in the said
 county of *Essex*, and also all houses, outhouses, barns, stables,
 edifices, buildings, hedges, ditches, woods, underwoods, ways
 and commons of pasture, profits, commodities, hereditaments
 and premises whatsoever belonging, or in any wise appertain-
 ing to the said messuage or tenement, windmill, and several
 parcels of land, meadow and pasture, and to every or any of
 them; and also all the estate, right, title, interest, reversion,
 remainder, claim, benefit and demand whatsoever of him the
 said *Craford Gibbens*, of, in, or out of the said premises, and
 every or any part thereof: and also all deeds, evidences, coun-
 terparts, leases, muniments and writings, touching or concern-
 ing the said premises, or any part thereof, which the said
Craford Gibbens, or any other person or persons in trust for his
 use, then had or should have in his or their custody or power,
 or could lawfully come by, without a suit: To have and to
 hold the said messuage or tenement, windmill, several parcels
 of land, and all other the premises above granted, bargained,
 sold, and conveyed with their and every of their appurtenances
 to the said *Gilbert Kinder*, his heirs and assigns for ever, to the
 sole and proper use and behoof of him the said *Gilbert*, his
 heirs and assigns for ever: By virtue of which said bargain,
 sale and inrolment, and by force of the statute published in
 the Parliament of our late Sovereign Lord *Henry the Eighth*,
 late King of *England*, held at *Westminster* in the county of
Middlesex, on the fourth day of *February*, in the twenty-seventh
 year of his reign, for transferring uses into possession; he the
 said *Gilbert* became seised of the reversion of the said tene-
 ments with the appurtenances, in his demesne as of a fee; and
 the said *Gilbert* being so seised of the reversion of the tene-
 ments aforesaid, with the appurtenances; and the said *John*
Letton being so possessed of the interest of the term aforesaid, he
 the said *Gilbert* afterwards (to wit) on the 9th day of *Dec.* in
 the twenty-second year of the reign of his said late Majesty, at
Southwold aforesaid, made his last will and testament in writ-
 ing, and thereby willed and bequeathed the tenements afore-
 said, with the appurtenances, to the said *Margaret*, by the name of
Margaret Kinder, her heirs and assigns for ever; and afterwards

That the
 premises
 were par-
 cel of the
 manor of
 B. other-
 wise D.

That by
 virtue of
 the bar-
 gain, sale,
 and inrol-
 ment, and
 the statute
 of uses,
 Gilbert
 Kinder
 was seised
 in fee, and
 John Lit-
 ton was
 possessed of
 the term.
 That *Gilb.*
 made a
 will 6 Dec.
 22 Car. 1:
 and devis-
 ed to M.
 and died.

Debt.

(P* 195) *the said *Gilbert* died at *Southwold* aforesaid, seized of such his estate therein, after whose decease she the said *Margaret* claimed the reversion of the tenements aforesaid, with the appurtenances, and was thereof seized in her demesne as of a fee, by virtue of the devise and bequest aforesaid; and the said *Margaret* being so seized of the reversion aforesaid; and the said *John Letton* being so possessed of the interest of the term aforesaid; the said *Margaret* afterwards married *Christopher Tooke* Gent. at *Southwold* aforesaid, by means whereof the said *Christopher* and *Margaret* became seized of the reversion aforesaid, in their demesne as of a fee, in right of the said *Margaret*, and the said *Christopher* and *Margaret* being so seized of the reversion aforesaid, and the said *John Letton* being possessed of the interest of his term, the said *Christopher* afterwards died at *Southwold* aforesaid, after whose decease the said *Margaret* became sole seized of the reversion aforesaid, with the appurtenances in her demesne as of a fee; and the said *Margaret* being so seized of the reversion aforesaid; and the said *John Letton* being so possessed of the interest of his said term, he the said *John Letton* afterwards at *Southwold* aforesaid, assigned all his interest of the said term in the tenements aforesaid, with the appurtenances to the said *John Glascock*: by virtue of which assignment the said *John Glascock* was possessed of the interest of the said term, of and in the tenements aforesaid, with the appurtenances; and the said *John Glascock* being so possessed of the interest of the said term, of and in the tenements aforesaid with the appurtenances; and the said *Margaret* being so seized of the reversion aforesaid, the said *George* afterwards, (to wit on the fifteenth day of *April*, in the nineteenth year of the reign of his present Majesty, died at *Southwold* aforesaid, after whose decease the said *John Glascock* entered into the tenements aforesaid, with the appurtenances, and was thereof possessed by virtue of the demise and assignment aforesaid; and the said *John Glascock* being so possessed thereof, and the said *Margaret* being so seized of the reversion of the tenements aforesaid, with the appurtenances, five pounds of the rent aforesaid for half a year ending at the feast of *St. Michael* the archangel last past, were in arrear to the said *Margaret* at that same feast, and are yet unpaid; whereby an action accrued to the said *Margaret* to require and have of the said *John Glascock* the said five pounds nevertheless the said *John Glascock*, (although often required hath not paid the said five pounds to the said *Margaret*, but hitherto altogether hath and still doth refuse to pay the same to the damage of the said *Margaret* sixty shillings; and therefore she brings her suit, and hath good proof of the premises when the court will consider thereof, &c.

That *Margaret* afterwards married *C. Tooke*.

That *Christopher Tooke* died and *Margaret* became sole seized.

That *John Letton* assigned the term to *J. G.* the defendant.

That *G. G.* the tenant for life died.

That *gl.* were in arrear; whereby an action accrued, breach.

Debt.

And the said *John Glusoc*, by *Godfrey Chiboale* his attorney, Plea.
comes and defends the force and injury when, &c. and pleads
that the said *Margaret* ought not to have her said action thereof
against him; because he avers, that long before the said *Crafford*, That long
Gibbens had any thing in the reversion of the tenements afore- before
said, with the appurtenances, one *John Rooper* Esq. *Humphrey* Crafford
Tyrrell, *William Rooper*, Gent. son of the said *John*, *Nicholas* Gibbens
Levison, merchant of the staple, and *Henry Fincham*, were seized had any
of the said tenements with their appurtenances, in their demesne thing, J. R.
as of a fee, *to the use and behoof of Dame *Johanna Bradbury*, H. C. W.
widow, and her heirs; and they being so seized thereof to the (P* 196)
use and behoof aforesaid, the the said dame *Johanna Bradbury*, R. N. L.
afterwards, (to wit) on the second day of *March*, in the twenty- and H. F.
first year of the reign of our late sovereign Lord *Henry* the were seized
Eighth, late King of *England*, at *Southwold* aforesaid, ordained in fee, to
and made her last will and testament in writing, and thereby the use of
gave and devised that one *Guy Crafford*, and *Johanna* then his Dame Jo-
wife, should amongst other things have the tenements aforesaid, hanna
with the appurtenances specified in the declaration aforesaid, *Bradbury*
to them and the heirs of their bodies lawfully issuing; and in f. e.
afterwards (to wit) the same day and year she the said Dame That 2d of
Johanna Bradbury died at *Southwold* aforesaid, after whose *March*, 21
decease the said *John Rooper*, Esq. *Humphrey Tyrrell*, Gent. H. 8. J. B.
William Rooper, Gent. son of the said *John Nicholas Levison*, devised the
merchant of the staple, and *Henry Fincham*, by virtue of the premises
said last will and testament of the said *Johanna Bradbury* to *Guy*
became seized of the tenements aforesaid, with the appurtenances *Crafford*
above specified in the said declaration, in their demesne as of a and *Johan-*
fee, to the use and behoof of the said *Guy Crafford* and *Johanna* na his wife
his wife, and the heirs of their bodies lawfully issuing, and in tail;
remained and continued so seized thereof to the same use and That dame
behoof, till the fourth day of *February*, in the twenty-seventh J. B. died,
year of the reign of our late sovereign Lord *Henry* the eighth, and the
late King of *England*, on which day, by virtue of the said act trustees
made and published in the parliament of the said late King were seized
Henry the Eighth, at *Westminster* in the county of *Middlesex*, to the
on the same fourth day of *February*, in the twenty-seventh year use of the
aforesaid, for transferring uses into possession, the said *Guy* said *Guy*
Crafford, and *Johanna* his wife, were seized of the tenements *Crafford*
aforesaid, with the appurtenances above specified in the said and *Johan-*
declaration, in their demesne as of a fee-tail, (to wit) to them na his wife
and the heirs of their bodies lawfully issuing; and being so in tail;
seized thereof the said *Guy Crafford* and *Johanna* his wife, and then
wards (to wit) on the first day of *November*, in the eighteenth came the
year of the reign of our late sovereign Lady *Elizabeth*, late statute of
Queen of *England*, died at *Southwold* aforesaid, being so seized uses, by
of such their estate therein, after whose decease the tenements which
Vol. II. R aforesaid, C-stui que
use became
seized.
That *Craf-*
ford and
Johanna
his wife
died seized
&c.

Debt.

and the
estate de-
scended to
Arthur
Crassford in
tail.

That Ar-
thur died.

and the es-
tate de-
scended to
M. and W.
Crassford as
coheirs.
(P* 197)

That the
44th of D.
Eliz. M.
died, and
W. be-
came sole
seized ;

and the
18th of K.
James
Geo. Gib-
bens mar-
ried W.
and be-
came seized
in right
of the said
W. of the
estate-tail.

That on
the last day
of Dec. 2

aforsaid, with the appurtenances above specified in the said declaration, descended to *Arthur Crassford*, as son and heir lawfully begotten of the bodies of the said *Guy* and *Johanna* his wife, whereby the said *Arthur* entered into the said tenements, with the appurtenances above specified in the said declaration, and was seized thereof in his demesne, as of a fee-tail ; (that is to say) to him and the heirs lawfully issuing of the bodies of the said *Guy Crassford* and *Johanna* his wife ; and being so seized thereof, the said *Arthur* afterwards, (to wit) on the first day of *May*, in the forty-second year of the reign of the said late Queen *Elizabeth*, died at *Southwold* aforsaid, so seized of such his estate therein, after whose death the said tenements, with the appurtenances above specified in the said declaration, descended to *Mary* and *Winefrid Crassford*, as daughters and coheirs of the said *Arthur Crassford*, lawfully issuing of his body ; whereupon the said *Mary* and *Winefrid* entered into the tenements aforsaid, with the appurtenances above specified in the said declaration, and were seized thereof in their demesne, as of a fee-tail ; * (that is to say) to them and the heirs of the said *Guy Crassford* and *Johanna* his wife lawfully issuing ; and being so seized thereof, the the said *Mary* afterwards, (to wit) on the tenth day of *November*, in the forty-fourth year of the reign of the late Queen *Elizabeth*, at *Southwold* aforsaid, died so seized of such an estate therein, without any issue begotten of her body, after whose decease the said *Mary's* moiety descended to the said *Winefrid*, as sister and heir to the said *Mary*, whereby the said *Winefrid* was seized of the whole tenements aforsaid, with the appurtenances, in her demesne as of a fee-tail ; (that is to say) to her and the heirs of the bodies of the said *Guy* and *Johanna* his wife lawfully issuing ; and being so seized thereof, the the said *Winefrid* afterwards, (to wit) on the first day of *May*, in the eighteenth year of the reign of our late Sovereign Lord *James*, late King of *England*, at *Southwold* aforsaid, married the aforsaid *George Gibbens*, whereby the said *George* and *Winefrid*, in right of the said *Winefrid*, became seized of the tenements aforsaid, with the appurtenances above specified in the said declaration, in their demesne as of a fee-tail ; (that is to say) to them and the heirs of the bodies of the said *Guy* and *Johanna* his wife lawfully issuing ; and being so seized thereof, they the said *George Gibbens* and *Winefrid* his wife afterwards, (to wit) on the eleventh day of *February*, in the twenty-first year of the reign of the said late King *James*, at *Southwold* aforsaid, had issue the said *Crassford Gibbens* between them lawfully begotten ; and the said *George Gibbens* and *Winefrid* being so seized of the tenements aforsaid, with the appurtenances above specified in the said declaration, the the said *Winefrid* afterwards, on the last day of *December*, in the second year of the reign of our late Sovereign Lord King *Charles*

Debt.

Charles the first, at *Southwold* aforesaid, died seized of such an estate therein, after whose decease the said *George Gibbens* held the said tenements with the appurtenances, and was seized thereof in his demesne as of a freehold, for the term of his life, as a tenant thereof by the curtesy of *England*, and the reversion of the said tenements with the appurtenances descended to the said *Crafford Gibbens*, as son and heir of the said *Winefrid* lawfully begotten of her body, whereby the said *Crafford Gibbens* became seized of the reversion of the said tenements, with the appurtenances as of a fee-tail and right, (that is to say) to him and the heirs of the bodies of the said *Guy* and *Johanna* lawfully issuing; and the said *George Gibbens* being so seized of the said tenements with the appurtenances, in his demesne as of a freehold, for the term of his life; and the said *Crafford Gibbens*, being seized as aforesaid of the reversion aforesaid, as of a fee-tail and right, he the said *Crafford* afterwards, (to wit) on the said sixth day of *February*, in the twentieth year of the reign of our late Sovereign Lord King *Charles* the first, at *Southwold* aforesaid, demised to the said *John Letton* the tenements aforesaid, with the appurtenances: to have and to hold to the said *John Letton*, his executors, administrators and assigns, from and immediately after the death and decease of the said *George Gibbens*, until the full end and term of twenty-one years, from thence next ensuing, and fully to be compleat and ended; yielding therefore yearly, during the term aforesaid, to the said *Crafford Gibbens*, his heirs and assigns ten pounds, at the two most usual feasts *or terms in the year, above specified in the declaration aforesaid, by even and equal portions, as the said *Margaret* hath above alledged in her said declaration, by virtue of which said demise the said *John Letton* was possessed of the interest of the term aforesaid; and the said *John Letton* being so possessed of the said term, and the said *George Gibbens* being so seized, as aforesaid, of the said tenements with the appurtenances, in his demesne as of a freehold, for the term of his life; and the said *Crafford Gibbens* being seized of the reversion thereof, as of a fee-tail and right in the manner aforesaid, he the said *Crafford Gibbens* afterwards, (to wit) on the eighteenth day of *March*, in the said twentieth year of the reign of the said late King *Charles* the first, at *Southwold* aforesaid, by his said indenture of bargain and sale enrolled of record as aforesaid, for the consideration above mentioned, bargained and sold to the said *Gilbert Kinder* the tenements aforesaid, with the appurtenances: to have and to hold to the said *Gilbert Kinder*, and his heirs for ever, as the said *Margaret* doth by her said declaration above likewise suggest: by virtue of which bargain, sale and inrolment, and by force of the statute aforesaid, the said *Gilbert* was seized of the reversion of the tenements

R 2

Car. 1. M. W. died, and *George* became tenant by the curtesy, the reversion belonging to *Crafford Gibbens* in tail.

That *Crafford Gibbens* seized of the reversion demised to the said *John Letton* for 21 years, to commence after the death of *G. Gibbens* tenant for life,

at 10l. per ann.
(P* 198)

That *Crafford Gibbens* 18th of Mar. 20 Car. 1. by a bargain and sale enrolled, bargained and sold the premises to *Gilbert Kinder* in fee; by virtue whereof, and of

Debt.

the statute of uses, the bargainee was seized.

That John Letton assigned his term to the defendant. That the tenant for life died,

and the defendant as assignee entered; but pleads further, that Crafford Gibbens before Michaelmas, on the 20th of April, 14 Car. 2. died, and the premises descended to S. G. as sole daughter and heir; and 27th of Sept. 19 Car. 2. entered upon the defendant and ejected him, and became seized of an estate-tail.

ments aforesaid, with the appurtenances, for the term of the life of the said *Crafford Gibbens*; and he being so seized thereof, and the said *John Letton* being so possessed, as aforesaid, of the interest of the said term, he the said *John Letton* afterwards at *Southwold* aforesaid, assigned all his said term in the tenements aforesaid, with the appurtenances to the said *John Glascock*; by virtue of which assignment the said *John Glascock* was possessed of the interest of the said term, of and in the tenements aforesaid, with the appurtenances, as the said *Margaret* hath also before alledged; and the said *John Glascock* being so possessed of the interest of the said term, of and in the tenements aforesaid, with the appurtenances; and the said *George Gibbens* being so seized, as aforesaid, of the tenements with the appurtenances, in his demesne as of a freehold, for the term of his life; he the said *George Gibbens* afterwards, (that is to say) on the fifteenth day of *April*, in the said nineteenth year of the reign of his said present Majesty, died at *Southwold* aforesaid, after whose decease the said *John Glascock* entered into the tenements aforesaid, with the appurtenances, and was thereof possessed, by virtue of the lease and assignment aforesaid, as the said *Margaret* hath likewise before alledged; but the said *John Glascock* further pleads, that he the said *John Glascock* being so possessed thereof, the said *Crafford Gibbens* afterwards, and before the said feast of *St. Michael* the archangel now last past, (that is to say) on the twentieth day of *April*, in the fourteenth year of the reign of his said present Majesty, died at *Southwold* aforesaid; after whose decease the said tenements with the appurtenances descended to *Susanna Gibbens*, as sole daughter and heir of the said *Crafford Gibbens*, of his body lawfully begotten; whereupon the said *Susanna Gibbens*, afterwards and before the said feast of *St. Michael* the archangel now last past, namely, on the twenty-seventh day of *September*, in the nineteenth year of the reign of his said present Majesty, entered into the tenements aforesaid, with the appurtenances, upon the possession of the said *John Glascock*, claiming her right and estate-tail aforesaid, of and in the tenements aforesaid, with the *appurtenances, and expelled and removed the said *John Glascock* from his said possession therein, and was thereof seized in her demesne as of a fee-tail; (that is to say) to her and the heirs of the said *Guy Crafford* and *Johanna* his wife, lawfully issuing; and this he is ready to verify; whereupon he prays judgment, whether the said *Margaret* ought to have or maintain her said action against him, &c.

Replication, that the defendant ought not to be ad-

And the said *Margaret* replies, that the said *John Glascock*, for the reason before alledged, ought not to be admitted to plead or alledge, that after the decease of the said *Crafford*, the tenements

Debt.

tenements aforesaid with the appurtenances descended to the said *Susanna Gibbens* as sole daughter and heir of the said *Craffford* of his body lawfully begotten; because she avers, that after the said indenture of bargain and sale, made as aforesaid, to the said *Gilbert Kinder* of the tenements aforesaid, with the appurtenances, and enrolled of record; and before the said *Susanna*, as daughter and heir of the said *Craffford*, of his body lawfully begotten, entered into the tenements aforesaid, with the appurtenances, then being parcel of the manor of *Downfields*, otherwise *Bawds*, (that is to say) in the term of *St. Michael*, in the year of our Lord one thousand six hundred forty-nine, a certain fine was levied in this court of Common Pleas, (to wit) at *Westminster*, in the county of *Middlesex*, (to wit) on the morrow of *St. Martin*, in the said year of our Lord one thousand six hundred forty-nine, before *Oliver St. John*, *John Puleston*, *Peter Warburton*, and *Edward Atkins*, and other faithful subjects then there present, between one *John Leach*, Gent. by the name of *John Leach*, Gent. plaintiff, and the said *Craffford* and *Anne* his wife, by the name of *Craffford Gibbens*, Gent. and *Anne* his wife, deforciant, of the tenements aforesaid, with the appurtenances, by the names of the manor of *Downfields*, otherwise *Bawds*, with the appurtenances, and three messuages, one dove-house, three gardens, three orchards, one hundred and fifty acres of land, seventy acres of meadow, one hundred and thirty acres of pasture, sixty acres of wood, two hundred acres of furze and heath, common of pasture for all cattle, view of frank-pledge, and whatever belongs to view of frank-pledge, and of a free fishery, the goods and chattels of felons, fugitives, waifs, estrays and heriots, with the appurtenances, in *Southwold*, *Schinfield* and *Dodinghurst*; whereupon a plea of covenant was summoned between them in the same court, (that is to say) that the said *Craffford* and *Anne* acknowledged the said manor, tenements, common of pasture, view of frank-pledge, fishery, goods and chattels of felons, fugitives, waifs, estrays and heriots, with the appurtenances, to be the right of the said *John*, as those which the said *John* hath of the gift of the said *Craffford* and *Anne*, and those they remised and quit-claimed from them the said *Craffford* and *Anne*, and their heirs, to the said *John* and his heirs for ever; and further, the said *Craffford* and *Anne* granted for themselves and the heirs of the said *Craffford*, that they would warrant to the said *John* and his heirs the said manor, tenements, common of pasture, view of frank-pledge, fishery, goods and chattels of felons, fugitives, waifs, estrays and heriots, with the appurtenances, against the said *Craffford* and *Anne*, and the heirs of the said *Craffford* for ever; and for this *acknowledgment, remise, (P* 200) quit-claim, fine and concord, the said *John* hath given to the

Debt.

with pro-
clamati-
ons.

The pro-
clamations
of the fine.

Prout pa-
ret per re-
cord of the
fine, &c.

That by
the fine the
premisses
remained
to Marga-
ret and her
heirs.

The plain-
tiff prays
judgment,
whether
the defen-
dant shall
be admitt-
ed to plead
against the
fine; and
prays like-
wise judg-
ment of the
debt and
damages.

Rejoinder
by protes-
tation that
the premis-
ses were
divided
from the

said *Crafford* and *Anne* three hundred pounds sterling; which said fine levied in the manner aforesaid, was engrossed, and was afterwards publickly and solemnly read and proclaimed in the said court, according to the form of the statute made and published in the parliament of our late Sovereign Lord *Henry* the seventh, late King of *England*, at *Westminster* aforesaid, in the fourth year of his reign, after the conquest, in the manner following; (that is to say) the first proclamation was made before the said late justices at *Westminster* aforesaid, on the twenty-eighth day of *November*, in *Michaelmas* term, in the said year of our Lord one thousand six hundred forty-nine; the second proclamation was made on the eighth day of *February* in *Hillary* term, in the same year of our Lord one thousand six hundred forty-nine; the third proclamation was made on the seventeenth day of *May* in *Easter* term, in the year of our Lord one thousand six hundred and fifty; and the fourth proclamation was made on the twentieth day of *June* in *Trinity* term, in the said year of our Lord one thousand six hundred and fifty, as by the said fine and the proclamations made thereon, now remaining in this court of record, it doth and may more fully appear; and the said *Margaret* doth aver, that at the times of the reading and proclamations aforesaid, made in the manner aforesaid, all pleas ceased in the said court of Common Pleas, according to the form of the statute aforesaid, whereby the tenements aforesaid, with the appurtenances, demised as aforesaid to the said *John Letton*, by reason of the said fine, with proclamations made thereupon as aforesaid, firmly remained to the said *Margaret* and her heirs, according to the bargain and sale made by the said *Crafford* to the said *Gilbert*, as aforesaid, and the devise aforesaid, against the said *Crafford* and the heirs of his body lawfully issuing; and this she is ready to verify; whereupon she prays judgment, whether the said *John Glascock* ought to be admitted to plead or alledge against the said fine, with proclamations levied in the manner aforesaid; that after the decease of the said *Crafford* the tenements aforesaid, with the appurtenances, descended to the said *Susanna*, as sole daughter and heir of the said *Crafford*, of his body lawfully begotten, &c. whereupon she likewise prays judgment, and her said debt together with her damages, occasioned by detaining the same, to be awarded to her, &c.

And the said *John Glascock* suggesting, by way of protestation, that the said tenements with the appurtenances above specified in the said declaration, were separated and divided from the manor aforesaid, by the said *George Gibbens*, before the said fine levied in the manner aforesaid, suggesting also by way of protestation, that the tenements aforesaid, above specified in the said declaration, are not contained in the said fine; the

Debt.

the said *John Glascock*, for a rejoinder avers, that the said manor; *Gilbert Kinder*, after making his said last will and before the likewise said fine levied in the manner aforesaid, (to wit) on the first that the day of *January*, in the twenty-fourth year of the reign of the premisses said late *King Charles the first*, died at *Southwold* aforesaid; were not and this he is ready to verify; whereupon, as before, he prays in the fire. judgment, and that the said *Margaret* may be precluded from That G. K. her said action against him, &c. after the will, and before the

**In this case there were two points resolved; First, That by the bargain and sale of Crafford Gibbens, who was but tenant in tail (P* 201) of a reversion, nothing passed to Kinder the bargainee, but an estate the case. 329. b. S. 606. which could not be a devise within the statute of Saum. 260. 32 H. 8. c. 1. and 34 & 35 H. 8. c. 8. which last statute expounded, Cart. 208. that estates of inheritance shall be an estate of fee simple only, and here the estate bargained and sold by the said Kinder descended as heir at law, and special occupier, notwithstanding the will. Secondly, That altho' by the fine of Crafford Gibbens, after the death of Kinder, the bargainee of the estate tail of Crafford Gibbens was barred and extinguished, yet that shall not give any power to the plaintiff being the devisee, to make the will good by way of reversion, but only to corroborate the estate of the heir of Kinder, to whom it had descended before the fine levied, and make it a base fee-simple in the said heir, which was but an estate for life descendable before; and accordingly judgment was given for the defendant.*

The cases in the margin of my book are as follow: *Cro. Eliz.* 804, 805. *Mod.* 625. 1 *Lev.* 252. *Noy* 177. *Popb.* 91. 1 *Roll. Ref.* 334. 1 *Bulst.* 184. *Plow.* 444. *Cro. Jac.* 145. *Cro. Eliz.* 100. 3 *Co.* 31. 4 *Co.* 4. 6 *Co.* 76. 8 *Co.* 85. 9 *Co.* 133. 10 *Co.* 81, 84. *Co. Lit.* 78, 111, 123. 1 *Roll Abr.* 618. 2 *And.* 21. *All.* 255. *Ley* 66. 1 *Bulst.* 165. 1 *Sid.* 55, 315, 362. *Ray.* 39. 1 *Mod.* 117. 1 *Lev.* 18, 19. *Cart.* 208. *Vide Cro. Eliz.* 804, 805. *Moor* 625. 1 *Leon.* 152. *Pop.* 91. 1 *Roll. Rep.* 334. 1 *Bulst.* 184. 8 *Co.* 84, 85. 10 *Co.* 78.

Hill. 3 Annæ.

BROOK against HUSTLER.

Yorkshire, ff. *Thomas Brook*, late of *Overstockton* in the said county, yeoman, was summoned to answer to Sir *William Hustler*, Knt. Sir *Richard Osbaldeston*, Knt. and *William Osbaldeston*, Esq. in an action that he render to them seventy-nine shillings and eleven pence, which he owes to and unjustly detains from them: And whereupon the said *Wm. Hustler*, *Richard* and *William Osbaldeston*, by *Robert Hopkinson* their attorney, complain, That his late Majesty *James the First*, late Seisin of K. King of *England*, was seised in right of the crown of *Eng-* Jam. 1 in land, a court-leet;

2 *Salk.*
769. 11
Mod. 76.
Lex. Man.
Ap. 19.
Declarati-
on for an
amerce-
ment in a
court-leet.

Debt.

land, as of a fee and right of and in the court-leet, and view of frank-pledge, with the appurtenances; and of all and every thing which did or had belonged, or in any wise appertained to the said court-leet or view of frank-pledge, within the manors or lordships, vills or hamlets of *West Britton, Cawthorne, Overstockton* or *Netherstockton*, in the said county of *York*, being or not being parcel of the dutchy of *Lancaster*, of all the residents and inhabitants within the manors or lordships, vills and hamlets aforesaid, and within the precincts of the same manors or lordships, vills and hamlets, or every or either of them, the said court-leet and view of frank-pledge, to be held twice in every year within the manors or lordships, or vills (P* 202) and hamlets aforesaid, *or either of them, or within the precincts of the same manors or lordships, vills and hamlets, or either of them, at such days and times in the year, as our said late Sovereign King *James* the First, his heirs or assigns should think meet, necessary or convenient, according to the law and custom of this kingdom of *England*, before his said Majesty's Steward of that court, or the deputy steward for the time being; and the said late King *James* the First being so seised thereof, afterwards by his letters patent under his great seal of *England*, and likewise executed under the seal of the dutchy of *Lancaster*, bearing date at *Westminster* in the county of *Middlesex*, on the twenty-ninth day of *June*, in the thirteenth year of his reign of *England*, and of the forty-eighth of *Scotland*, which the said *William Hustler*, and *Richard* and *William Osbauston* bring into this court, for and as well in consideration of the sum of twenty shillings of lawful money of *England*, well and truly paid at the receipt of his Majesty's Exchequer at *Westminster*, to his use, by his beloved subject *George Wentworth*, of *Bulkcliffe* in *West Bretton* in the county of *York*, whereof his said late Majesty acknowledged himself truly paid and satisfied; as also for other good causes and divers good considerations, specially moving the said late King from his special favour, and from his certain knowledge and mere motion, gave and granted for himself and successors to the said *George*, his heirs and assigns, that they for ever after should and might have, hold and enjoy within the manors or lordships, vills or hamlets of *West Britton, Cawthorne, Overstockton* and *Netherstockton*, and every of them in the said county of *York*, and within the precincts of the same manors or lordships, vills or hamlets, and every of them in the said county of *York*, being or not being part of the dutchy of *Lancaster* aforesaid, courts leet and view of frank-pledge, to be held for all the residents and inhabitants, and other residents coming within the lordships or manors, vills or hamlets aforesaid, and within the precincts of the said manors or lordships, vills or hamlets, think fit.

Grant
thereof to
Went-
worth, by
letters pa-
tent,

To be held
at such day
and times,
as the gran-
tee should
think fit.

Debt.

hamlets, or every or any of them the said courts-leet and view of frank-pledge, to be held from time to time twice in every year, within the manors or lordships, vills or hamlets aforesaid, or within the precincts of the same manors or lordships, vills or hamlets, or some of them, at the same places, days and times, which to the said *George Wentworth*, his heirs or assigns, it should seem fit, convenient or necessary, according to the law and custom of this Kingdom of *England*, before the steward of the said *George Wentworth*, his heirs and assigns for the time being, or before such deputy-steward for the time being, and all and whatever had, or in any ways howsoever did or ought to belong or appertain to a court-leet, or view of frank-pledge; and also all and singular the amerciaments, fines, forfeitures, pains, penalties, perquisites, profits, liberties, pre-eminencies, privileges, rights and jurisdictions whatsoever, which might or ought in any manner to belong to the said courts-leet, or views of frank-pledge, to his said late Majesty, or his successors: By virtue of which said letters patent, the said *George Wentworth* was seised as of a fee and right of and in the court-leet, and view of frank-pledge aforesaid, with the appurtenances, and held several courts and views of frank-pledge, within the manors or lordships, vills or hamlets of *West *Bretton, Cawthorne, Overstockton and Netherstockton*, according to the gift or grant aforesaid, contained in the letters patent aforesaid; and the said *George* being so seised of the courts-leet and view of frank-pledge aforesaid, afterwards, (to wit) on the second day of *July*, in the year of our Lord one thousand six hundred and thirty-eight, he died at *Netherstockton* aforesaid; after whose decease the said court-leet and view of frank-pledge descended to *Will. Wentworth*, Gent as son and heir to the said *George*, whereby the said *William Wentworth*, son and heir to the said *George*, became seised as of a fee and right, of and in the court-leet and view of frank-pledge aforesaid, with the appurtenances; and being so seised thereof, he the said *William* afterwards, (to wit) on the fourth day of *March*, in the year of our Lord one thousand six hundred thirty-nine, died at *Netherstockton* aforesaid, without any issue of his body lawfully to be begotten; after whose death the said court-leet and view of frank-pledge, with the appurtenances, descended to *Thomas Wentworth*, Esq. and afterwards a baronet, as brother and heir to the said *Will. Wentworth*, whereby he the said *Thomas Wentworth*, as brother and heir to the said *William Wentworth*, became seised of and in the court-leet and view of frank-pledge aforesaid, with the appurtenances, as of a fee and right; and being so seised, he the said *Thomas* afterwards, (to wit) on the first day of *April*, in the year of our Lord one thousand six hundred seventy-six, died

That the grantee being seised, held several courts and died. (P* 203)

Descent to his son and heir, who was seised.

who died without issue, whereby they descended to his brother

Debt.

died at *Netherstockton* aforesaid, without any issue of his body begotten; after whose decease the said court-leet and view of frank-pledge, with the appurtenances, descended to Sir *Matthew Wentworth*, bart. as brother and heir of the said *Thomas Wentworth*, whereby the said *Matthew*, as brother and heir of the said *Thomas Wentworth*, was seised of and in the court leet and view of frank-pledge aforesaid, with the appurtenances, as of a fee and right; and being so seised thereof, he the said *Matthew* afterwards, (to wit) on the second day of *August*, in the year of our Lord one thousand six hundred seventy-eight, died at *Netherstockton* aforesaid; after whose death the said court-leet and view of frank-pledge, with the appurtenances, descended to Sir *Matthew Wentworth*, bart. as son and heir of *Matthew Wentworth*, the brother, whereby the said *Matthew Wentworth* the son was seised of and in the said court-leet and view of frank-pledge, with the appurtenances, as of a fee and right; and the said *Matthew* being so seised thereof afterwards, (to wit) on the eighth day of *December*, in the year of our Lord one thousand six hundred ninety-three, by an indenture of bargain and sale executed between the said *Matthew Wentworth* the son, of the one part, and the said *William Husler*, *Richard Osbaldeston*, and *William Osbaldeston*, of the other part; which said other part sealed with the seal of the said *Matthew Wentworth*, the son, they the said *William Husler*, *Richard* and *William Osbaldeston* bring here into this court; the date whereof is the same day and year, in consideration of five shillings to him before in hand paid by the said *William Husler*, and *Richard* and *William Osbaldeston*, bargained and sold to the said *William Husler*, *William* and *Richard Osbaldeston* the said court-leet and view of frank-pledge, with the appurtenances: To have and to hold to the said *William Husler* **Richard* and *William Osbaldeston*, their executors, administrators and assigns, from the day of the date of the said indenture to the full end and term of one whole year from thence next ensuing, and fully to be compleat and ended: By virtue of which said bargain and sale, and by force of the statute for transferring of uses into possession, in that case made and provided, they the said *William Husler* and *Richard* and *William Osbaldeston* were possessed of the said court-leet and view of frank-pledge aforesaid, for the term to them above demised and being so possessed thereof, and the said *Matthew Wentworth* the son, being seised of the reversion of the said court-leet and view of frank-pledge, with the appurtenances, as of a fee in right, afterwards, (to wit) on the ninth day of *November* in the said year of our Lord one thousand six hundred and thirty, he the said *Matthew Wentworth*, the son, by another indenture executed at *Netherstockton*, aforesaid, between the said

who dying
without issue,
they descended
to his brother;

who being
seised

by lease
and release
conveyed
to the
plaintiff.

(P* 204)

Matthew

Debt.

Matthew Wentworth the son, of the one part, and the said *William Husler, Richard Osbaldeston* and *William Osbaldeston*, of the other part; one part whereof sealed with the seal of the said *Matthew Wentworth* the son, they the said *William Husler, William* and *Richard Osbaldeston* bring into this court, the date whereof is the same day and year the said *Matthew Wentworth* the son, released to the said *William Husler, Richard* and *William Osbaldeston*, their heirs or assigns, all the estate, right, title and interest of him the said *Matthew Wentworth* the son, of and in the court-leet and view of frank-pledge, with the appurtenances; by means of which premises they the said *William Husler, Richard* and *William Osbaldeston* became and now are seised of and in the court-leet and view of frank-pledge afore said, with the appurtenances, as of a fee and right; and that *Thomas Brook*, on the twenty-fourth day of *April*, one thousand six hundred and thirty, was and long before had been residing and dwelling in *Overstockton* afore said, within the jurisdiction of the leet and view of frank-pledge afore said, and ought to do suit at the court and view of frank-pledge afore said; and they the said *William Husler, Richard* and *William Osbaldeston* being seised as afore said, of the said court-leet and view of frank-pledge, with the appurtenances, a court-leet and view of frank-pledge was held at *Netherstockton* afore said, within the manors and lordships afore said, on the twenty-fourth day of *April*, in the year of our Lord one thousand six hundred seventy-three, within the manors and lordships afore said, before *Richard Witton, Esq.* steward of the said *William Husler, Richard* and *William Osbaldeston* of their court afore said; of which court so held, due notice was given to the residents and inhabitants within the manors, lordships, villis and hamlets afore said, (to wit) at *Netherstockton* afore said; and that the said *Thomas Brook* did not perform his suit at that court, nor appear, but made default; whereupon, at that same court, it was by the jurors who were sworn and charged in the same court, to enquire and present those things which belong to the said court-leet and view of frank-pledge, it was presented upon their oath, that the said *Thomas Brook* was then a resident and inhabitant within the manors afore said, and within the jurisdiction of the said court and view of frank-pledge, and that he *ought to have performed suit of that court of view of frank-pledge; and the said *Thomas Brook*, although he was solemnly called, did not appear, but made default; by reason whereof he the said *Thomas Brook* was then and there amerced by the same court; which said amerciament was then and there in that court assented to thirty-nine shillings and eleven pence of lawful money of *England*, by *Joseph Senior* and *Timothy Rhodes*, then residents and inhabitants within the

That the plaintiff thereby became seised; that the defendant was an inhabitant within the jurisdiction of the leet, and owed suit. a court held 24Ap. 1703.

whereof notice was given to the inhabitants. The defendant made default in not appearing, whereby the jury presented

(P* 205)

and he was amerced by the court, and assessed by two

said

Debt.

affeerors
chosen and
sworn at
39s. 11d.
whereof he
had notice,
whereby
action ac-
crued, &c.

said manors, then and there elected and sworn affeerors by the court, whereof the said *Thomas Brook* afterwards, (to wit) on the day and year last above mentioned, had notice at *Netherstockton* afore said, whereby an action accrued to the said *Wm. Husler, Richard and William Osbaldeston*, to require and have of the said *Thomas Brook* the said thirty-nine shillings and eleven pence, part of the above demanded seventy-nine shillings and eleven pence; and whereas also he the said *Thomas Brook* afterwards, (to wit) on the first day of *July*, in the year of our Lord one thousand seven hundred and three, at *Netherstockton* afore said, borrowed of the said *William Husler, Richard and William Osbaldeston*, residue of the said seventy-nine pounds eleven shillings. to be paid to the said *William Husler, Richard and William Osbaldeston*, whenever after he should be thereto required: Nevertheless the said *Richard Brook*, altho' often thereto requested, hath not paid the said seventy-nine shillings and eleven pence, or any part thereof, to the said *William Husler, Richard Osbaldeston and William Osbaldeston*, or either of them, but hath hitherto altogether refused to pay them, or either of them, the said money, or any part thereof; therefore they declare they are injured and endamaged to the value of one hundred shillings; and thereupon they bring their suit, &c.

The case.
Salk. 56.

It appears by the declaration, that the defendant was amerced per cur. not saying in what sum; and that it was affeered by affeerors to such a sum: It was objected that the court ought to impose a sum certain; and that by affeerors after to be mitigated. Vide Hob. 129. Lev. 206. Sed. Cur. contra; the amerciamento ought to be general, quod fit in misericordia, and that is to be ascertained by affeerors.

Hill. 9 W. 3. Roll 321.

BEALE and Ux' against SIMPSON.

Winford.
Lut. 627.
N. L. 199.
Raym. ent.
Debt for
203l. 10s.
upon an
escape of
R. D. out
of executi-
on.

York, ss. William Simpson, late of *Mansfield* in the county of *Nottingham*, Esq. Chief Bailiff of the liberty of the honor of *Pontefract*, in the said county of *York*, was summoned to answer to *Henry Beale*, Esq. and *Hannah* his wife, administratrix of the goods and chattels, which were the property of *John Stanhope*, Esq. with a will annexed to the administration, during the minority of *Mary Stanhope* and *Hannah Stanhope* daughters and residuary legatees of the said *John*, in an action that he render to them two hundred and three pounds ten shillings, which he unjustly detains from them, &c. And whereupon the said *Henry* and *Hannah* his wife, by *Lawrence*
Brewer.

Debt.

Breves their attorney, declare, That whereas they the said *Henry* and his wife heretofore, (to wit) in *Trinity* term, in the eighth year of the reign of his present Majesty, before Sir *George Treby* and his brethren, then his Majesty's Justices of the court of *Common Pleas here, (to wit) at *Westminster*, by the judgment of the same court, by the name of *Henry Beale*, Esq. and *Hannah* his wife, administratrix of the goods and chattels which were of *John Stanhope*, Esq. with a will annexed to the administration, during the minority of *Mury Stanhope* and *Hannah Stanhope*, daughters and residuary legatees of the said *John*, against one *Richard Dickens*, Gent. then and now one of the attorneys of his said Majesty's court of common pleas here, by the name of *Richard Dickens*, Gent. one of the attorneys, &c. otherwise called *Richard Dickens*, of *Leeds* in the county of *York*, Gent. upon a certain writing obligatory, made, sealed, and delivered by the said *Richard* to the said *John Stanhope*, in his life-time, at *Leeds* aforesaid, as well a certain debt of two hundred pounds as seventy shillings, which were awarded to the said *Henry* and *Hannah* his wife, in this his said Majesty's court of common pleas, for their damages which they had sustained, by reason of detaining their said debt, whereof he was convicted, as by the record and proceedings thereof, now here remaining in his said Majesty's court of common pleas, (to wit) at *Westminster* aforesaid, it doth manifestly appear : and whereas they the said *Henry* and *Hannah* his wife, in order to have the said judgment executed, afterwards in the said *Trinity* term, sued out of this his said Majesty's court of common pleas, his said Majesty's writ of *Capias ad satisfaciendum*, of and upon the judgment aforesaid against the said *Richard*, directed to the sheriff of the said county of *York* ; by which writ his said Majesty commanded the said then sheriff of the said county of *York* aforesaid, that he should take the said *Richard*, if, &c. and safely keep him, &c. so that he should have his body before his said Majesty's justices here, (to wit) at *Westminster* aforesaid, on Saturday next after fifteen days of *St. Martin* then next following, to make satisfaction to the said *Henry* and *Hannah* his wife, for the debt and damages aforesaid, recovered in the manner aforesaid : by virtue of which writ *John Bradshaw*, Esq. then being the sheriff of the said county of *York*, afterwards, (to wit) on the first day of *August*, in the eighth year aforesaid, at *Leeds* aforesaid, made and directed his warrant in writing, sealed with the seal of his office as sheriff of the county aforesaid, directed to the chief bailiff of the liberty of the honor of *Pontefract*, in the said county of *York* ; which said chief bailiff then had and now hath full power of executing and returning of writs, precepts and warrants within that liberty, and to whom it entirely belonged to execute the aforesaid writ, in as much

(P* 206)

Ca. sa. sued
out the
same term;
Ret. 15
Martini.

The 1st of
August the
same year
the sheriff
made his
warrant to
the bailiff
of the li-
berty of
Pontefract

Debt.

much as the same could not be executed out of that liberty; by which warrant the said *John Bradshaw* commanded the chief bailiff of the honor of *Pontefract* aforesaid, that the said bailiff should take the said *Richard*, if, &c. and safely keep him, &c. so that the said *John Bradshaw* might have the said *Richard*'s body before his said Majesty's justices here, (to wit) at *Westminster* aforesaid, on *Saturday* next after the said fifteen days of *St. Martin*, to make satisfaction to the said *Henry* and *Hannah* his wife, for the debt and damages aforesaid: by virtue of which warrant he the said *William Simpson*, afterwards, and before the return of the said writ and warrant, (namely) on the first day of *November*, in the eighth year of the reign of his present Majesty, he the said *William* then being the chief bailiff of the *liberty of the honor of *Pontefract* aforesaid, took and arrested the said *Richard* at *Leeds* aforesaid; which said town of *Leeds* is within that liberty, and then and there had and detained the said *Richard* in his custody, in execution for the debt and damages aforesaid, being in prison under the said *W.*'s custody, in execution for the debt and damages aforesaid, he the said *W.* afterwards, (namely) on the third day of *February*, in the eighth year aforesaid, without the command, leave or consent, and against the will of the said *Henry* and *Hannah* his wife, voluntarily permitted the said *Richard* to escape out of his custody, and to go at large wherever he pleased, (he the said *William* being then and now the chief bailiff of the liberty of the honor of *Pontefract* aforesaid; and they the said *Henry* and *Hannah* his wife, or either of them, then and yet not being satisfied and paid their debt and damages aforesaid, recovered in the manner as above) whereby an action accrued to the said *Henry* and *Hannah* his wife, to require and have of the said *William* the said two hundred and three pounds ten shillings; nevertheless the said *William*, although often requested, hath not paid the said *Henry* and *Hannah* his wife, or either of them the said two hundred and three pounds ten shillings; to which said *Hannah*, administration with the will annexed, of all the goods and chattels which were the property of the said *John Stanhope*, at the time of his death, during the minority of the said *Mary* and *Hannah Stanhope*, daughters and residuary legatees of the said *John Stanhope*, who are now alive and within age, viz. the said *Mary* of the age of fourteen years, and the said *Hannah* twelve years of age; and upon the twenty-ninth day of *June*, in the fifth year of the reign of our Sovereign Lord King *William* and our late Sovereign Lady *Mary*, late Queen of *England*, &c. at *Leeds* aforesaid, after the decease of the said *John Stanhope*, was in a legal manner granted by *John* by divine providence archbishop of *York*, primate and metropolitan of *England*; but instead thereof the said *William* hath

(P* 207)

On the 11th of Nov. in the same year, the said R. D. was taken in execution by the defendant, then bailiff of the liberty; and escaped at *Leeds*, Feb. 3.

That administration was granted to the plaintiff by the archbishop of *York*.

Debt.

hitherto altogether refused to pay the said sum of money to the said *Henry* and *Hannah*, or either of them, and doth unjustly detain the same; whereupon they the said *Henry* and *Hannah* his wife declare that they are injured and endamaged to the value of forty pounds; and therefore they bring their suit, and have good proof of the premiffes, when the court will consider thereof; and they bring into this court the letters administration of the said archbishop, with the will annexed, which certify that the said administration hath been granted to them as above set forth.

And the said *William Simpson*, by *Henry Wood*, his attorney, Plea. comes and defends the force and injury, when, &c. and pleads that they the said *Henry* and *Hannah* ought not to have their said action thereof against him, because he avers that before the said time, when it is supposed the said *Richard* made the escape, as aforesaid, or that the said *William* permitted him to escape out of his custody, (namely) on the twenty-third day of *January*, in the eighth year of the reign of his present Majesty, his Majesty's writ of *Habeas Corpus* was sued out of his said Majesty's Court of Common Pleas (to wit) at *Westminster* in the county of *Middlesex*; by which writ his said Majesty commanded the bailiff of the liberty aforesaid, *that he should have here before his Majesty's justices at *Westminster* aforesaid, on *Saturday* next after the purification of the Blessed *Virgin Mary*, then next ensuing, the body of the said *Richard Dickens*, detained in his said Majesty's prison under the custody of the said bailiff, together with the day and cause of his being taken and detained, by whatsoever name the said *Richard* should be thereto reputed, to do and receive that which this court should then and there consider of in that particular, and that the said bailiff should have there that writ; which writ, afterwards and before the said escape, is supposed to have been permitted, (namely) on the twenty-seventh day of *January*, in the eighth year aforesaid, was delivered to the said *William*, then and now bailiff of the said liberty, at *Leeds* aforesaid, to be executed in due form of law: By virtue of which said writ he the said *William* afterwards, and before the return thereof, (namely) on the third day of *February*, in the eighth year aforesaid, at *Leeds* aforesaid, took the body of the said *Richard* out of his said Majesty's prison and gaol of the liberty aforesaid, and carried him from the said prison, under the custody of the said *William*, the usual and highest way to *Westminster* aforesaid, and had him here at the return of the writ aforesaid, according to the tenor of that writ, and made a return to this court in a schedule annexed to the said writ, the day and cause of taking and retaining the said *Richard*

That before the escape supposed, viz. 23 Jan. a writ of Habeas Corpus issued.

Ret. Cro. Pur.

Delivery of the writ to the sheriff 27 Jan. by virtue of which writ he had the body of the defendant in court at the day of the return. The return of the cause of his commitment.

Debt.

Richard, in the manner following; (that is to say) that before the arrival of the said writ, the said *Richard* was taken within the liberty aforesaid, and detained in his said Majesty's prison, under the custody of the said *William*, by virtue of the said warrant mentioned in the declaration aforesaid, for the debt and damages aforesaid, specified in the same declaration; and that this was the only cause of the said *Richard*'s being taken and detained in prison and in custody as aforesaid, which together with the body of the said *Richard* he had ready at the day and place mentioned in the said writ of *Habeas Corpus*, according to the tenour of that writ; and thereupon the said *Richard* was then (*to wit*) at the return of the said writ, committed by this court to his Majesty's prison of the *Fleet*, on the occasion aforesaid, there to remain until, &c. as by the record of the said writ, and the return thereof, and the said commitment of this court now remaining here in this court, it doth more fully and at large appear; which said taking of the said *Richard* out of the prison and gaol, as aforesaid, and carrying the said *Richard* from the said prison to *Westminster* aforesaid, done for the reason aforesaid, is the same escape, or his the said *William*'s permitting the said *Richard* to escape out of the custody of the said *William*, and to go at large, whereof the said *Henry* and *Hannah* do now, as above, complain against him; and this he is ready to verify; whereupon he prays judgment whether the said *Henry* and *Hannah* ought to have their said action against him, &c.

The commitment of R. D. to the prison of the Fleet.

Averment that it is the same escape.

Replication protesting that the writ of Habeas Corpus was not (P* 209) delivered to the defendant before the escape. That the 28th of Nov. an Habeas Corpus issued.

And they the said *Henry* and *Hannah* his wife, protesting that the said writ of *Habeas Corpus*, above mentioned in the plea of the said *William*, was not delivered to the said *William* before the said time of the escape aforesaid, in the said declaration of the said *Henry* and *Hannah* above mentioned to have been permitted, as the said *William* hath alledged in his plea aforesaid, do alledge of their *replication to the plea of the said *William*, that they ought not to be precluded from their said action against the said *William*, by any thing above alledged by the said *William* in his plea; because they do aver, that on the twenty-eighth day of *November*, in the eighth year of the reign of his present Majesty, his said Majesty's writ of *Habeas Corpus* was sued out of his said Majesty's court of common pleas, (*to wit*) at *Westminster* aforesaid, directed to the bailiff of the liberty of the honor of *Pontefract* aforesaid; by which writ his said Majesty commanded the bailiff of the liberty of the honor of *Pontefract* aforesaid, that he should have the body of the said *Richard Dickens*, reputed by what name soever, detained in his said Majesty's prison, under the custody of the bailiff of the liberty aforesaid, together with the day and cause of the said *Richard*'s being so taken and detained before his said Majesty.

Debt.

Majesty's justices here, (to wit) at *Westminster* aforesaid, on
Saturday next after the *octave* of *St. Hillary* next ensuing, be-
 ing the twenty-third day of *January*, in the eighth year of the
 reign of his present Majesty; that they the said Majesty's jus-
 tices of the court of common pleas, here viewing the case,
 might do what of right and according to the law and custom of
 this kingdom of *England*, was to be done in this particular;
 and that the said bailiff should have there at the same time that
 writ; which writ afterwards and before the return thereof, (to
 wit) on the ninth day of *December*, in the eighth year aforesaid,
 at *Leeds* aforesaid, was delivered to the said *William*, being
 then bailiff of the liberty aforesaid, to be executed in due form
 of law; but the said *William*, at the return of the writ aforesaid,
 did nothing thereupon: nevertheless, he by colour and under
 pretence of that writ, after the return thereof, (to wit) on the
 third day of *February*, in the eighth year aforesaid, at *Leeds*
 aforesaid, without any other writ, precept or authority, and
 against the will of the said *Henry* and *Hannah* his wife, took
 the body of the said *Richard* out of his said Majesty's prison
 and gaol of the liberty aforesaid, and carried him from the said
 prison to *Westminster* aforesaid, under the custody of the said
William, and had him there on the sixth day of *February*,
 in the eighth year aforesaid; and the said *Richard* being so
 there afterwards, (*namely*) on the sixth day of *February*, in the
 eighth year aforesaid, and not before; the said writ of *Habeas*
Corpus, above specified in the said *William's* plea, was sued out
 of the court of common pleas, and delivered to the said *Wil-*
liam, by fraud and contrivance between the said *William* and
 other persons unknown to the said *Henry* and *Hannah* his wife;
 by which said writ his said Majesty did command the said
 bailiff of the liberty aforesaid, in such manner and form as the
 said *William* hath above alledged in his said plea: by virtue of
 which said last mentioned writ of *Habeas Corpus*, he the said
William afterwards, on the same sixth day of *February*, being
 the said *Saturday* next after the morrow of the purification of
 the blessed *Virgin Mary*, carried the body of the said *Richard*
 into his said Majesty's court of common pleas, and then and
 there had him in the said court, and made a return to the said
 court, in a schedule annexed to the said last mentioned *Habeas*
Corpus, of the day and cause of the said *Richard's* being taken
 and detained, as the said *William* hath above set forth in his
 plea, as aforesaid; and thereupon the said *Richard* afterwards
 on the said sixth day of *February*, in the eighth year aforesaid,
 that being the day of the return of the said last mentioned
Habeas Corpus, was by his said Majesty's court of common pleas
 here committed to his said Majesty's prison of the *Fleet*, on the
 occasion aforesaid, there to remain until, &c. as the said *William*
 hath

Ret. Oct.
 Hill.
 That it
 was deli-
 vered to
 the defen-
 dant the
 9th of Dec.
 That after
 the return
 thereof,
 viz. 3 Feb.
 he took the
 said R. D.
 by colour
 of that
 writ, and
 carried
 him to
Westmin-
ster, Feb.
 6. and the
 same day
 by fraud,
 &c. the
Habeas
Corpus
 mentioned
 in the plea,
 was sued
 out and de-
 livered to
 the defen-
 dant, and
 not before.
 That by
 virtue of
 the last
 writ of
Habeas
Corpus
 the said R.
 (1* 210)
 D. was
 carried to
Westmin-
ster the
 same 6th
 of Feb. and
 thereupon
 committed
 to the
Fleet;

Debt.

and traverse that he was taken out of prison, and carried to Westminster by virtue of the Habeas Corpus in the defendant's plea. A special demurrer.

hath above alledged: without that, that the said *W.* by virtue of the said writ of *Habeas Corpus* above mentioned in the said *W.*'s plea, took the body of the said *Richard* out of his said Majesty's prison and gaol of the liberty aforesaid, and carried him from the said prison to *Westminster* aforesaid, as the said *William* hath also above alledged in his plea; and this the said *Henry* and *Hannah* his wife are ready to verify; whereupon they pray judgment, and their said debt, together with their damages, occasioned by detaining the same, to be awarded to them, &c.

And the said *William* rejoins, that the said replication of the said *Henry* and *Hannah* above pleaded, and the matter therein contained, are in law insufficient for the said *Henry* and *Hannah* to maintain their said action against the said *William*, and that he is under no necessity, nor in any wise bound by the law of the land to make answer to the said replication, in the manner and form as the same is above pleaded; and this he is ready to verify; whereupon, for want of a sufficient replication of the said *Henry* and *Hannah* in this particular, he the said *William* prays judgment, and that the said *Henry* and *Hannah* be precluded from having their said action against him, &c. and the said *William*, according to the statute in this case made and provided, shews to this court this reason for his demurrer in law, (*viz.*) that the said traverse is repugnant, and doth traverse a matter that is not traversable, &c.

The Case,
Lut. 632.

An exception was taken to this declaration, because it was not averred that the executors were within the age of seventeen years, but only generally that they were within age; but the exception was not allowed; for the defendant, by his plea, had admitted the plaintiff's authority to bring the action; but however it may be perceived I have altered the precedent in that particular.

But the chief exception was, that the traverse by the plaintiff in his declaration was matter of law, and therefore ill; and that was the opinion of the chief justice; but the three other judges being of another opinion, the plaintiff had his judgment.

(P* 211)
Winford.

*Easter Term, 1 Annæ. Roll 566, 567.

THORNTON against BETHEL.

Lut. 704.

N. L. 219. *London*, ff. *Hugh Bethel*, late of *Ryfe* in *Holderness*, in the county of *York*, Esq. *Robert Bloome*, late of *London* aforesaid, merchant, *Jason Pinder*, late of *North-Ferriby* in the county of the town of *Kingston upon Hull*, merchant, and *Simpson Bridges*, late of the town of *Kingston upon Hull*, in the county of the same

Debt.

same town, merchant, were summoned to answer to *Peter Thornton*, in an action that they render to him eight hundred pounds, which they owe to and unjustly detain from him, &c. and whereupon the said *William*, by *Peter Allington* his attorney, declares, that whereas by an indenture of charter-party of affreightment, made at *London* aforesaid, in the parish of the blessed *Mary* of the arches, in the ward of *Cheap*, on the fourteenth day of *February*, in the year of our Lord one thousand six hundred ninety-eight, executed between *Peter Thornton*, by the name of *Peter Thornton*, of the town of *Kingslon upon Hull*, mariner, master of the good pink or vessel, called the *Hopewell* of *Hull*, burden one hundred and ten ton dead-weight, or thereabouts, then in the river *Hull*, of the one part, and the said *Hugh, Robert, Jason* and *Simpson*, by the names of the several persons, whose names are subscribed, and their seals fixed to one part of the said charter-party, sealed with the seals of the said *Hugh, Robert, Jason* and *Simpson*, and to which other part the names of *Hugh, Robert, Jason* and *Simpson* are subscribed, and their seals fixed, he the said *Peter* brings into this court, the date whereof is the same day and year, he the said *Peter* granted and demised the said pink to freightment to them the said *Hugh, Robert, Jason* and *Simpson*, by the names of them the said merchants subscribing thereto; and that they in like manner hired the same from the said master for a trading voyage, to be made by the grace of God, as followeth; (to wit) the said master for himself, his executors and administrators, covenanted, promised, and agreed and with every of them the said merchants subscribing to the said charter-party, and their respective executors and assigns; that he the said master, and his crew, after the date of the said charter-party, as soon as the said master should find it convenient, would set sail with her intended loading of coals, in some part of the *West* coast, where he should think it convenient to deliver the said coals; and they being delivered, would depart from thence with the said pink or vessel, with the first and next conveniency, and would directly, as wind and weather permit, sail to *Sligo* in *Ireland*, or so near thereto as the said vessel could safely arrive, and would there load, receive, and take on board of her all such free goods and merchandizes, as the said merchants subscribing to the said charter-party, their factors or assigns, should please to load and put on board her, not exceeding so much as she could reasonably stow and carry in her, over and above her tackle, apparel and furniture, and five ton allowed to the said master and company for their privilege; *and the said pink or vessel being so laden, or otherwise dispatched by them the said merchants subscribing to the said charter-party, their factors or assigns, according to such order as he the said master should

Debt for 800l. upon a charter-party of affreightment.

The charter party made the 14th of Feb. 1698.

whereby the plaintiff granted and demised to the defendants a ship for a trading voyage. That he, when he should find it convenient, would set sail with his loading of coals, and deliver them at some part of the western coast, and then set sail to *Sligo* in *Ireland*, and there (P* 212) receive the defendant's merchandizes.

Debt.

and then set sail to such port in Newfoundland as the defendant should direct, and then deliver their goods, and there receive on board other goods of the defendants; there receive from the said merchants subscribing to the said charter-party, their factors or assigns, she should directly, as wind and weather would permit, sail into such port or ports, at or in *Newfoundland*, upon the coast of *America*, or so near thereto, as the said pink or vessel could safely arrive, and would there stay to unload and deliver to the said merchants subscribing to the said charter-party, their factors or assigns, all such goods and merchandizes as should be loaded for them at *Stigo* afore said; and that then and immediately after the delivery of her freight should reload, receive, and take on board her all such free goods and merchandizes, as they the said merchants subscribing to the said charter-party, their factors or assigns, should load her with, or put on board her, not exceeding what she could reasonably carry and stow in her over and above her tackle, apparel and furniture, and five ton allowed to the said master and company, as afore said; and the said pink or vessel being so loaden, or otherwise dispatched by them the said merchants subscribing to the said charter-party, their factors or assigns, according to such order as he the said master should there receive from the said merchants subscribing to the said charter-party, their factors or assigns, should directly, as

and then set sail to some port in *Spain*, *Portugal*, or *France*, as the defendants should direct, and there deliver the defendants goods, and take in others; wind and weather would permit, set sail and return into some port or ports, or so near thereto as the said pink or vessel could safely arrive in *Spain*, *Portugal* or *France*, to which of them she should be ordered by the said merchants subscribing to the said charter-party, their factors or assigns, and should there stay to unlade and deliver to the said merchants subscribing to the said charter-party, their factors or assigns, all such goods and merchandizes as should be by them loaden in *Newfoundland*; and that then immediately after the delivery of her loading should reload, receive, and take on board her, all such free goods and merchandizes, as the said merchants subscribing to the said charter-party, their factors or assigns, should load or put on board her, not exceeding what she could reasonably carry and stow in her, over and above her tackle, apparel and furniture, and five ton being allowed to the said master and his company, as afore said; and the said pink or ship being so loaden, or otherwise dispatched by the said merchants subscribing to the said charter-party, their factors or assigns, she should according to such order, as he the said master should there receive from

and then sail to *London*, *Hull*, or *Newcastle*, as the defendants should direct; and then deliver the defendants goods. the said merchants subscribing to the said charter-party, their factors or assigns, directly, as wind and weather would permit, return and come back to *London*, *Hull* or *Newcastle* to unload, as they the said merchants subscribing to the said charter-party, their factors or assigns, should order and direct, and should stay at the place of her discharge to deliver to the said merchants subscribing to the said charter-party, their factors or assigns, all such goods and merchandizes as should be loaden for them, in the places afore said, called *Spain*, *Portugal* or *France*.

Debt.

France, as aforesaid, and so upon such her discharge to compleat her intended voyage, (the perils of the seas, and the restraint of princes and rulers excepted :) And *further the said master covenanted and warranted that the said pink or vessel, at the time of her departure from and out of the port of *Hull*, should be well and sufficiently tackled, manned, and furnished with a boat, and all things requisite for the voyage of such pink; and they the said merchants subscribing the said charter-party for themselves, their executors and administrators, covenanted and agreed with the said *Peter Thornton*, the master, his executors and assigns, by the said charter-party, that they the said merchants subscribing the said charter party, their executors and administrators, factors or assigns, would not only from time to time load, unload and dispatch the said pink or vessel, at all and every the port and ports, and place and places before mentioned and expressed, according to the true intent and purport of the said charter-party, but would also well and truly pay, or cause to be paid to the said master, his executors, administrators or assigns, the full, whole, and just sum of fifty pounds sterling per month; which said monthly payment should commence from the first day in which the said pink or vessel, after the date of the said charter-party, should happen to break ground in or upon the western coast, where the said master should think fit to deliver his coals, as aforesaid, and should run on and continue until the last day of the discharge of the said pink or vessel, at any of the said ports called *London*, *Hull* or *Newcastle*, to which she should be ordered to be unloaden at the end of the said intended voyage, in the manner and form following; that is to say, before the departure out of the port of *Sligo* in *Ireland*, one month's pay thereof either in money, according to the exchange, or in merchandizable goods, at a current rate; and also before her departure out of the port in *Newfound and*, one month's pay more in merchandizable fish, at the current rate; and also before her departure out of *Spain*, *Portugal* or *France*, one month's pay in sterling money; and all the residue of the said monthly payments in sterling-money for every month, should be paid to the said *Peter Thornton*, the master, his executors or assigns, at the port of discharge from her said intended voyage, whether at *London*, *Hull* or *Newcastle*, within the term or space of two months then next following, after such her discharge there; together with two third parts of the port-charges, with primage and average, accustomed, and to the true performance of every thing in the said charter-party, on the part of the said master, or his assigns, to be performed; he the said *Peter* firmly, by the said charter-party, obliged himself, his executors and administrators, and his said vessel, together with all the furniture and freight to the said merchants subscribing

A covenant by the plaintiff that the ship should be well tackled, &c.

(P* 213)

The defendants covenant to load, unload and dispatch the ship to the said ports, and to pay the plaintiff 50l. a month. The several times of payment.

The plaintiff and defendants bind themselves in 800l. for

Debt.

the performance.

(P* 214)

Averment
of performance of
every thing on
his part.

scribing the said charter-party, their executors and assigns, in the penal sum of eight hundred pounds sterling, and to the true performance of every thing in the said charter party, on the part of the said merchants subscribing the said charter-party, or their assigns, to be performed, they the said merchants, by the said charter-party, firmly obliged themselves, their executors and administrators, and the goods, as aforesaid, intended to be loaden, to the said master, his executors and assigns, in the like penal sum of eight hundred pounds sterling, as by the said charter-party it doth and may more fully and at large appear; and the said *Peter*, in fact declares, that the said *Peter*, with his company, in *that particular sufficient to navigate and govern the said pink or vessel in her intended voyage, as soon as it was convenient after making the said charter-party, (*namely*) on the twenty-eighth day of *March*, in the year of our Lord one thousand six hundred ninety-nine, set sail with the said pink or vessel, and her intended freight of coals, from the said river of *Hull* in the town of *Kingston upon Hull*, towards the western coast; and afterwards, (*namely*) on the twelfth day of *April*, in the year last above-mentioned, arrived at the western coast in the county of *Devon*, with the pink or vessel, and coals aforesaid, and there discharged the pink of her said coals; and afterwards (*to wit*) on the twenty-seventh of the same month of *April*, in the year last above mentioned, she then broke ground, and he with the first and next conveniency then next following, departed from thence with the pink or vessel, and the company aforesaid, and directly as wind and weather did permit, sailed with the pink or vessel, and company aforesaid, towards *Sligo* aforesaid; and afterwards, (*to wit*) on the twenty-third day of *May*, in the year last above mentioned, he the said *Peter Thornton* arrived with the said pink or vessel and company, at *Sligo* aforesaid in *Ireland*, in parts beyond the seas; and immediately thereupon re-loaded, received, and took on board the said pink or vessel, according to the covenant aforesaid, in that particular, all such free goods and merchandizes, as the said merchants subscribing the said charter-party, their factors or assigns, there thought fit to load and put on board the pink or vessel aforesaid; and the pink or vessel being so loaden, he the said *Peter* according to the orders which he received at *Sligo* aforesaid, from the said merchants, departed with the pink or vessel and company aforesaid, from *Sligo* aforesaid, on the eighteenth day of *June*, in the year last above-mentioned; and from thence directly, as wind and weather did permit, set sail towards *Carbonear* in *Newfoundland* aforesaid, upon the coast of *America* aforesaid, and arrived at that port beyond sea afterwards, (*to wit*) on the ninth day of *August*, in the year last above

Debt.

above-mentioned, and staid there until he there unloaded and delivered out of the said pink or vessel to the said merchants subscribing the said charter-party, their factors or assigns, the goods or merchandizes so, as aforesaid, loaden, received, and taken on board the said pink or vessel at *Sligo* aforesaid; and immediately after the said discharge and delivery of the goods and merchandizes, he the said *Peter*, at the port of *Carbonear* aforesaid, re-loaded, received into, and took on board the said pink or vessel, according to the covenant aforesaid, in that particular, all such free goods and merchandizes, as the said merchants subscribing the said charter-party, put or sent to be put on board the said pink or vessel; and the said pink or vessel being so laden, he the said *Peter*, according to the orders there given by the said merchants subscribing the said charter-party to the said *Peter*, and by him there received, directly as wind and weather would permit, set sail with the said pink or vessel, loaden as aforesaid, from thence toward the port of *Cadix* in *Spain* aforesaid; and afterwards, (namely) on the twenty-first day of *October*, in the year last above mentioned, arrived at that port beyond the seas, and staid there until he there discharged and delivered to the said merchants subscribing the said *charter-party, their factors or assigns, all the goods and merchandizes so, as aforesaid, loaden, taken, and received on board at the port of *Carbonear* aforesaid; and immediately after such discharge, according to the covenant aforesaid in that particular, there reloaded, received into, and took on board the said pink or vessel, all such free goods and merchandizes, as the said merchants subscribing the said charter-party, their factors or assigns, put or sent to be put on board her; and the said pink or vessel loaden as aforesaid, directly, as wind and weather would permit, set sail towards the port of *Kingston upon Hull*, in the county of the town of *Kingston upon Hull* aforesaid, to be discharged as they the said merchants, their said factors or assigns, should order and direct; and afterwards, and before the day of suing out of the said original writ of the said *Peter*, (namely) on the fifteenth day of *March*, in the year last above mentioned, he arrived there with the pink or vessel aforesaid; and the goods and merchandizes last above specified, to be discharged in the said port, and there remained until he the said *Peter*, afterwards, (to wit) on the thirtieth day of *March*, in the year of our Lord one thousand six hundred and seventy, unloaded the pink or vessel aforesaid, and then and there delivered all the goods and merchandizes last above mentioned, to the said merchants, according to their order and direction, then and there given to the said *Peter*; and thus the said *Peter*, at the day and year, and at the place last above mentioned, finished his intended voyage according to the

Debt.

Averment that there were ten months elapsed since the first breaking ground in the western coast to the end of the voyage.
Breach.

the form and effect of the charter-party aforesaid; and the said *Peter* further declares, that afterwards he the said *Peter* had so, as aforesaid, arrived with the pink or vessel aforesaid, and before the voyage was ended, as aforesaid, ten months and more were elapsed; and suggesting, by way of protestation, that the said *Hugh, Robert, Jason* and *Simpson*, have not performed any thing in the said charter-party on their parts to be performed and fulfilled; the said *Peter* in fact avers, that the said *Hugh, Robert, Jason* and *Simpson* have not, nor hath either of them paid or caused to be paid, either in monies, according to the exchange, or in merchandizable goods, at a current rate, to the said *Peter*, the fifty pounds, as aforesaid, agreed to be paid before the vessel departed from *Sligo* aforesaid, and the port of *Sligo* aforesaid, or at any time afterwards, whereby an action accrued to the said *Peter*, to require and have from the said *Hugh, Robert, Jason* and *Simpson*, the said eight hundred pounds: Nevertheless the said *Hugh, Robert, Jason*, and *Simpson*, (although often requested) have not, or hath either of them paid the said eight hundred pounds to the said *Peter*; but altogether have and still do refuse to pay the same, to the damage of the said *Peter* twenty pounds; and therefore he brings this suit, and hath good proof of the premisses when the court will consider thereof.

This declaration was perused and approved of by Sir *Edw. Northey*, then attorney general, and three serjeants; and the defendant took issue thereupon.

Winford. *Pasch. 13 W. 3. *Impar lance Roll 445. Issue Roll 677.*
(F* 216)

WENTWORTH against SQUIB.

Lut. 640.
N. L. 18,
201.

Declarati-
on upon a
bond

upon a
judgment
in the com-
mon pleas.

Middlesex, ff. Arnold Squib, late of the parish of St. *Andrew's, Holborn*, in the county aforesaid, gent. otherwise called, &c. was summoned to answer to *Henry Wentworth*, gent. in an action that he render to him two hundred and two pounds ten shillings, which he unjustly detains from him, &c. And whereupon the said *Henry*, by *William Allington* his attorney, declares, That the said *Arnold*, on the eighth day of *July*, in the third year of the reign of our Sovereign Lord *James* the Second, King of *England*, &c. at *Westminster* in the county of *Middlesex*, by his writing obligatory acknowledged himself to be bound to the said *Henry* in one hundred pounds, part of the said two hundred and two pounds ten shillings, to be paid to the said *Henry*, whenever he the said *Arnold* should be thereto required; and whereas the said *Henry* afterwards, (namely) in *Easter* term, in the tenth year of the

Debt.

the reign of his present Majesty, in his said Majesty's court of Common Pleas, before Sir *George Treby*, Knt. and his brethren, then his said Majesty's Justices of his said Majesty's court of Common Pleas, here, (to wit) at *Westminster* in the said county of *Middlesex*, by the name of *Henry Wentworth*, gent. by the judgment of the same court recovered against the said *Arnold*, by the name of *Arnold Squib*, late of *London*, gent. otherwise called, &c. as well a debt of one hundred pounds, as also fifty shillings residue of the said two hundred and two pounds ten shillings; which in this same court, (to wit) at *Westminster* aforesaid, were awarded to the said *Henry* for his damages which he had sustained, by reason of detaining the said debt, whereof he is convicted, as by the record and proceedings thereof remaining in this court, (to wit) at *Westminster* aforesaid, it doth more fully appear; which judgment now remains in its full force, virtue and effect; not reversed, annulled or satisfied; and the said *Henry* hath had no execution of the said judgment; whereby an action accrued to the said *Henry*, to require and have of the said *Arnold* the said one hundred and two pounds ten shillings, residue of the said two hundred and two pounds ten shillings: Nevertheless the said *Arnold*, altho' often required, hath not paid the said two hundred and two pounds ten shillings to the said *Henry*, but hitherto hath and still doth refuse to pay the same; whereupon the said *Henry* declares he is injured and endamaged to the value of fifty pounds; and therefore he brings his suit, and hath good proof of the premisses when the court will consider thereof; and he brings here into this court the said writing obligatory, which testifies the said debt in the manner aforesaid; the date whereof is the day and year first above mentioned.

* *A special plea to a bond for the performance of an award.* (P* 217)

And the said *John*, by *John Salwins* his attorney, comes and defends the force and injury when, &c. and craves Oyer of the said bond, and it is read to him; he likewise craves Oyer of the said bond, and it is likewise read to him in these words; The condition of this obligation is such, that if the above-bounded *John Kingsford*, his heirs, executors or administrators, and every of them, shall and do from time to time, and at all times hereafter, well and truly stand unto, obey, observe, fulfil and keep the award, arbitrament, order, rule, judgment, final end and determination of *David Pelhill* of *Oxford* in the county of *Kent*, Esq. and *Humphry Stiles* of *Beckenham* in the said county, Esq. arbitrators, indifferently nominated and chosen by and between the said *John Kingsford*,
and

Lut. 558.
N. L. 172.

Debt.

and the above-named *William Lambert*, to arbitrate, award, order, rule judge and determine of all and all manner of actions, cause or causes of actions, suits, complaints, debts, duties, reckonings, accounts, controversies, trespasses and demands whatsoever, had, moved or depending, or which might have been had, moved or depending, by and between the said parties, or any of them, for any matter, cause or thing, from the beginning of the world until the day of the date hereof, which the said arbitrators shall make and publish of or in the premisses in writing, under their hands and seals, or otherwise by word of mouth, at or before the twenty-ninth day of *September* next ensuing the date hereof, ready to be delivered unto the said *John Kingsford* and *William Lambert*, or any of them, requiring the same; then this obligation to be void and of none effect, or else to remain in full force and virtue; which being read and heard, the said *John* pleads, that the said *William* ought not to have or maintain his said action against him; because he pleads that the said arbitrators made no such award, order, rule, judgment, final end or determination in writing, under their hands and seals, or otherwise by word of mouth, of and upon the premisses above specified in the said condition, at and before the twenty-ninth day of *September*, in the condition aforesaid above mentioned; and this he is ready to verify; wherefore he prays judgment, whether the said *William* ought to have or maintain his said action thereof against him, &c.

Replica-
tion setting
forth the
award.

And the said *William* replies that he, (notwithstanding any thing alledged by the said *John* in his said plea, ought not to be precluded from having his said action thereupon against the said *John*; because he avers, that after the said bond was made, and before the said twenty-ninth day of *September*, (namely) on the twenty-sixth day of the same month of *September*, in the tenth year aforesaid, at *London* aforesaid, in the said parish and ward, the said arbitrators undertook the charge of the award, order, rule, judgment, and final end and determination aforesaid, of and concerning the premisses specified in the condition aforesaid; and then and there made and published their award in writing, indented under their **hands and seals*, of and upon the premisses mentioned in the said condition between the said parties, ready then and there to be delivered to them, or such of them as should require the same; one part whereof sealed with the seals of the said *Humphry* and *David*, the said *William* brings here into this court; the date whereof is the same day and year, the said arbitrators did award, order and adjudge between the said *William* and *John*, in the manner and form following; that is to say, that he the said *J. K.* his executors, administrators and assigns, should

well

Debt.

well and truly pay, or cause to be paid to the said *W. L.* his executors, administrators and assigns, the full and just sum of sixty-six pounds six shillings of lawful money of *England*, at or upon the twenty-second day of *October* then next ensuing, between the hours of ten and twelve in the forenoon of the same day, in or at a house then the dwelling-house of the said *W. L.* in *Sennock* in the county of *Keni*, in full satisfaction of all rents, costs at law, dues, claims and demands whatsoever, which he the said *W. L.* had or might have, for any matter, cause or thing whatsoever against the said *J. K.* from the beginning of the world until the eleventh day of *August* then last past, and the time of entering into the said bonds of arbitration; and also the said arbitrators did award, that he the said *W. L.* at and upon the said twenty-second day of *October* then next following, between the same hours of ten and twelve of the same day, in or at the said dwelling-house of the said *W. L.* should well and truly pay to the said *J. K.* the full sum of two shillings of lawful money of *England*, in full satisfaction of all dues and demands whatever, which he the said *J. K.* had or might have against the said *W. L.* for any matter, cause or thing whatsoever, from the beginning of the world until the eleventh day of *August* then last past, and the time of their entering into the said arbitration; and also the said arbitrators did order, adjudge and determine that after payment of the said several sums of money, as aforesaid, appointed by the said arbitrators to be paid; that they the said *W. L.* and *J. K.* respectively and mutually, should give general releases of all actions, causes of actions, suits, debts, accounts, controversies and demands whatsoever, submitted to the award of the said arbitrators, as in the said written award it is more fully contained; which said award, order, rule, judgment, and final end and determination after the said arbitration-bond was made, and before the said twenty-ninth day of *September*, in the tenth year aforesaid, (to wit) on the twenty-sixth day of the same month of *September*, at *London* aforesaid, in the said parish and ward, was ready to be delivered to the said *W. L.* and *J. K.* under the hands and seals of the said arbitrators, according to the form and effect of the condition aforesaid; and the said *W.* avers, that the said *J. K.* hath not paid, or caused to be paid to the said *W.* the said sixty-six pounds six shillings, at or upon the said twenty-second day of *October*, which he ought upon that day to have paid him, according to the form and effect of the said award; and this he is ready to verify; whereupon he prays judgment, and his said debt, together with his damages, occasioned by his detaining the same, to be awarded to him, &c.

Note;

Debt.

(P* 219) *Note; To this replication there was a demurrer and a joinder
 Lut. 560, in demurrer; and an exception taken that it was not alledged that
 561. the award was made under the hands and seals of the arbitrators;
 but however, it was afterwards set forth that the award was ready
 to be delivered under their hands and seals; and therefore it was
 sufficient; but however you may perceive I have altered the precedent,
 and as I apprehend it ought to be.

2 Saund.

Hill. 22 & 23 Car. 2.

127.

1 Lev. 285.

Raym 187.

1 Mod. 15.

1 Sid. 428,

455.

2 Keb. 562,

619.

Declarati-

on in debt

upon an

award.

COPPIN against HURNARD.

Suffolk, ff. *Thomas Coppin* complains of *William Hurnard*,
 Gent. being in the custody of the marshall of the *marshalsea* of
 our sovereign Lord the King, before the King himself, in an
 action that he render to him nine pounds of lawful money of
England, which he owes to and unjustly detains from him, for
 this cause, that is to say, that whereas on the twelfth day of
September, in the nineteenth year of the reign of our Sovereign
 Lord *Charles* the second, now King of *England*, &c. certain
 suits and controversies had arisen and been depending between
 the said *Thomas* and *William*; for the pacifying which suits and
 controversies they the said *Thomas* and *William*, on the twelfth
 day of *September*, in the nineteenth year aforesaid, at *Halls-*
worth in the county aforesaid, submitted themselves to stand to
 the award, order and judgment of *William Carey*, Gent. and
Edward Nelson, Gent. arbitrators, indifferently chosen between
 them; so that the said award should be made by the said arbi-
 trators of and concerning the premises, before the last day of
Michaelmas term then next ensuing, if they could be able so to
 do; and if they should not be able so to do, then to the award
 and final determination of one *Richard Cook*, Esq. indifferently
 chosen between the said *Thomas* and *William*, so that such
 award should be made of and concerning the premises, before
 the twentieth day of *December* then next ensuing; and the said
Thomas in fact declares, that the said *William Carey* and *William*
Nelson, before the last day of *Michaelmas* term then next ensu-
 ing the said twelfth day of *September*, in the nineteenth year
 aforesaid, made no award of and concerning the premises;
 whereof the said *Richard Cook* having notice thereof, and taking
 upon himself the charge of the arbitrament aforesaid, after-
 wards and before the twentieth day of *December* then next en-
 suing, (to wit) on the tenth day of the said month of *December*
 at *Halls-worth* aforesaid, in the said county; he the said *Richard*
Cook awarded, ordered and adjudged between the said *T.* and
W. H. of and concerning the premises, in the manner follow-

ing

Debt.

ing; (that is to say) that the said *W. H.* upon the twenty-fourth day of *December* then next ensuing, should pay to the said *T. C.* nine pounds, as well for monies due by the said *W. H.* to the said *T.* as for the expences and costs of the said *T.* in and about prosecuting several suits aforesaid; and upon payment of the said nine pounds, they the said *T.* and *W.* should give each other general acquittances, whereby an action accrued to the said *T.* to require and have of the said *W. H.* the said nine pounds: nevertheless the said *W.* although often requested, &c. hath not paid the said nine pounds to the said *T.* but hitherto hath and still doth refuse to pay the same, to the damage of the said *T.* ten pounds; and therefore he brings his suit, &c.

The Case,
2 Saaved.
129.

It may be perceived that the declaration from whence this precedent was taken, was upon an award where the arbitrators had till the last day of the term to make their award; and the umpire had the same time to make his award, and the plaintiff had set forth, that the arbitrators could not make their award before the last day of Michaelmas term; and that thereupon the umpire made the umpirage; but the averment that the arbitrators could not make their award was idle, unless the plaintiff had shewn that one of them was dead, or shew how they were disabled. But Twissden held the submission as to the umpire was merely void. Judgment was given for the defendant; therefore it may be perceived I have made this precedent otherwise, and made the time for the umpire to make his award till the twentieth of December, for there could not be two concurrent jurisdictions at the same time. But see the cases hereafter under title debt upon awards.

Suffolk, ff. *A. B.* who as well, &c. complains of *C. D.* being in the custody of the marshal of the marshalsea of our Sovereign Lord the King, before the King himself, in an action that he render to our said Sovereign Lord the King, and to the said *A.* who as well, &c. seventy pounds of lawful money of Great Britain, which he owes to and unjustly detains from our said Sovereign Lord the King; and the said *A.* who as well, &c. for this cause, (that is to say) that he the said *C.* on the first day of April, in the fifth year of the reign of our said Sovereign Lord the King, and continually ever since for the space of one whole year then next ensuing, hath been and continued a spiritual person, and beneficed; (that is to say) he the said *C.* during all that time, hath been and now is a vicar of the vicarage of the parish church of *M.* and therein beneficed; and that the said *C.* for seven whole months together, concurring in the year aforesaid, to be computed from the first day of May in the same year, was not personally resident or abiding at or upon his vicarage aforesaid, nor in, at or upon any other benefice of the said *C.* but he the said *C.* for the space of seven

An action
of debt
Qui teneat
upon the
statute of
non-resi-
dence.

Debt.

seven months aforeſaid, voluntarily abſented himſelf from his ſaid vicarage; nor was he reſident upon his ſaid vicarage, or upon his any other benefice, againſt the form of the ſtatute in ſuch caſe made and provided; whereby an action accrued to the ſaid *A.* who as well, &c. to require and have of the ſaid *C.* ſeventy pounds; (that is to ſay) ten pounds for every month that the ſaid *C.* had as aforeſaid been delinquent, againſt the form of the ſtatute aforeſaid: nevertheleſs the ſaid *C.* although often requested, hath not paid to the ſaid *A.* the ſaid ſeventy pounds; but hitherto altogether hath and ſtill doth reſuſe to pay the ſame; whereupon he declares that he is injured and endamaged to the value of ten pounds; and therefore he brings his ſuit, and hath good proof of the premiſſes when the court will conſider thereof.

(P* 221) **Pleas in the Exchequer-chamber at Weſtminſter, before Sir Petet*
King, Knt. Chief Juſtice of the Common Pleas of our
Sovereign Lord the King; Sir Thomas Bury, Knt. Chief Baron
of the Exchequer of our ſaid Lord the King, of the degree of
the Coif; John Blencow, Knt. Robert Tracy, Eſq. and
Robert Dormer, Eſq. the three other judges of the Common Pleas
of our ſaid Sovereign Lord the King; and alſo before Robert
Price, Eſq. Sir James Montague, Knt. and Sir Francis
Page, Knt. three other Barons of the Exchequer of our ſaid
Sovereign Lord the King, of the degree of the Coif, on Monday
the twenty-ſeventh day of November, in the eighth year of the
reign of our Sovereign Lord George, now King of Great
Britain, &c.

The writ
of error.

“ Our Sovereign Lord the King hath commanded his beloved
and faithful Sir *John Pratt*, Knt. chief juſtice of our ſaid
Sovereign Lord the King, aſſigned to hold pleas in the court
of our ſaid Sovereign Lord the King, before the King him-
ſelf, his writ cloſe in theſe words; (to wit, *George* by the
grace of God, King of *Great Britain, France and Ireland*,
defender of the faith, &c. to our beloved and faithful Sir
John Pratt, Knt. our chief juſtice, aſſigned to hold pleas
before us, greeting, whereas in the ſtatute made in the par-
liament of the Lady *Elizabeth*, late Queen of *England*, held
at *Weſtminſter* on the twenty-third day of *November*, in the
twenty-ſeventh year of her reign, it was enacted by the
authority of the ſame parliament, that where any judgment
at any time then afterwards ſhould be given in the court
of King’s bench, in any ſuit or action of *debt, detainue, cov-*
nant, treſpaſs upon the caſe, ejeſtment or treſpaſs, firſt com-
menced or * firſt to be commenced, except only where we
ſhould be a party) the plaintiff or defendant againſt whom
“ any

* Note :
That word
is repeated

Debt.

" any such judgment should be given, might at his election in the very
 " prosecute out of the court of chancery a special writ of ^{act, and}
 " error, to be devised in the said court of chancery, to be di- ^{therefore}
 " rected to the chief justice of the said court of King's bench, ^{it must be}
 " for the time being, commanding him to cause the said record, ^{so here.}
 " and all things concerning the said judgments, to be brought
 " before the justices of the common bench, and the barons of
 " the exchequer, into the exchequer-chamber, there to be ex-
 " amined by the aforesaid justices of the common bench and
 " barons aforesaid: which said justices of the common bench,
 " and such barons of the exchequer, who are of the degree of
 " the Coif, or six of them at the least, by virtue of the same
 " act, have full power and authority to examine all such er-
 " rors as should be assigned or found in or upon any such
 " judgment; and thereupon to reverse or affirm the said judg-
 " ment, as the law should require, (except errors assigned or
 " found for or concerning the jurisdiction of the said court of
 " king's bench, or any defect or form in any writ, return,
 " plaint, bill, declaration, or in any plea, process, verdict or
 " proceedings whatsoever;) and that after such judgment
 " should be affirmed or reversed, the said record and every
 " thing concerning it, to be removed and brought back again,
 " so as such further process might be thereupon had, as well
 " for execution as otherwise, as should appertain, as it is more
 " fully contained in the *said statute; and because (as it is (P* 222)
 " said) manifest error doth appear in the record and proceed-
 " ings, and also in giving judgment of the complaint, which
 " was in our court before us, by a bill between *Thomas Pitt*,
 " Esq. and *Robert Coney*, of a plea of debt of ninety-six pounds,
 " which the said *Thomas* hath demanded of the said *Robert*, to
 " the great damage of the said *Robert*, as we have been in-
 " formed by his complaint; which said error doth in no man-
 " ner relate to us, or the jurisdiction of our said court of
 " king's bench, or to any defect of form in any writ, return,
 " plaint, bill, declaration, or in any plea, process, verdict or
 " proceedings whatsoever, as we have been informed: We
 " therefore willing that the error, if any there be, shall be cor-
 " rected, and full and speedy justice be done in this behalf to
 " the aforesaid parties, we command you, that if judgment
 " be given thereof, then the record and proceedings aforesaid
 " together with all things touching them, be caused to be
 " brought before the said justices of the common bench, and
 " the barons of our exchequer, into our exchequer-chamber
 " aforesaid, on *Monday*, (to wit) the twenty-seventh day of
 " this instant *November*, that the justices and barons, seeing
 " and examining the record and proceedings aforesaid, may
 " cause those things further to be done therein, as of right,
 " according

Debt.

“ according to the form of the statute aforesaid, were to be done. Witness our self at *Westminster* the thirteenth day of *November*, in the eighth year of our reign.

Hart.

The answer of Sir *John Pratt* the chief justice within named

The re-
turn.

The record and proceedings of the plaint, whereof mention is made within, together with all things touching the same, I certify to the justices and barons within specified, at the day and place within contained, in a certain schedule hereunto annexed, as I am within commanded to do.

John Pratt.

Placita in the King's bench. Pleas before our Sovereign Lord the King at *Westminster* of *Easter* term, in the seventh year of the reign of our Sovereign Lord *George*, now King of *Great Britain*, &c. *Roll.* 200.

London, ff. *Thomas Pitt*, Esq. appointeth in his stead *Jacob Turner* his attorney, against *Robert Coney*, of a plea of debt.

London, ff. *Robert Coney* appointeth in his stead *Edward Halsead* his attorney, against *Thomas Pitt*, Esq. of the plea aforesaid.

The me-
morandum

London, ff. Be it remembered that heretofore, (to wit) in the term of *St. Hillary* last past, *Thomas Pitt*, Esq. came before our Sovereign Lord the King at *Westminster*, by *Jacob Turner* his attorney, and then brought here into the court of our said Sovereign Lord the King, his bill against *Robert Coney*, being in the custody of the marshal of the *marshalsea*, &c. of a plea of debt; and there are pledges of prosecuting, (to wit) *John Doe* and *Richard Roe*; which said bill followeth in these words:

(P* 223)

London, ff. *Thomas Pitt*, Esq. *complaineth of *Robert Coney*, being in the custody of the marshal of the *marshalsea* of our said Sovereign Lord the King, before the King himself, of a plea that he render to him ninety-six pounds fifteen shillings of lawful money of this kingdom, which he oweth to and unjustly detaineth from him: For that whereas the aforesaid *Robert*, on the twenty-sixth day of *January*, in the sixth year of the reign of our sovereign Lord *George*, now King of *Great Britain*, &c. at *London* aforesaid, (to wit) in the parish of the blessed *Mary* of the arches in the ward of *Cheap*, by his certain deed then and there made, sealed with the seal of the said *Robert*, and now shewn now here to this court of our said Sovereign Lord the King, obliged himself to pay to the said *Thomas* six hundred

The de-
claration

upon a bot-
tomry
bond.

forty-four

Debt.

forty-four pieces of foreign money called *rupees*, current money of *Calcutta*, thirteen pieces of the like money called *Annas*, and eight pieces of foreign money called *pile*, together with the encrease thereof of twenty *per cent.* answering thirty days after the safe arrival of the ship called the *Cardigan* into the river of *Thames*, (the same ship then being in the bay of *Bengall*, in parts beyond the seas) or in any other port of *Great Britain* where the same should break bulk, at the rate of two shillings and six pence for every of the same pieces of foreign money called *rupees*, amounting in the whole to the aforesaid ninety-six pounds fifteen shillings; and the said *Thomas* in fact avers, that after making the said deed, (that is to say) on the twenty-eighth day of *August*, in the seventh year of the reign of our said sovereign Lord the said King, the aforesaid ship safely arrived in the said river of *Thames*, namely at *London* aforesaid, in the parish and ward aforesaid, and did then and there break bulk; whereof the aforesaid *Robert* then and there had notice, and thirty days were elapsed after the said arrival of the said ship, and before the day of exhibiting of the said bill; by which an action accrued to the said *Thomas*, to demand and have of the aforesaid *R.* the said ninety-six pounds fifteen shillings: notwithstanding which the aforesaid *Robert*, although often required, &c. hath not yet paid the said ninety-six pounds fifteen shillings to the said *Thomas*; but altogether hitherto hath and still doth refuse to pay the same, to the damage of the said *Thomas* ten pounds; and therefore he brings his suit, &c.

And now at this day, (to wit) on *Wednesday* next, after fifteen days of *Easter* this same term, (until which day the said *Robert* had leave to imparl and then to answer) before our sovereign Lord the King at *Westminster*, came as well the said *T. Pitt* by his attorney aforesaid, as the aforesaid *John Coney*, by *Edward Halfstead* his attorney; and the said *John Coney* defendeth the force and injury when, &c. and saith that the aforesaid *Thomas* ought not to have his said action against him: because he avers that the declaration aforesaid, and the matter therein contained, are not sufficient in law for him the said *Thomas* to maintain his said action against the said *Robert*; to which said declaration the said *Robert* is under no necessity, or in any wise bound by the law of the land to answer; and this he is ready to verify; wherefore for want of a sufficient declaration the said *Robert* prayeth judgment, and that the aforesaid *Thomas* may be precluded from having his action aforesaid against him the said *Robert*, &c.

*And the aforesaid *Thomas* replies, that he, notwithstanding any thing above alledged by the aforesaid *Robert* in his plea, ought not to be precluded from having his said action there-
(P* 224)
joinder in demurrer.

Debt.

Continu-
ances of
the de-
murrer.

Judgment.

Judgment
signed the
1st of July,
1722.
Errors af-
signed.

upon against the said *Robert*; because he avers, that the declaration aforesaid, and the matter therein contained, are good and sufficient in law for him the said *Thomas* to have the said action maintained against the said *R.* which said declaration and matter therein contained, he the said *Thomas* is ready to verify and prove, as the court, &c. and because the aforesaid *Robert* hath not answered to the said declaration, nor hath hitherto in any wise denied the same; he the said *Thomas* prayeth judgment, and his debt aforesaid, together with his damages, by occasion of detaining of that debt to be adjudged to him, &c. But because the said court of our said sovereign Lord the King now here, is not yet advised to give judgment of and concerning the premises, a day is given to the parties aforesaid, before our said sovereign Lord the King, at *Westminster*, until *Monday* next after three weeks of the holy Trinity, to hear their judgment of and concerning the premises, for that the court of our said sovereign Lord the King, now here, therefore is not yet, &c. at which day before our said sovereign Lord the King at *Westminster*, came the parties aforesaid, by their attornies aforesaid; whereupon all and singular the premises being now here seen and fully understood, and upon mature deliberation thereof had, it appeareth here to the court of our said sovereign Lord the King, that the declaration aforesaid, and the matter therein contained, are good and sufficient in law for him the said *T.* to have his said action aforesaid to be maintained: therefore it is adjudged, that the aforesaid *T.* do recover against the said *R.* his debt aforesaid, and also sixteen pounds for his damages, which he has sustained, as well by occasion of detaining the said debt, as for his costs and charges by him laid out about his suit, in this cause awarded to the said *Thomas* with his consent, by this court of our said sovereign Lord the King now here; and be the aforesaid *R.* amerced, &c. at which day came hither the aforesaid *Robert Coney*, by his attorney aforesaid, and saith, that in the record and proceedings aforesaid, and also in giving the above judgment, there is manifest error, namely in this respect, that the declaration, and the matter therein contained, are not sufficient in law for him the said *Thomas Pitt* to have his action aforesaid maintained against the said *Robert*; and so the judgment thereupon contained and given is erroneous and void in law; therefore in that there is manifest error; there is error also in this respect, that by the record it appears that the aforesaid judgment in the aforesaid plea was given for the said *Thomas Pitt*; whereas by the law of the land of this kingdom, the judgment aforesaid ought to have been given for the said *R.* against the said *T.* therefore in that instance there is manifest error, and the aforesaid

: clerk

Debt.

*Robert prayeth a writ of our said Sovereign Lord the King,
 &c.†*

**A declaration in debt upon a by-law by a corporation by prescription. (P* 225)*

The MAYOR, &c. of Guildford, against

CLARKE.

*Surrey, ff. John Clarke, late of Guildford in the county
 aforesaid, dyer, was summoned to answer to the Mayor and
 inhabitants of the vill of Guildford in the county of Surrey, in
 an action that he render to them twenty pounds of lawful
 money of England, which he owes to and unjustly detains from
 them: and thereupon the said Mayor and good men of the vill
 of Guildford aforesaid; by Henry Dyve their attorney, declare,
 that whereas the said vill of Guildford in the said county of
 Surrey is an ancient vill, and that the good men of the same
 vill, for so long a time as there is no remembrance of any man
 to the contrary, have been and now are a body corporate and
 politick, in truth, fact and name, by the name of the Mayor
 and good men of the vill of Guildford in the county of Surrey;
 and they have used to plead and be impleaded, answer and be
 answered by that name: And whereas within that vill there is,
 and time out of mind hath been, such a custom used and ap-
 proved of, that the Mayor and good men of the vill aforesaid,
 for the time being, or the major part of them gathered toge-
 ther and assembled in Common Council, have used and been
 accustomed to make and ordain laws and customs, for the good
 rule and government of the said vill, and of the inhabitants
 thereof; and to impose pains and penalties upon persons delin-
 quents, against such laws and customs: And whereas within
 the vill aforesaid, there hath been an ancient officer elected by
 the Mayor and good men aforesaid, yearly and every year on
 Monday next ensuing the feast of St. Michael the archangel, to
 transact the affairs of the said vill: And whereas the said
 Mayor and good men of the vill aforesaid, on the second day
 of October, in the thirty-fourth year of the reign of his late
 Majesty Charles the Second, late King of England, &c. at the
 vill of Guildford aforesaid, being then and there gathered to-
 gether and assembled in Common Council, ordained and esta-
 blished,*

2Vent 243:

*That it is
 an ancient
 vill;
 a corpora-
 tion time
 out of
 mind, to
 plead and
 be im-
 pleaded.*

*a custom to
 make bye-
 laws, and
 to impose
 penalties.*

*A custom
 to elect a
 bailiff an-
 nually.*

T 2

† In this case, when the plaintiff recovered on the bottomree bond, the defendant brought this writ of error but put in no bail; and a question was made on the words of the statute which are BONDS FOR PAYMENT OF MONEY only; but the court held here, that the contingency having happened, it is a bond for the payment of money only, and there must be bail.

Debt.

The bye-law set forth.

The forfeit re.

The defendant refused to execute the office.

The defendant refused to execute the office.

The case. 2 Vent. 241, 248.

blished, that if any inhabitant of the same vill, (*A*) being a freeman thereof and a member of the said corporation, should then after, according to the ancient usage and custom of the same vill, be duly elected to the office of bailiff of the said vill, and should refuse to accept of and undertake the said office of bailiff of the said vill, or to execute the same; that then upon such refusal or non-acceptance of such office, every such person should forfeit and pay to the Mayor and good men aforesaid the sum of twenty pounds of lawful money of England, to the use of the said corporation: And whereas after the making of the said ordinance (to wit) on the thirtieth day of September, in the first year of the reign of our sovereign Lord and Lady William and Mary, now King and Queen of England, (*B*) That day being on the Monday next ensuing the feast of St. Michael the Archangel, at the vill of Guildford aforesaid; he the said John Clarke then being and long before and ever since having been an inhabitant and freeman of that vill, and a member of that corporation, *was, according to the ancient usage and custom of the same vill, bailiff of the vill aforesaid, for the year then next ensuing; whereof he the said John then and there had notice, and was then and there required to accept of and execute that office; and that he the said John then and there did and ever since hath, and now doth refuse to accept of and execute that office; whereby an action accrued to the said Mayor and good men of the vill of Guildford aforesaid, to require and have of the said John the said twenty pounds; nevertheless he the said John, (tho' often required) hath not as yet paid to the said mayor and good men of the vill of Guildford, aforesaid the said twenty pounds; but hitherto altogether hath and still doth refuse to pay them the same, to the damage of the said mayor and good men of the vill aforesaid ten pounds; and therefore they bring their suit, and have good proof of the premisses when the court will consider thereof.

There were two exceptions taken to the declaration from which this precedent was translated: one was, That the bye-law was said to have been, That if any inhabitant should be chosen; whereas they cannot make bye-laws to bind all the inhabitants of the town, but only those that are freemen or members of the corporation; and therefore it may be perceived by the words printed in Italic, marked letter (A) That I have altered this precedent to make it stand good against that exception.

The other exception was, That by the prescription the election was to be on the next Monday after Michaelmas; and it was alleged to be on the thirtieth of September; but they did not shew that, to be the next Monday after Michaelmas, which the court could not take notice of, or consult the almanack; but it ought to have been set forth in the pleadings; and these were held incurable faults.

Debt.

faults; whereupon judgment was given for the defendant. And it may be likewise perceived by the words printed in Italic, marked letter (B) that I have also altered this precedent as to that particular.

A Declaration in an Action of Debt upon a Bill penal, by an Executor against an Heir.

Surrey, ff. *A. B.* executor of the last will and testament of *C. D.* deceased, complains of *E. F.* the heir of *G. H.* deceased; that is to say the brother and heir of *J. K.* son and heir of *L. M.* brother and heir of the said *G. H.* late of *S.* in the county of *Surrey*, yeoman, deceased, otherwise called *G. H.* of *S.* in the said county yeoman, being in the custody of the marshal of the *Marshalsea* of our Sovereign Lord the King, before the King himself, in an action that he render to him one hundred and twenty pounds of lawful money of *England*, which he unjustly detains from him, for this cause; that is to say, That whereas the said *G.* whose heir the said *E.* the now defendant is, when alive, (to wit) on the twenty-third day of *October*, in the sixth year of the reign of his present Majesty, at *S.* in the county aforesaid, by his writing obligatory, sealed with the seal of the said *G.* and now here shewn to the court of our said Sovereign Lord the King; the date whereof is the same day *and year, acknowledged himself to be held and firmly bound (P* 227) to the said *C.* in his life time, in the said sum of one hundred and twenty pounds, to be paid to the said *C.* his executors or administrators, whenever he should be afterwards thereto required; and he the said *G.* in his life-time, by the same writing obliged himself and his heirs, well and truly to make the same payment: Nevertheless neither he the said *G.* in his life-time, or the said *L. M.* brother to the said *G.* after the death of the said *G.* or the said *J. K.* after the death of the said *L.* brother to the said *G.* or the said *E.* the now defendant, after the death of the said *J. K.* altho' often required, have not nor hath either of them paid the said one hundred and twenty pounds either to the said *C.* in his life-time, or to the said *A.* after the decease of the said *C.* but they have altogether hitherto respectively refused to pay the same to the said *C.* in his life time, and to the said *A.* after the decease of the said *C.* and the said *E. F.* the defendant, doth even now refuse to pay to, and unjustly detains the same from him the said *A.* to the delay of the faithful execution of the said last will and testament, and to the damage of the said *A.* fifty pounds; and therefore he brings his action, and hath good proof of the premisses when the court will consider thereof: And the said *A.* brings here into this court the said letters testamentary of the said *C.* whereby

Debt.

whereby it doth sufficiently appear to this court of our said Sovereign Lord the King, that the said *A.* is executor of the last will and testament of the said *C.* and to have the administration thereof, &c.

Riens per
descent
pleaded.

And now at this day, (to wit) on *Tuesday* next after the *Octaves* of *St. Hillary* this same term, until which day the said *E. F.* the now defendant had leave to imparl to the said bill, and then to answer, &c.) as well the said *A.* by his said attorney, as the said *E. F.* the now defendant, by *C. S.* his attorney, came before our Sovereign Lord the King at *Westminster*; and he the said *E. F.* defends the force and injury when, &c. and pleads that he ought not to be charged with the debt aforesaid, by virtue of the said writing obligatory, as heir to the said *G. H.* because suggesting by way of protestation, that the said writing is not the deed of the said *G. H.* he the said *E. F.* the now defendant, doth for his defence alledge, that he hath not, nor had he at the day of exhibiting the bill aforesaid, nor at any time afterwards, any lands or tenements in fee-simple, by hereditary descent from the said *G. H.* and this he is ready to verify; whereupon he prays judgment, whether as heir to the said *G. H.* he ought to be charged with the debt aforesaid, by virtue of the said writing obligatory, &c.

Replica-
tion.

And the said *A.* replies, that notwithstanding what hath been above alledged by the said *E. F.* the now defendant, in his plea, he the said *E. F.* the now defendant, as heir to the said *G. H.* ought to be charged with the debt aforesaid, by virtue of the said writing obligatory; because he avers, that on *Monday* next after three weeks from *St. Michael*, in the sixth year of the reign of our said Sovereign Lord the King, on which day the said bill was exhibited to this court, he the said *E. F.* the now defendant, had several lands and tenements in fee-simple by hereditary descent from the said *G. H.* whereof he might have satisfied the said *A.* of the debt aforesaid; that is to say, at *S.* in the said county: and this he *prays may be enquired of by the country; and the said *E. F.* the now defendant, prays likewise the same, &c. Therefore let a jury thereof appear before our Sovereign Lord the King at *Westminster*, on *Thursday* next after the morrow of the purification of the Blessed Virgin *Mary*, and who neither, &c. to recognise, &c. because as well, &c. the same day is given to the parties aforesaid, to be there, &c.

(P* 228)

BUSH

Debt.

BUSH against BUCKINGHAM.

2 Vent. 84.

And the said *Thomas* by *Humphrey Taylor* his attorney, comes and defends the force and injury when, &c. and craves *Oyer* of the aforesaid writing obligatory; and it is read to him, &c. And he likewise craves *Oyer* of the condition of the said writing; and it is read to him in these words: "The condition of this obligation is such, That if the above bound *Thomas Buckingham* and *William Holk*, or either of them, they or either of their heirs, executors, administrators or assigns, or any of them, do or shall well and truly pay, or cause to be paid unto the above named *Mary Bush*, her executors, administrators or assigns, or any of them, the full and just sum of fifty-two pounds and ten shillings of good and lawful money of *England*, in or upon the twelfth day of *November* next ensuing the date hereof, without fraud or further delay; that then this present obligation to be void and of no effect, or else to remain in full force and virtue." Which being read and heard, the said *Thomas* pleads that he ought not to be charged with the said debt, by virtue of the writing aforesaid; because he avers, that by an act published and provided in the Parliament of our late Sovereign Lord *Charles* the Second, late King of *England*, begun and held at *Westminster* in the county of *Middlesex*, on the twenty-fifth day of *April*, in the twelfth year of his reign, (amongst other things) It was enacted by the authority of the same Parliament, That no person or persons whatsoever, from and after the twenty-ninth day of *September*, in the year of our Lord one thousand six hundred sixty, should directly or indirectly from and after the twenty-ninth day of *September*, take for the lending of and monies, wares, merchandizes, or any other commodities whatsoever, beyond the value of six pounds, for the forbearance of one hundred pounds for a year; and so according to that rate for a greater or lesser sum, or for a longer or shorter time: And that all bonds, contracts and securities whatsoever, after the time aforesaid, made for the payment of any principal sum of money to be lent, or to perform covenants upon or for any usury, upon which there should be taken or reserved beyond the rate of six pounds for one hundred pounds, as aforesaid, should be altogether void, as it doth by the same act, (amongst other things) more fully appear: And the said *Thomas* doth further aver, That after the twenty-ninth day of *September* above-mentioned, in the aforesaid act, and before making the said writing obligatory, (that is to say) on the said eleventh day of *May*, in the year of our Lord one thousand

A plea of the statute of usury, to an act on of debt upon a bond. The condition.

The statute.

Debt.

whereby it doth sufficiently appear to this court of our said Sovereign Lord the King, that the said *A.* is executor of the last will and testament of the said *C.* and to have the administration thereof, &c.

Riens per
descent
pleaded.

And now at this day, (to wit) on *Tuesday* next after the *Octaves* of *St. Hillary* this same term, until which day the said *E. F.* the now defendant had leave to imparl to the said bill, and then to answer, &c.) as well the said *A.* by his said attorney, as the said *E. F.* the now defendant, by *C. S.* his attorney, came before our Sovereign Lord the King at *Westminster*; and he the said *E. F.* defends the force and injury when, &c. and pleads that he ought not to be charged with the debt aforesaid, by virtue of the said writing obligatory, as heir to the said *G. H.* because suggesting by way of protestation, that the said writing is not the deed of the said *G. H.* he the said *E. F.* the now defendant, doth for his defence alledge, that he hath not, nor had he at the day of exhibiting the bill aforesaid, nor at any time afterwards, any lands or tenements in fee-simple, by hereditary descent from the said *G. H.* and this he is ready to verify; whereupon he prays judgment, whether as heir to the said *G. H.* he ought to be charged with the debt aforesaid, by virtue of the said writing obligatory, &c.

Replication.

And the said *A.* replies, that notwithstanding what hath been above alledged by the said *E. F.* the now defendant, in his plea, he the said *E. F.* the now defendant, as heir to the said *G. H.* ought to be charged with the debt aforesaid, by virtue of the said writing obligatory; because he avers, that on *Monday* next after three weeks from *St. Michael*, in the sixth year of the reign of our said Sovereign Lord the King, on which day the said bill was exhibited to this court, he the said *E. F.* the now defendant, had several lands and tenements in fee-simple by hereditary descent from the said *G. H.* whereof he might have satisfied the said *A.* of the debt aforesaid; that is to say, at *S.* in the said county: and this he *prays may be enquired of by the country; and the said *E. F.* the now defendant, prays likewise the same, &c. Therefore let a jury thereof appear before our Sovereign Lord the King at *Westminster*, on *Thursday* next after the morrow of the purification of the Blessed Virgin *Mary*, and who neither, &c. to recognise, &c. because as well, &c. the same day is given to the parties aforesaid, to be there, &c.

(P* 228)

BUSH

Debt.

BUSH against BUCKINGHAM.

2 Vent. 84.

And the said *Thomas* by *Humphrey Taylor* his attorney, comes and defends the force and injury when, &c. and craves *Oyer* of the aforefaid writing obligatory; and it is read to him, &c. And he likewise craves *Oyer* of the condition of the said writing; and it is read to him in these words: "The condition of this obligation is such, That if the above bound *Thomas Buckingham* and *William Holk*, or either of them, they or either of their heirs, executors, administrators or assigns, or any of them, do or shall well and truly pay, or cause to be paid unto the above named *Mary Bush*, her executors, administrators or assigns, or any of them, the full and just sum of fifty-two pounds and ten shillings of good and lawful money of *England*, in or upon the twelfth day of *November* next ensuing the date hereof, without fraud or further delay; that then this present obligation to be void and of no effect, or else to remain in full force and virtue." Which being read and heard, the said *Thomas* pleads that he ought not to be charged with the said debt, by virtue of the writing aforefaid; because he avers, that by an act published and provided in the Parliament of our late Sovereign Lord *Charles* the Second, late King of *England*, begun and held at *Westminster* in the county of *Middlesex*, on the twenty-fifth day of *April*, in the twelfth year of his reign, (amongst other things) It was enacted by the authority of the same Parliament, That no person or persons whatsoever, from and after the twenty-ninth day of *September*, in the year of our Lord one thousand six hundred sixty, should directly or indirectly from and after the twenty-ninth day of *September*, take for the lending of and monies, wares, merchandizes, or any other commodities whatsoever, beyond the value of six pounds, for the forbearance of one hundred pounds for a year; and so according to that rate for a greater or lesser sum, or for a longer or shorter time: And that all bonds, contracts and securities whatsoever, after the time aforefaid, made for the payment of any principal sum of money to be lent, or to perform covenants upon or for any usury, upon which there should be taken or reserved beyond the rate of six pounds for one hundred pounds, as aforefaid, should be altogether void, as it doth by the same act, (amongst other things) more fully appear: And the said *Thomas* doth further aver, That after the twenty-ninth day of *September* above-mentioned, in the aforefaid act, and before making the said writing obligatory, (that is to say) on the said eleventh day of *May*, in the year of our Lord one thousand

A plea of the statute of usury, to an action of debt upon a bond. The condition.

The statute.

Debt.

The usuri-
ous con-
tract.

(P* 229)

thousand six hundred eighty-six, at *Luton* aforesaid, It was corruptly, and contrary to the intent of the said statute concluded and agreed *between the said *Mary* and the said *Thomas*, that she the said *Mary* should lend to the said *Thomas* fifty pounds, to be repaid to the said *Mary* on the twelfth day of *November*, specified in the condition aforesaid; and that he the said *Thomas* should pay to the said *Mary* the sum of fifty shillings for lucre and interest, for the forbearance and giving the said day of payment of the aforesaid fifty pounds; and that to secure the payment, as well of the principal debt of fifty pounds, as of the said fifty shillings, he the said *Thomas* should, by his writing obligatory, executed in due form of law, become bound and obliged to the said *Mary* in one hundred pounds, with a condition thereunder written for the payment of fifty-two pounds ten shillings, upon the said twelfth day of *November* then next ensuing: And he the said *Thomas* further pleads, that in pursuance of the said corrupt agreement made and executed between the said *Mary* and the said *Thomas*, as above set forth, she the said *Mary* afterwards, (that is to say) on the said eleventh day of *May*, in the said year of our Lord one thousand six hundred eighty-six, at *Luton* aforesaid, lent to the said *Thomas* fifty pounds, to be repaid to the said *Mary* on the said twelfth day of *November* then next ensuing: And that he the said *Thomas*, to secure the payment as well of the aforesaid fifty pounds as of the said fifty shillings, for lucre and interest for the forbearance of the day of payment thereof, then and there became bound and obliged to the said *Mary* in the said one hundred pounds, by the said writing obligatory brought into this court, with the above recited condition thereunder written; and that she the said *Mary* then and there accepted the said writing obligatory for the payment of the said fifty-two pounds ten shillings, according to the intent and purpose of the corrupt agreement aforesaid: And he the said *Thomas* further pleads, that the said sum of fifty shillings for the forbearance and giving the day of payment of the said fifty pounds for the time aforesaid, exceeds the rate of six pounds for one hundred pounds for a year; whereby the said writing obligatory brought into this court, is by force of the said act of Parliament void and of no force in law; and this he is ready to verify; whereupon he prays judgment whether he ought to be charged with the said debt, by virtue of the said writing obligatory, &c.

Replica-
tion.

And the said *Mary* replies, that she, notwithstanding any thing before alledged, ought not to be precluded from having her said action against the said *Thomas*; because she avers, that on the said eleventh day of *May*, in the aforesaid year of our Lord one thousand six hundred eighty-six, at *Luton* aforesaid,

it

Debt.

was agreed between the said *Mary* and *Thomas*, at the request of the said *Thomas*, in the manner following; (that is to say) that she the said *Mary* should lend the said *Thomas* fifty pounds of lawful money of *England*, and should have and receive for interest thereof, and forgiving a day of payment of the same, according to the rate of five pounds for one hundred pounds for a year, and no more: And that *Thomas Cheyney* of *Luton* aforesaid, a scrivener, who then had in his hands fifty pounds of the said *Mary's* money, and should pay and deliver the same to the said *Thomas Buckingham*, should prepare and take from the said *Thomas Buckingham* and the said *William How*, *named in the said condition, to the use of the said *Mary*, a lawful writing obligatory, with a condition for the payment of the said fifty pounds with interest, according to the rate of five pounds for one hundred pounds, as aforesaid. And she the said *Mary* further replies, that afterwards, on the day and year last above specified, at *Luton* aforesaid, the said *Thomas Cheyney* paid and delivered to the said *Thomas Buckingham* the aforesaid fifty pounds, and then and there, in the absence and without the notice of the said *Mary*, took from the said *Thomas Buckingham* and *William* the writing obligatory above specified in the said plea; in which condition the said sum of fifty-two pounds ten shillings was negligently, improvidently and by the error of the said scrivener, and without the notice of the said *Mary*, written and inserted for and instead of fifty-one pounds five shillings: *Without that*, that it was corruptly, against the form of the statute aforesaid, agreed or concluded between the said *Mary* and the said *Thomas Buckingham*, in such manner and form as he the said *Thomas Buckingham* hath above alledged in his plea; and this she is ready to verify; whereupon she prays judgment, and her aforesaid debt, together with her damages, occasioned by detaining the same, to be awarded to her, &c. (P* 230)

To which there was a demurrer and a joinder in demurrer; The case . and it was insisted upon for the defendant, that the plaintiff accepted the said bond, which implies a consent to it; and though the plaintiff says in her replication, that she had no notice at the time of making of the bond; yet if there were notice when it was accepted, that carries the plaintiff's consent to the corrupt agreement: But the whole court gave judgment for the plaintiff, and held it to be the same case with that of Nevison and Whitley. 3 Cro. 501. For though the plaintiff did know how it was when the bond was accepted, as it must be supposed in the case of Nevison, and that the plaintiff had notice how it was when the action was brought; yet that does not make the plaintiff party to the corrupt agreement

Debt.

agreement; and the plaintiff must make use of the bond of necessity, to recover the money. 2 Cro. 677. *Buckly and Guilbank's case.* 2 Vent. 84.

(P* 231)

*Hill. 19 & 20 Car. 2. Roll 401.

1 Saund.

145:

1 Sid. 365.

2 Keb. 341.

Lex Man.

142.

Vid. Ent.

173.

WADE against BALE.

A special plea to an action of debt upon a bond, with a condition to surrender copyhold lands.

Oyer of
the condi-
tion,
in hæc ver-
ba.

And now here at this day, namely on *Thursday* next after the octaves of *St. Hillary* this same term, to which day the said *Simon* had leave to imparl to the said bill, and then to answer, &c. as well the said *John Wade* by his said attorney, as the said *Simon* by *Hugh Gamlin* his attorney, come before our Sovereign Lord the King at *Westminster*; and the said *Simon* defends the force and injury when, &c. and craves Oyer of the said bond; and it is read to him, &c. he likewise craves Oyer of the condition of the said bond, and it is read to him in these words: *ff.* "The condition of this obligation is such, That if the above bounden *Simon Bache*, or his heirs, do and shall at the next court to be holden for or within the manor of *Wimbledon* in the county of *Surrey*, sufficiently and in due form of law, surrender into the hands of the lord of the said manor, for the use and behoof of the above-named *John Wade*, his heirs and assigns, all that his copyhold messuage or tenement, with the appurtenances situate and being in *Mortlake* in the said county of *Surrey*, parcel of the manor of *Wimbledon* aforesaid, with all and singular the yards, gardens, backfides, ways, easements, profits, commodities and appurtenances whatsoever thereunto belonging or appertaining; and do also then and there cause and procure the said *John Wade* to be duly and lawfully admitted tenant of the same premises, so to be surrendered according to the custom of the said manor: And also if the said *John Wade* his heirs and assigns, shall and do at all times from and after the making of the said surrender, lawfully, peaceably and quietly have, hold and enjoy the said messuage or tenement, and premises, with the appurtenances, without any let, suit, trouble or interruption of the said *Simon Bache* and *Lancelot Symons*, Esq. late one of the customary tenants of the said manor, or either of them, their or either of their heirs, executors, administrators or assigns, or any of them or of any other person or persons whatsoever, lawfully which shall or may lawfully claim any estate, right, title

Debt.

" or interest of, into or out of the said premisses, or any part thereof, by, from or under the said *Simon Bache* or *Lancelot Symons*, or either of them, their or either of their heirs, executors, administrators or assigns, or any of them, then this obligation to be void and of none effect, or else to abide in full force and virtue.

Which being read and heard, the said *Simon* pleads, that the Plea,

said *John* ought not to have or maintain his said action against him; because he avers, that the next court held for the manor of *Wimbledon*, after making the said bond, was held within the manor aforesaid, on the fourth day of *April*, in the year of our Lord one *thousand six hundred fifty-four, at which day he the said *Simon*, in the court aforesaid, surrendered into the hands of *John Lambert*, Esq. being then the lord of the manor of *Wimbledon* aforesaid, the messuage aforesaid, mentioned in the said condition, with all the gardens, backsides, ways, easements, profits and commodities whatsoever belonging to the said messuage, to the use and behoof of the said *John Wade*, his heirs and assigns; to which said *John* the said lord of the manor, at the same court by his steward, granted the tenements aforesaid with the appurtenances; To have and to hold to the said *John*, his heirs and assigns, at the will of the Lord, according to the custom of the manor aforesaid; and he the said *John* was in the court aforesaid, admitted sole tenant of the tenements aforesaid, surrendered as aforesaid, according to the custom of the said manor; and that he the said *John*, from the time of making the said surrender, lawfully, peaceably and quietly had, held and enjoyed the tenements aforesaid, with the appurtenances, without any impediment, suit or interruption of the said *Simon Bache* and *Lancelot Symons*, named in the condition aforesaid, or of either of them, or of either of their heirs, executors, administrators or assigns, or of any other person or persons lawfully claiming, or who could lawfully claim any estate, right, title or interest, of, in or from the said premisses, or any part thereof, by, from or under the said *Simon* or *Lancelot*, or either of them, or either of their heirs, executors, administrators or assigns, according to the form and effect of the condition aforesaid; and this he is ready to verify; whereupon he prays judgment whether the said *John* ought to have or maintain his said action thereupon against him, &c.

And the said *John Wade* replies, that he, notwithstanding any thing above alledged by the said *Simon* in his plea, ought not to be precluded from his said action against him the said *Simon*; because he the said *John* avers, that the messuage aforesaid, mentioned in the said condition, now is, and for so long a time as there is no remembrance of any man to the con-

trary

That the next court after making the bond,

(P* 2;2) was on the 4th day of April, 1654. that *Simon* surrendered into the hands of the lord of the manor, the copyhold lands to the use of *John Wade*.

That *John* after making the surrender, peaceably enjoyed the lands, &c. without the interruption of the defendant or his heirs, &c.

Replication.

That the messuage, &c. was copyhold, &c.

Debt.

contrary, hath been parcel of the manor of *Wimbledon* aforesaid, and demised and demisable by a copy of the court-rolls of that manor, by the lord of the said manor, or by his steward for the time being, to whatsoever person or persons willing to take the same in fee-simple, or for a term of life or years, at the will of the Lord, according to the custom of the manor aforesaid: And the said *John* further replies, that before making the said bond, Sir *Edward Cecil*, Knt. was seized of the manor aforesaid, with the appurtenances, whereof, &c. in his demesne of a fee; and being so seized thereof, he the said *Edward Cecil* afterwards and before making the said bond, (to wit) at a court-baron held at the manor aforesaid, at *Putney* within that manor, on the eighth day of *April*, in the twenty-second year of the reign of our late sovereign Lord *James* then King of *England*, &c. before *William Langhorn*, Gent. then steward of that manor, by a copy of the court-rolls of the said manor, granted the messuage aforesaid, with the appurtenances, to *Patience Hussey* for the term of her life, and the remainder thereof, after the decease of the said *Patience*, to the said *Lancelot Simons* and his heirs for ever; by virtue of which said grant, she the said *Patience* entered into the said *messuage with the appurtenances and was seized thereof in her demesne, as of a freehold for the term of her life, at the will of the Lord, according to the custom of the manor aforesaid, (the remainder thereof belonging to the said *Lancelot* and his heirs;) and the said *Patience* being so seized thereof, and the remainder thereof belonging to the said *Lancelot* and his heirs, in the manner aforesaid, he the said *Lancelot* afterwards, (*that is to say*) at a court-baron of the right honourable *Henry* Earl of *Holland*, Sir *Richard Wyndham* Knt. and Sir *Richard Wynne* knight and baronet, then lords of the manor aforesaid, held at *Mortlake* within that manor, on the twenty-seventh day of *August*, in the seventeenth year of the reign of his present Majesty *Charles* the second, King of *England*, &c. before *Edward Mathews*, then steward of the court of that manor, came and surrendered (*amongst other things*) into the hands of the lords of the said manor, his remainder aforesaid, of and in the messuage aforesaid, with the appurtenances, to the use and behoof of *Patience Hussey*, for and during the term of her natural life; and after her decease, to the use and behoof of the said *Lancelot Simons* and *Jane* then his wife, for and during the term of their natural lives, and the longest liver of them; and after their decease, to the use and behoof of the said *Lancelot* for ever; which said *Lancelot* and *Jane*, then personally present in the same court, prayed that they might be admitted to their remainder aforesaid, of and in the messuage aforesaid, with the appurtenances, according

and that
 the 8th of
 April, 22
 K. James,
 the Lord
 granted,
 &c. the
 lands to
 P. H. for
 life, re-
 mainder to
 L. S.
 (P* 233)

That L. S.

27th Aug.
 17 Car. 2.

surrendered
 to the
 use of P. H.
 for life.

Remain-
 der to L. S.
 and Jane
 his wife;
 remainder
 to the right
 heirs of
 L. S.

Debt.

to the form and effect of the surrender aforesaid, to whom the said lords of the manor aforesaid, by their said steward, gave a copy of the court-rolls of that manor, granted seisin thereof; To have and to hold to the said *Lancelot and Jane*, and the heirs of the said *Lancelot* for ever, at the will of the lords, according to the custom of the manor aforesaid, according to the form and effect of the surrender aforesaid; and the said *John* further replies, that they the said *Lancelot* and the said lady *Patience Hussey*, afterwards and before making the said bond, (to wit) on the first day of *March*, in the year of our Lord one thousand six hundred fifty-two, died at the parish aforesaid, in the county aforesaid; and the said *John Wade* further replies, that after making the said bond, and after the surrender of the messuage aforesaid, made by the said *Simon Bache* to the said *John Wade*, in the manner aforesaid, (to wit) on the fifteenth day of *February*, in the nineteenth year of the reign of his present Majesty *Charles* the second, now King of *England*, she the said *Jane Simons* claiming her right and title to the messuages aforesaid, with the appurtenances for the term of her life, under the said *Lancelot Simons*, by virtue of the surrender aforesaid, made by the said *Lancelot*, in the manner aforesaid, entered into the said messuage with the appurtenances, and drove out and removed the said *John Wade* from his possession thereof, and was and now is seized thereof in her demesne, as of a freehold for the term of her life, at the will of the Lord, according to the custom of the manor aforesaid; and this the said *John Wade* is ready to verify; whereupon he prays judgment, and his said debt together with his damages, occasioned by the detaining the same, to be awarded to him, &c.

That L. S. and J. were admitted tenants, &c.

That L. S. and P. H. 1 Mar. 1652. died.

That Jane entered as into her estate for life.

**To which there was a demurrer and a joinder in demurrer; (P* 234) and the causes shewn for the demurrer were, that it did not appear by the replication that Jane Symons had any good and legal title; The case, and that the replication was not sufficient, because the said John 1 Saund. did not thereby deny or destroy the title of the said Simon Bache: 149. and it was argued by Winnington for the defendant, that the surrender by Lancelot Symons to the use of Patience Hussey for her life, was void; because she had an estate for life before, and by consequence the remainder limited after that particular estate, void in its creation, is also void; so that Jane Symons could have no title; and the plaintiff in his replication assigned no breach, But it was argued by the counsel for the plaintiff, and so agreed to by the court, that the estate limited to Patience Hussey was void, and that by way of present estate, and not by way of a remainder; for they said that a surrender is rather in the nature of a deed-poll than of an indenture, and enured by way of a use, and surrenders and admissions*

Debt.

tances are to be often construed and taken contrary to the rules of conveyances at common law, as in Cro. Eliz. 323. Cro. Jac. 434. The husband takes copyhold lands from the lord, to whom the lord granted seisin, habendum to the husband and wife; this is a good grant to the wife, although she only be named afterwards in the habendum; and the wife by those words takes a present estate with her husband, which could not be done by a conveyance at common law; so here the surrender is to be construed as an immediate settlement upon the husband and wife, and the law in such cases hath always made a construction, ut res magis valeat, as Dyer 367. Cro. Eliz. 323. The grant of a reversion, when it shall happen after the death of the tenant for life, is construed a good grant of the present reversion, notwithstanding the words seem to be otherwise; and so it ought to be here taken, that the intent was that Jane and Lancelot should have the messuage jointly for their lives in possession, after the death of Patience the tenant for life, as an immediate settlement; and the cases in the margin of my book, are as follow:
 4 Co. 23. Cro. Eliz. 115, 323, 373. 1 Roll 511. Cro. Jac. 105, 106. 4 Co. 23. Cart. 238. Poph. 38, 39. 1 Salk. 233. 1 Cro. 185. 2 Cro. 915. 3 Cro. 323. 10 Co. 107. 2 Co. 51.

(P* 235)
 Lill. Ent.

*The STATIONERS COMPANY against HUNT.

^{153.}
 A declaration upon a by-law of the company of stationers for not accepting the livery.

London, ff. The master and wardens, or guardians and commonalty of the mystery or art of stationers of the city of London, complain of John Hunt being in the custody of the marshal of the marshal's sea of our sovereign Lord the King, before the King himself, in an action that he render to them forty pounds of lawful money of Great Britain, which he owes to and unjustly detains from them, for this cause; (that is to say) that whereas our late sovereign Lord and Lady Philip and Mary, King and Queen of England, &c. by their letters patents sealed with the great seal of England, bearing date at Westminster, on the fourth day of May, in the third and fourth years of their reign, out of their special favour, and from their certain knowledge and mere motion, willed, gave and granted for themselves, the heirs and successors of the said Queen, to their faithful and beloved subjects Thomas Dockray, (naming the rest in the letters patents) freemen of the mystery or art of stationers of the city of London, and to their survivors, that they should for ever after be in truth, deed and name, one body of themselves for ever, and one community for ever, incorporated of one master, and two guardians or wardens, and community of the said mystery or art of stationers of the said city, and that they should have perpetual succession:

Debt.

and further, the said Lord and Lady, the King and Queen, out of their special grace, and from their certain knowledge and mere motion, did by their same letters patents, ordain, create, erect, make and constitute the said *Thomas Dockray*, master of the said mystery or art of stationers of the city aforesaid, during one whole year then next ensuing : and the said *John Carwood* and *Henry Cook*, guardians or wardens of the said mystery or art of stationers of the city aforesaid : and did further make, create and constitute *William Bonham Wray*, &c. (*naming the rest in the letters patents*) the community of the said mystery or art of stationers of the city aforesaid : and furthermore, the said lord and lady, the King and Queen, did by their same letters patents, ordain, create, erect, make and constitute the said master, wardens and company in substance and name, one body for themselves for ever, and one company for ever corporate of one master, and two wardens or guardians, and company of the said mystery or art of stationers of *London* aforesaid ; and did incorporate the said master, wardens or guardians, and company, and by their said letters patents, willed, granted, created, erected, ordained, made, declared and constituted them a body corporate, really and fully, by the name of the master, and wardens or guardians, and company of the art of stationers of the city of *London*, to endure for ever after ; and that the same master, and wardens or guardians, and company, should for ever after have a perpetual succession : and that they the said master and wardens, or guardians and company should for ever after be named, esteemed and called by the name of master and wardens, or guardians and company of the mystery or art of stationers of the city of *London*, and should and *might by that name plead and be impleaded, answer and be answered, in all and all manner of matters, suits and complaints, actions, demands and causes before whatsoever judges or justices, and in whatsoever courts or places, and should have a common seal to be used and employed in their affairs and businesses, and for sealing all and singular their deeds and writing, touching or concerning their affairs and businesses whatsoever : and that they the said master and wardens, or guardians and company, and their successors might, from time to time, make, ordain and establish ordinances, provisions and statutes, as often as they should think fit and necessary for the good and sound rule and government of the brethren of the art or mystery aforesaid, and of the said company, so that they should not be such ordinances, provisions and statutes, in any wise repugnant or contrary to the laws or statutes of this kingdom, or to the prejudice of the commonwealth thereof ; and that they and their successors should and might,

(P^o 236)

Debt.

might, being assembled together of themselves, make such statutes and ordinances, and other things, for the benefit of the said art or mystery of stationers, and of the said company, and for other lawful causes in the manner aforesaid, as often as they should please lawfully and with impunity, without any molestation or disturbance of the said Lord and Lady, the King and Queen, or the successors of the said Lady the Queen, or of any other person whatsoever, as by the said letters patents, inrolled of record in the court of chancery, of our Lord and Lady the now King and Queen at *Westminster*, an exemplification of which inrolment under the great seal of his late Majesty *Charles* the second, late King of *England*, and bearing date at *Westminster*, on the twenty-third day of *October*, in the thirty-sixth year of his reign, they the said master, wardens or guardians, and company of the mystery or art of stationers of the city of *London* bring into this court, it doth and may more fully appear: and they the said master, wardens or guardians, and company of the said city of *London*, do in fact declare, that after making the letters patents aforesaid, and before the exhibiting their bill, (to wit) on the fourteenth day of *May*, in the year of our Lord one thousand six hundred ninety-four, at *London* aforesaid, at the parish of *St. Martin Ludgate*, in the ward of *Farringdon within*, they the said master and wardens, or guardians and company of the mystery or art of stationers of the city of *London*, being then and there assembled for the good government of the said freemen of the art or mystery aforesaid, and of the company aforesaid, and their successors, make and ordained certain ordinances, not repugnant or contrary to the laws of this kingdom, or in any wise tending to the prejudice of the commonwealth thereof, (amongst other things) that the master, wardens and assistants of the said company, or the major part of them, in a court of assistants to be held according to the usage of the said company, should when and as often as they should think fit, elect and admit such member and members of the said company, upon the livery or cloathing of the said company, as they should esteem proper; and that the person so elected upon his admission into the livery or cloathing, should pay to the said master and wardens, or guardians and company of the art or mystery of stationers *of the city of *London* the sum of twenty pounds, for such his or their admission thereto: and if any such person so elected upon the livery or cloathing, as aforesaid, should not upon notice thereof accept the same, having no reasonable cause to refuse it, then he should pay to the master and wardens, or guardians and company of the mystery

Debt.

mystery or art of stationers of the city of *London*, for such his refusal, the sum of forty pounds of lawful money of *England* * ; • which which said ordinance made, as aforesaid, afterwards, (to wit) must be now on the thirty-first day of *May*, in the year of our Lord one thou called Great sand six hundred ninety-four, at *London* aforesaid, in the said Britain. parish and ward, at the request of the master and wardens, or guardians and company of the mystery or art of stationers of the city of *London* ; and according to the tenor of an act of parliament in such case made and provided, by the right honourable sir *John Summers*, knt. lord keeper of the great seal of *England*, sir *John Holt*, knt. chief justice of our Sovereign Lord the King, and then Lady the Queen, assigned to hold pleas in the said court of our said Lord the King, and then Lady the Queen, before our Sovereign Lord the King, and the then Lady the Queen, and sir *George Treby*, knt. lord chief justice of their Majesty's court of common pleas at *Westminster*, was viewed, read and examined, and by them approved of, established and confirmed : and they the said master, wardens, or guardians and company of the mystery or art of stationers of the city of *London*, do in fact aver, that after making the said ordinance, and before exhibiting their bill, (to wit) on the first day of *May*, in the year of our Lord one thousand six hundred ninety five, he the said *John* hath been, and ever since was and now is a freeman and member of the said company of master, wardens, or guardians and company of the mystery or art of stationers of the city of *London*, (to wit) at *London* aforesaid, in the said parish and ward, and that after the first day of *May*, in the last mentioned year of our Lord, and before the exhibiting their bill, (to wit) at a court of assistants of the said master and wardens, or guardians and company of stationers of the city of *London*, held according to the usage of the said society, at stationers hall, in the parish and ward aforesaid, on *Monday* the fifth day of *August*, in the year of our Lord one thousand six hundred ninety-five, by *John* then master, *William Rawlins* and *Samuel Lowndes* then wardens, and *Roger Norton*, *Edward Breufter*, &c. (naming the rest, then assistants, of the said company, being then present and assembled together, and they being at that time the major part of the master, wardens and assistants of the company aforesaid, he the said *John Hunt* being then a freeman and member of the said company, was then and there elected by the said master, wardens and assistants, being assembled in the court of assistants, as aforesaid, upon the livery of the company of them the said master and wardens, or guardians and company of the mystery or art of stationers of the city of *London* ; and although he the said *John* afterwards, (to wit) on the fifth day of *October*, in the year of our

Debt.

(P*238) Lord last above mentioned, at *London* aforesaid, in the said parish and ward, had notice as well of the said ordinance, as of the election aforesaid, and was requested by the said master and wardens, or guardians and company of the * mystery or art of stationers of the city of *London*, to accept the said livery: nevertheless he the said *John* then and there altogether refused to accept the said livery, and did not then, or at any other time, accept the same, not having any reasonable cause to refuse the said livery, contrary to the intent and purpose of the same ordinance; whereby an action accrued to the said master and wardens, or guardians and company of the mystery or art of stationers of the city of *London*, to require and have of the said *John Hunt* the said forty pounds: nevertheless the said *John Hunt*, although often requested, hath not paid the said forty pounds to the said master and wardens, or guardians and company of the mystery or art of stationers of the city of *London*, but hitherto altogether hath and still doth refuse to pay them the same, to the damage of the said master and wardens, or guardians and company of stationers of the city of *London* fifty pounds; and therefore they bring their suit, and have good proof of the premisses when the court will consider thereof. *Lilly* 153.

Lut. 402.
N. L. 121.

Hill. 1 & 2 Jac. 2. Roll 1534.

Windford.

The Mayor, &c. of Cambridge against *Herring*.

A Declaration in Debt for the Breach of a By-Law. *Camb. St. Gerrard Herring*, late of *Cambridge* in the county aforesaid, draper, was summoned to answer to the mayor, bailiffs and burgesses of *Cambridge* aforesaid, in an action that he render to them ten pounds, which he owes to and unjustly detains from them: And whereupon they the said mayor, bailiffs and burgesses, by *Richard Pyke* their attorney, declare, that whereas the vill of *Cambridge*, in the said county of *Cambridge*, is an ancient vill and borough: And whereas our late Sovereign Lord *James* the first, late King of *England*, on the thirtieth day of *April*, in the third year of his reign, at *Westminster* in the county of *Middlesex*, by his letters patents sealed with his great seal of *England*, which they the said mayor, bailiffs and burgesses bring here into this court, dated at *Westminster* aforesaid, on the same day and year from his special favour, and from a certain knowledge and mere motion, willed, ordained, constituted, granted and declared for him, his heirs and successors, that the said borough of *Cambridge* should from thence for ever after be and remain a free borough of itself, and that the men of the said borough should be free burgesses, and that they should for ever have all the liberties

Debt.

berties and free customs belonging to a free borough; and that the mayor, bailiffs and burgesses of the said borough, should from thence be and remain a body corporate and politick, in reality, fact and name, by the name of the mayor, bailiffs and burgesses of the borough of *Cambridge*; and his said late Majesty, for himself, his heirs and successors, by the same letters patents, erected, made, ordained, constituted and declared them by the name of the mayor, bailiffs and burgesses of the borough of *Cambridge*, one body corporate and politick, in reality, fact and name, and that they should by that name have perpetual succession; and further, his said late Majesty out of his abundant grace willed, and by the same letters patents, for himself and his successors, granted to the said mayor, bailiffs and burgesses of the borough aforesaid, and their successors, that the mayor, bailiffs and burgesses for the time being, or the major part of them, whereof he willed the mayor of the borough aforesaid to be one, should have full power, authority and faculty of erecting, constituting, ordaining, making and establishing, from time to time, such and such-like laws, statutes, rights, ordinances and constitutions, as to them or the major part of them; whereof he willed the mayor of the borough aforesaid to be one, it should seem meet, profitable, wholesome, honest and necessary, according to their sound discretions, for the good rule and government of the mayor, bailiffs and burgesses of the borough aforesaid; and all and singular other the burgesses, officers, ministers, artificers, inhabitants and residents whatsoever, within the said borough and the liberties thereof, for the more ample publick good, common benefit, and good government of the borough aforesaid; and also for the better governing and disposing, letting and demising of the lands, possessions, reversions and hereditaments of the said mayor, bailiffs and burgesses of the borough aforesaid, and all other the things and causes whatsoever of the said borough, touching or in any wise concerning the estate, rights or interest of the borough aforesaid; and that the mayor, bailiffs and burgesses for the time being, or the major part of them, whereof he willed the mayor of the said borough for the time being to be one, as often as they should erect, make and establish such laws, rights, constitutions and ordinances, in the manner aforesaid, should make, ordain, limit and provide such and such-like pains, punishments and penalties, by the imprisonment of the body or bodies, or by fines or amerciaments, or by either of them, against or upon all delinquents against such laws, institutions, rights, ordinances, or either of them, or any such-like, or whatsoever it should seem necessary, fit and requisite to the said mayor, bailiffs and burgesses for the time being, or the major part of them, whereof

That the Mayor, Bailiffs and Burgesses should be a Body Corporate, by the Name of the Mayor, &c.

(P*239)

With a Power to make By-Laws.

And to impose fines.

Debt.

he willed that the mayor, for the time being, to be one, for the observance of their laws, ordinances and constitutions; and that they might and should levy and have the same fines and amerciaments to the use and behoof of the mayor, bailiffs and burgeses of the borough aforesaid, and their successors, without being hindered by his Majesty, his heirs and successors, or by any or either of his officers or ministers, or their heirs or successors, and without giving any account thereof to him, his heirs and successors, all and every of which laws, ordinances, rights and constitutions to be made as aforesaid, he willed to be observed under the penalties therein contained; so that notwithstanding, such laws, ordinances, constitutions, imprisonments, fines and amerciaments, be reasonable and not repugnant or contrary to the laws, statutes, customs or rights of his kingdom of *England*, and the reasonable and laudable prescriptions and customs used and accustomed in the said ancient borough: By virtue of which said letters patents, they the said mayor, bailiffs and burgeses, became a body corporate and polittick, in reality, fact and name; and afterwards our late Sovereign Lord *Charles* the first, late King of *England*, on the sixth day of *February*, in * the seventh year of his reign, at *Westminster* aforesaid, by his letters patents sealed with his great seal of *England*, which they the said mayor, bailiffs and burgeses, also bring into this court, bearing date at *Westminster* the same day and year, of his abundant grace, willed and by the same letters patents, for himself and his successors, granted to the said mayor, bailiffs and burgeses aforesaid, their heirs and successors, that there should be for ever after one of the burgeses of the borough aforesaid, who should be and be called a mayor of the borough aforesaid; and that there should and might be twelve of the capital burgeses of the borough aforesaid, besides the mayor of the said borough, who should be and be called aldermen, and of the privy council of the borough aforesaid, as anciently they used to be; and that there likewise should and might be within the borough aforesaid, twenty-four of some of the most discreet burgeses of the said borough, who should be and be called of the common-council of the borough aforesaid: And our said late Sovereign Lord King *Charles* the first willed, and by his same letters patents granted for himself, his heirs and successors, that the said twenty-four common-council men of the borough aforesaid, for the time being, should from time to time be aiding and assisting the mayor and aldermen, for the time being, in all causes, things, affairs and matters whatsoever, touching or in any wise concerning the said borough, as often as and whensoever they should be requested by the mayor for the time being, as they had till that time been used and accustomed,

(P*240) That King *Charles* the first grant ed that one of the Burgeses should be a Mayor, &c.

and Twelve Capital Burgeses, who should be Aldermen, and of their Privy Council;

And that there should be Twenty-four Common Council Assistants.

the borough aforesaid; and that there should and might be twelve of the capital burgeses of the borough aforesaid, besides the mayor of the said borough, who should be and be called aldermen, and of the privy council of the borough aforesaid, as anciently they used to be; and that there likewise should and might be within the borough aforesaid, twenty-four of some of the most discreet burgeses of the said borough, who should be and be called of the common-council of the borough aforesaid: And our said late Sovereign Lord King *Charles* the first willed, and by his same letters patents granted for himself, his heirs and successors, that the said twenty-four common-council men of the borough aforesaid, for the time being, should from time to time be aiding and assisting the mayor and aldermen, for the time being, in all causes, things, affairs and matters whatsoever, touching or in any wise concerning the said borough, as often as and whensoever they should be requested by the mayor for the time being, as they had till that time been used and accustomed,

Debt.

and had antiently enjoyed, as by the said letters patents of his said late Majesty King *Charles* the first, it doth more fully appear: And whereas afterwards also, (that is to say) at a general council held by adjournment for the borough aforesaid, on the third day of *May*, in the thirtieth year of the reign of our late Sovereign Lord *Charles* the second, late King of *England*, &c. one *Edward Miller*, (being mayor of the vill of *Cambridge* aforesaid) and the major part of the bailiffs and burgeses then being assembled together, at the borough of *Cambridge* aforesaid, at the general council at the *Guildhall* of the same vill, did for the good rule and government of the burgeses of the said borough think fit, and so ordain, and place and appoint it in the book of ordinances of the said corporation; "That if at any time from thenceforward any person of the common-council of the same vill, should voluntarily resign or lay down his place of common-council man, then such person of the common-council so resigning or laying down his place, should forthwith pay ten pounds to the use of the said corporation;"

The By-Law, That if any of the Common-Council voluntarily resigned, he should pay 10l. to the Use of the Corporation.

And whereas afterwards our said late Sovereign Lord *Charles* the second, late King of *England*, on the third day of *January*, in the thirty-sixth year of his reign, at *Westminster*, by his letters patent sealed with his great seal of *England*, (which the said mayor, bailiffs and burgeses bring here into this court, dated at *Westminster* on the same day and year) out of his special favour, and from his certain knowledge and mere motion, a new constituted, declared, and granted that the burgeses and inhabitants of the borough aforesaid, should from thenceforth for ever after be and exist one body corporate and politick, in reality, deed and name, * by the name of the mayor, bailiffs and burgeses of the borough of *Cambridge*, and incorporated, erected, made, ordained, constituted, created, confirmed, ratified and declared them, by the name of the mayor, bailiffs and burgeses of the borough of *Cambridge*, one body corporate and politick, in reality, deed and name, and that they should have perpetual succession by that name: And our said late Sovereign Lord King *Charles* the second, by his same letters patents did (amongst other things) nominate, constitute and appoint the said *Gerrard Her-*

A new Patent of Incorporation by King *Charles* the Second.

(P* 241)

ring, one of the first and modern of the common-council of the borough aforesaid, continuing him in that office, during his life: And the said mayor, bailiffs and burgeses aforesaid, do further declare, that afterwards, (that is to say) on the thirtieth day of *April*, in the year of our Lord one thousand six hundred and eighty-five, at *Cambridge* aforesaid, he the said *Gerrard*, in writing under his hand, voluntarily resigned his place or office of common-council-man of the vill of *Cambridge* aforesaid; where-

That the Defendant was appointed of the Common Council;

and 30th of April, 1689. he resigned his place of Common-Council-man.

by an action accrued to the said mayor, bailiffs and burgeses,

Debt.

to require and have of the said *Gerrard Herring* the said ten pounds: *Nevertheless* the said *Gerrard Herring*, although often required, hath not paid the said ten pounds to the said mayor, bailiffs and burgeses, but hitherto hath and still doth refuse to pay them the same; whereby they declare they are injured and endamaged to the value of one hundred shillings; and therefore they bring their suit, and have good Proof of the Premises when the Court will consider thereof.

Lut 405.
The Case.

After a verdict for the Plaintiff, four exceptions were taken to the Declaration in Arrest of Judgment. First, That there could be no Resignation but to the Mayor. Secondly, That the Resignation ought to have been by Deed, for the Defendant hath a Freehold. Thirdly, That no Notice was given him of the By-Law, and that he was not a Member at the Time of making the By-Law. Fourthly, That the Corporation, which was at the Time of making the By-Law, became dissolved by the last Charter; but all these Exceptions were over-ruled, and the Plaintiff had his Judgment.

A Declaration
upon a
Bill penal,

And upon an
Emisset.

(P*242)

London, ff. T. W. esq; complains of *J. G.* otherwise *J. G.* citizen and merchant of *London*, being in the custody of the Marshal of the *Marshalsea* of our sovereign Lord the King, before the King himself in an action that he tender to him one hundred and ten pounds of lawful money of *Great-Britain*, which he owes to and unjustly detains from him, for this cause; that is to say, that whereas the said *J.* on the fifth day of *April*, in the year of our Lord one thousand seven hundred thirty-three, at *London*, (that is to say) at the parish of *St. Mary le Bow*, in *Cheap Ward*, by his bill obligatory, sealed with the seal of the said *J.* and now shewn here to this court of our said sovereign Lord the King, (the date whereof is the same day and year) acknowledged himself to owe and be indebted to the said *T.* in the sum of twenty-nine pounds four shillings, current money of *Great-Britain*, to be paid to the said *T.* at or upon the twenty-eighth day of *July* then next ensuing the date of the said bill obligatory; and that such payment might be truly and faithfully made, he the said *J.* did by the same bill * bind his heirs, executors, and administrators, in the sum of fifty pounds: And the said *T.* doth in fact declare, that the said *J.* did not pay to the said *T.* the said sum of twenty-nine pounds four shillings, at or upon the said twenty-eighth day of *July* then next ensuing the date of the said bill obligatory, according to the intent and purport of the bill obligatory aforesaid; whereby an action accrued to the said *T.* to demand and have of the said *J.* the said fifty pounds, part of the said one hundred and ten pounds: And whereas he the said *J.* afterwards, (that is to say) on the twentieth day of *February*, in the year of our Lord one thousand seven

ven

Debt.

ven hundred thirty-two, at *London* aforesaid, in the said parish and ward, bought of the said *T.* sixty pounds weight of silk for sixty pounds of lawful money of *Great-Britain*, being the residue of the said one hundred and ten pounds: Nevertheless the said *J.* altho' often required, hath not paid the said *T.* the said one hundred and ten pounds, but hitherto hath and still doth refuse to pay the same; and therefore he brings his suit, and bath good Proof of the Premisses when the Court will consider thereof.

And now here at this day, that is to say, on *Friday* next after Imparlance. the morrow of the Holy Trinity this same Term, (until which day the said *J. G.* had leave to imparl, and then to answer to the said bill) as well the said *T. W.* by his said Attorney, as also the said *J. G.* by *H. H.* his Attorney, come before our sovereign Lord the King at *Westminster*; and the said *J.* defends the force and injury when, &c. and pleads that the said *T.* ought not to have or maintain his said action thereupon against him, because as to the said fifty pounds, part of the said one hundred and ten pounds, the said *J.* doth alledge that he paid the said *T.* the said sum of twenty-nine pounds four shillings, upon the said twenty-eighth day of *July*, next ensuing the date of the said bill obligatory, (*that is to say*) at *London* aforesaid, in the said parish and ward, which he ought to have paid him at that day, according to the intent and purport of the bill obligatory aforesaid; and therefore he puts himself on the country; and the said *T.* doth likewise the same: Therefore let a jury thereof come before our sovereign Lord the King at *Westminster*, on *Tuesday* next after three weeks of the Holy Trinity, and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the parties to be there, &c.

And as to the said sixty pounds, residue of the said one hundred and ten pounds, the said *J.* pleads that he doth not owe to the said *T.* the said sixty pounds, or any part thereof, in such manner and form as the said *T.* declares against him; and this he is ready to defend against the said *J.* and his suit, in what manner soever this court of our sovereign Lord the King shall here adjudge; therefore it is *adjudged*, that the said *J.* do thereupon wage his law with himself, and twelve sureties, and let him come with his law here before our sovereign Lord the King at *Westminster*, on (such a day); and the said Attorney for the said *James* is directed, that he then bring before our sovereign Lord the King at *Westminster*, the said *J.* his client, in his own person, to perfect his law aforesaid, the same day is given to the said *T.* to be there, &c.

* *Norfolk*, ff. *A. B.* complains of *C. D.* citizen and weaver (P*243) of *Norwich*, in the county of the said city, being in the custody of

The Defendant pleads Payment as to parts.

An Issue thereupon.

As to the Emisset the Defendant wages Law.

Debt.

A Declaration in Debt where the Defendant is bound by a Statute-staple. of the marshal of the *Marshalsea* of our sovereign Lord the King before the King himself, in an action that he render to him two hundred pounds of lawful money of *Great-Britain*, which he owes to and unjustly detains from him, &c. for this cause; (*that is to say*) that whereas the said *C. D.* on the tenth day of *October*, in the year of our Lord one thousand seven hundred thirty three, at *Thetford* in the said county, by his writing obligatory, sealed with the seal of the said *C. D.* and now shewn here to this court of our said sovereign Lord the King, (the date whereof is the same day and year) acknowledged himself to be bound and firmly obliged to the said *A.* in the said two hundred pounds, to be paid to the said *A.* whenever after he the said *C.* should be thereto required; and unless he should so do, the said *C.* willed that the penalty of a statute-staple for merchandizes therein bought and sold, should go against him and his heirs: nevertheless the said *C.* though often required, &c. [*As in the former*]

A Declaration in Debt upon a Recognizance acknowledged in the High Court of Chancery. *Middlesex.* ss. *A. B.* complains of *C. D.* being in the custody of the marshal of the *Marshalsea*, of our sovereign Lord the King, before the King himself, in an action that he render to him one hundred pounds of lawful money of *Great-Britain*, which he owes to and unjustly detains from him, for this cause; (*that is to say*) That whereas the said *J.* on the twentieth day of *June*, in the year of our Lord one thousand seven hundred thirty-three, before our sovereign Lord the King, in his high court of chancery, (that same court then being held at *Westminster* in the county of *Middlesex*) acknowledged himself to owe to the said *A.* one hundred pounds, to be paid at the feast of *St. Michael* the Archangel then next ensuing: Nevertheless the said *C.* although often requested, &c. [*As in the former.*]

An Action of Debt upon an Award. *Han. 89.* *London,* ss. *A. B.* complains of *C. D.* being in the custody of the marshal of the *Marshalsea* of our sovereign Lord the King, before the King himself, in an action that he render to him ten pounds, which he owes to and unjustly detains from him, for this cause; (*that is to say*) That whereas the said *A.* and he the said *C.* on the twenty-eighth day of *June*, in the seventh year of the reign of our sovereign Lord the King, at *London*, (*that is to say*) in the parish of *St. Mary le Bow*, in *Cheap ward*, mutually submitted and referred themselves to the arbitrament, order and judgment of *F. B.* and *R. J.* arbitrators, indifferently chosen between them, concerning all manner of trespasses complaints, actions, suits, causes of action, disputes and demands whatsoever, which had then arisen or were depending between them the said *A.* and the said *C.* and they the said *F. B.* and

Debt.

and R. J. (so being arbitrators indifferently chosen between them, having accepted the charge of arbitrating, determining and adjudging between them the said A. and the said C. of and concerning the premisses afterwards, *(that is to say)* on the twenty-eighth day of *June*, in the seventh year aforesaid, at * *London* (P*244) aforesaid, in the said parish and ward, arbitrated, determined and adjudged that the said C. should pay to the said A. the sum of ten pounds, on the first day of *August* then next following; and that they the said A. and C. should give each to the other a general release; whereby an action accrued to the said A. to demand and have of the said C. the said ten pounds: Nevertheless, &c.

Middlesex, ff. A. B. complains of C. D. being in the custody of the marshal, &c. in an action that he render to him two hundred shillings, which he owes to and unjustly detains from him, for this cause; *(that is to say)* That whereas the said C. on the tenth day of *June*, in the fifth year of the reign of our sovereign Lord the King, at *Westminster* in the county aforesaid, was retained by the said C. to serve him in his trade of a distiller, from the feast of the nativity of St. *John* the Baptist, for one whole year from thence next ensuing, taking ten pounds for his salary for that time; by means of which retainer the said A. did truly and faithfully serve the said C. in his trade aforesaid, for the time aforesaid; and the said ten pounds are now in arrear and unpaid; whereby an action accrued to the said A. to demand and have of the said C. the said ten pounds: Nevertheless the said C. &c.

Middlesex, ff. A. B. complains of C. D. being in the custody of the marshal, &c. in an action that he render to him eighteen pounds four shillings of lawful money of *Great-Britain*, which he owes to and unjustly detains from him, for this cause; *(that is to say)* That whereas the said C. on the twenty-ninth day of *June*, in the fifth year of the reign of our sovereign Lord the King, at *Westminster* in the county aforesaid, put one H. D. his son to E. B. then wife of the said A. B. to be suckled, nourished and kept, and for the said E. to do whatever else in that case was incumbent to the duty of a nurse, from the said twenty-ninth day of *June*, for a long time, *(that is to say)* for one year and three quarters of a year, from thence next ensuing, taking for the premisses from the said C. four shillings weekly for every week; and altho' the said E. B. wife of the said A. B. did truly and faithfully perform all and singular the premisses for the time aforesaid; so that there became due to the said A. B. eighteen pounds four shillings for suckling, nursing and keeping the

Debt.

the said son of the said C. for the time aforesaid, at the rate of four shillings a week: nevertheless the said C. &c.

An Action
of Debt for
an Annuity
granted by
the Defen-
dant's Wife
before Mar-
riage.

(P*245)

Middlesex, ff. *A. B.* complains of *C. D.* and *E.* his wife, late of *Hampstead*, widow, relict of *G. H.* esq; deceased, being in the custody of the marshal, &c. in an action that they render to him twenty pounds of lawful money of *Great-Britain*, which are in arrear to him for a certain annuity or annual rent of ten pounds, which they owe to and unjustly detain from him: For that whereas the said *E.* while she was sole, on the thirtieth day of *May*, in the third year of the reign of our sovereign Lord the king, at *Hampstead* in the county aforesaid, by her indented writing, which the said *A.* brings into this court, sealed with the seal of the said *E.* * (the date whereof is the same day and year) gave and granted to the said *A.* the annuity aforesaid, by the name of an annual rent or annuity of ten pounds of good and lawful money of *Great-Britain*, issuing out of her manor of *T.* and out of all and singular other her lands, tenements and hereditaments whatsoever, with every of their appurtenances in *H.* in the county aforesaid, for him the said *H.* and his assigns, to have, hold, enjoy and receive the said annual rent of ten pounds, for the term, and during the natural life of the said *E.* to the sole use and behoof of the said *A.* and his assigns, to be paid yearly by equal portions, from the feast of *St. Michael* then next ensuing: By virtue whereof the said *A.* became seized of the said annual rent or annuity aforesaid; and being so seized thereof, she the said *E.* afterwards, (*that is to say*) on the twentieth day of *August*, in the said third year of the reign of our sovereign Lord the King, took to husband the said *C. D.* at *Hampstead* in the county aforesaid; and because the said annual rent or annuity of ten pounds for two whole years, (*that is to say*) from the feast of *St. Michael* the Archangel, in the fourth year aforesaid, to the twelfth day of *November*, in the sixth year of the reign of our sovereign Lord the King, is in arrear and unpaid to the said *A.* an action accrued to the said *A.* to demand and have of the said *C.* and *E.* his wife, the said twenty pounds: Nevertheless the said *C.* and *E.* (altho' often requested) have not paid the said *A.* the said twenty pounds, but have withdrawn the said annuity from the said *A.* and altogether have and now do refuse to pay the same, to the damage of the said *A.* five pounds; and therefore he brings his suit, &c.

A Declara-
tion against
the Warden
of the Fleet
for an
Escape of
one commit-
ted upon a
*Habeas Cor-
pus*.

Middlesex, ff. *Katherine Norden*, widow, by *Charles Town-
send* her attorney, complains of *Thomas Fox*, esq; warden of the
prison of the *Fleet* of our sovereign Lord and Lady the King and
Queen, personally present here in court, in an action that he
render to the said *Katherine* three hundred and four pounds,
which he owes to and unjustly detains from her, for this cause;

(ibid)

Debt.

(that is to say) That whereas the said Katherine lately, (to wit) in Trinity term, in the fourth year of the reign of our sovereign Lord and Lady the King and Queen, in the court of our sovereign Lord and Lady the King and Queen, before Sir George Treby, Knt. and his brethren, then justices of the court of Common Pleas of our said sovereign Lord and Lady the King and Queen, (to wit) at Westminster in the county of Middlesex; That the Plaintiff recovered a Judgment. by the judgment of the same court, recovered against one William Lenthall, esq; late of London, as well a certain debt of two hundred and forty pounds, as also forty shillings which were adjudged to the said Katherine, in the same court of our said sovereign Lord and Lady the King and Queen, at Westminster aforesaid, for her damages which she had sustained, by reason of detaining that debt, as by the record and proceedings thereof now remaining in this court, it doth more fully appear; which said judgment now remains in its full force, virtue and effect, not reversed, annulled or satisfied: And whereas afterwards, (that is to say) in Michaelmas term now last past, in and by the same court of our said sovereign Lord and Lady the King and Queen now here, (namely, * at Westminster aforesaid, Adjudication of an Execution. (P* 246) before Sir George Treby, Knt. and his brethren, then justices of the court of Common Pleas of our said sovereign Lord and Lady the King and Queen, at Westminster aforesaid: It was adjudged that the said Katherine should have an execution against the said William for the said debt and damages, by the default of the said William, as by the record and proceedings thereof now remaining in this same court at Westminster aforesaid, it doth more plainly appear: And whereas she the said Katherine heretofore, (that is to say) in Hilary term, in the fourth and fifth years of the reign of our said sovereign Lord and Lady the King and Queen, in the said court of Common Pleas of our said sovereign Lord and Lady the King and Queen, before Sir George Treby, Knt. and his brethren, then their said majesties justices of the same court at Westminster aforesaid, by the judgment of the same court, recovered against the said William, by the name of William Lenthall, of London, esq; as well a certain debt of sixty pounds, as also forty shillings which in the same court of our said sovereign Lord and Lady the King and Queen, now here, (namely) at Westminster aforesaid, were adjudged to the said Katherine for her damages which she had sustained by reason of detaining the said debt, as by the record and proceedings thereof now remaining in this court of our sovereign Lord and Lady the King and Queen, it doth more fully appear; which said last mentioned judgment now remains in its full force, virtue and effect, not reversed, annulled or satisfied: And whereas afterwards, (that is to say) on Tuesday next after the Octaves of

Another Judgment recovered by the Plaintiff.

Debt.

The Com. of St. Martin last past, the said *William* then-being in the custody of the said *Thomas*, (then and from thenceforth hitherto being warden of the prison of the *Fleet*) he the said *William*

was conducted here to the bar aforesaid, by the said *Thomas*, then warden of the prison of the *Fleet* aforesaid, by virtue of a writ of *Habeas Corpus* of our sovereign Lord and Lady the King and Queen; and thereupon the said *William*, at the request of the said *Katherine*, by her attorney aforesaid, was by the same court committed to the prison of the *Fleet*, in execution for the several debts and damages aforesaid, there to remain until, &c. * as by the Record of the said commitment remaining in this court, it doth and may more fully appear: By virtue of which Commitment of the said *William*, in the manner aforesaid, he the said *William* became in the custody of the said *Thomas*, in execution for those several debts and damages; and the said *William* being so in prison of the said *Thomas*, warden of the prison of the *Fleet*, in execution for the several debts and damages aforesaid, in the manner aforesaid, he the said *Thomas* afterwards, (that is to say) on the twentieth day of *January*, in the fifth year of the reign of our sovereign Lord and Lady the King and Queen, he the said *Thomas* being then warden of the said

The Escape.

prison of the *Fleet*, permitted the said *William* to go at large wherever he would, at the parish of *St. Clements Danes*, in the said county, the said *Katherine* not having had any satisfaction for her debts and damages aforesaid; whereby an action accrued to the said *Katherine*, to require and demand of the said *Thomas* the three hundred and four pounds aforesaid: Nevertheless the said *Thomas*, (altho' often required) hath not paid to the said *Katherine* the said * three hundred and four pounds, but hitherto hath and still doth refuse to pay the same; whereupon she declares she is injured and endamaged to the value of forty pounds; and therefore she brings her suit, and hath good proof of the premisses when the court will consider thereof.

The Case.

3 Lev. 353.

The Exception taken to the declaration was, that the Plaintiff bore not in setting forth the commitment concluded with a Prout packet of the record of the commitment; but it seems that was cured by the Defendant's pleading and tendering an issue of another matter, which admitted the commitment; therefore it may be perceived that I have inserted those words pursuant to the resolution of the court.

A Declaration in Debt for an Attorney's fee.
Harr. 92.

Middlesex, ss. *C. D.* was attached by a writ of privilege of our sovereign Lord the King, to answer to *A. B.* gent. one of the attorneys of the court of Common Pleas of our sovereign Lord the King, according to the liberties and privileges of the same court, therein used and approved of for so long a time, that there is no remembrance of any man to the contrary, in an action that he render to him eight pounds of lawful money of

Debt.

Great-Britain, which he owes to and unjustly detains from him,
 &c. And whereupon the said *A.* personally present here in this
 court complains, that whereas the said *C.* on the sixth day of
June, in the fifth year of the reign of our sovereign Lord the
 King, at *Westminster* in the county aforesaid, retained the said
A. to be an attorney for the said *C.* here in this court of Common
 Pleas, (*that is to say*) at *Westminster* in the county aforesaid, to
 prosecute and defend for the said *C.* as his attorney, a writ in the
 name of the said *C.* against *E. F.* of *G.* in the county aforesaid,
 husbandman, and *P. G.* of the same place, yeoman, in an ac-
 tion of debt upon several demands of twenty pounds, to be re-
 turnable and returned in the same court, to be prosecuted and
 defended from that day, so long as both parties should please,
 the said *A.* to receive from the said *C.* for his fees in that cause
 every term, wherein the said *A.* should be an attorney for the
 said *C.* in that action, three shillings and four pence as an attor-
 ney's fee, and one shilling and eight pence as an agent's fee, be-
 sides the expences and costs to be laid out by the said *A.* in and
 about prosecuting and defending that action: By virtue of
 which retainer, he the said *A.* afterwards, (*namely*) in *Michael-*
mas term, in the year above mentioned, was an attorney for the
 said *C.* in that action; and that same *Michaelmas* term, in the
 year aforesaid sued out a writ in the said action of debt for the said
C. against the said *E. F.* and *P. G.* returnable and returned in
 the court of Common Pleas aforesaid, and so remained an at-
 torney for the said *C.* in that action, for six terms after such re-
 tainer, and paid and laid out sixty shillings to several officers
 and clerks of the said court of Common Pleas, and of his ma-
 jesty's high court of Chancery, in the same six terms, in and
 about prosecuting and defending the action aforesaid; which
 said sixty shillings so paid and laid out by the said *A.* to the of-
 ficers and clerks of the courts aforesaid, for him the said *C.* in
 and about prosecuting and defending that action, and three shil-
 lings and four pence for his attorney's fee, and one * shilling
 and eight pence for his agent's fee, in the same action for every (P*248)
 term of the said six terms, wherein the said *A.* so remained as an
 attorney for the said *C.* in the whole amount to four pounds
 ten shillings: And whereas the said *C.* on the tenth day of *Ju-*
ly, in the year aforesaid, at *Westminster* aforesaid, retained the
 said *A.* to be an attorney for the said *C.* in the said court of
 Common Pleas, to sue out for the said *C.* his attorney, in the
 name of the said *C.* a writ of *Superfedeas quia Improvide* upon an
 exigent, at the suit of *H. O.* in an action of debt upon a de-
 mand for forty shillings, to answer to the said *H.* he the said *A.*
 taking from the said *C.* in the said action three shillings and four
 pence

Debt.

pence for an attorney's fee, and one shilling and four pence as an agent's fee, in every term wherein the said *A.* should so remain an attorney for the said *C.* in that action, besides the expences to be laid out by the said *A.* in and about prosecuting and defending that action: By virtue of which retainer, he the said *A.* afterwards in *Trinity* term, in the year aforesaid, became an attorney for the said *C.* in that action, that in that same *Trinity* term sued out a writ of *Supersedeas quia Improvide* for the said *C.* at the suit of the said *H.* returnable here in this court of Common Pleas aforesaid, (namely) at *Westminster* aforesaid, and so remained as an attorney for the said *C.* in that action, to answer for the said *C.* to the said *H.* therein, for the space of four terms after such retainer; and in and about prosecuting and defending that action, he the said *A.* paid and laid out to the officers and clerks of the court of Common Pleas aforesaid, the further sum of thirty shillings, in the whole amounting to the said sum of three pounds ten shillings; whereby an action accrued to the said *A.* to demand and have of the said *C.* the said sum of eight pounds: *Nevertheless* the said *C.* altho' often required, hath not paid to the said *A.* the sum of eight pounds, but hitherto hath and still doth refuse so to do, to the damage of the said *A.* five pounds; and therefore he brings his suit, &c.

Readings

Rea
an
th

IN
th

F
S
T
F
F
S
S
E
N
A

First

Action
of a
by the
after in

Debt
Action n
at comm
and are
our man

1. If a
pon than
he if he
the damag
covered in
the arrear
because th

Readings, &c.

Readings and Observations on Actions of Debt, with (P*249)
an Abridgement of the Cases in the Reports relating
thereto.

IN treating of *Actions of Debt*, the cases in the books relating thereto, are here distributed in the following manner :

- First, *Of the Action itself, and the several species thereof.*
- Secondly, *By and against whom to be brought.*
- Thirdly, *Where the Action is well brought, and where not.*
- Fourthly, *Of the Process.*
- Fifthly, *Of the Declaration.*
- Sixthly, *Of the Pleadings.*
- Seventhly, *Of the Issue, Trial and Verdict.*
- Eighthly, *Of the Evidence.*
- Ninthly, *Of the Damages and Costs.*
- And Tenthly, *Of the Judgment and Execution.*

First, *Of Actions of Debt, and the several Species thereof.*

Actions of debt are remedies appointed by law for the recovery of a sum of money, reduced into a precise certainty, either by the *Common Law* or by the *Statute Law* : Of which see hereafter in *Actions on Statutes*

Debts for which this Action may be brought at common law, arise and are created these four manner of ways :

First, By a Judgment obtained in a ^{1 Esp N. P. 182 213.} court of record upon a suit.

Secondly, By a specialty acknowledged to be enter'd of record, as upon ^{1 Esp. N. P. 184.} a recognizance, statutes merchant or staple, or such like.

Thirdly, On specialties indented or ^{1 Esp. N. P. 137.} not indented, the latter of which is term'd a deed poll, and are call'd specialties, because they specify in writing the ground and foundation of the debt.

Fourthly, On contracts without specialties, and those are either express or ^{1 Esp. 182, & seq.} implied.

First, *Of Actions of Debt on Judgments.*

^{1 Esp. 213.}

1. If a man recovers a debt, he may bring an action of debt upon that judgment. ^{1 Roll Abr. 600. Letter N. pl. 7.} The like if he recovers damages. ^{Ibid. pl. 2.} For by the recovery, the damages are reduced to a certainty ; so where damages are recovered in a real action. ^{Ibid pl. 1.} But not upon a recovery of the arrearages of a rent-service ; ^{43 E. 3. 2. contra 9 E. 450. b.} because these continue a freehold, for the arrearages of an annuity

Readings and Observations

nuitie recovered in an action of annuity. 43 E. 3. 2. But he may for the arrearages recovered in an action of account. 43 E. 3. 2. b. 11 H. 4. 79. b.

(P*250) * 2. And if the action be brought in *London*, which did not lie elsewhere, but there only by custom; yet where there is a judgment recovered, there an action will lie in the courts above upon that judgment. *Mason v. Nicholls*, 1 *Roll's Abr.* 600. pl. 8.

3. But a woman recovering her dower in the Lords Court, cannot have an action in the courts above for her damages; because upon such judgment no writ of error or false judgment lies; but her remedy is there in the Manor, or in Chancery. *Ibid.* pl. 4. 9.

4. If a judgment be had in the King's Bench, and a writ of error be brought in the Exchequer-Chamber, or in Parliament, notwithstanding that an action of debt lies upon this judgment in the King's Bench: So if a writ of error be brought in the King's Bench upon a judgment in the Common Pleas, an action of debt may be brought in the King's Bench upon that judgment. 1. *Sid.* 236. But there the reporter makes a doubt, whether the action will lie in the Common Pleas after the writ of error. *Vide Far.* 16, 140.

5. But in 4 *Mod.* 247. it seems it has been a doubt as it was cited in the case of *Dighton* and *Granvil* that it would not; but it is otherwise adjudg'd in 8 H. 6. 31. a. 18 E. 4.

6. But the reason upon which the distinction is made is, that when a writ of error is brought in the King's Bench upon a judgment in the Common Pleas, the record itself is removed; but in the case of a writ of error in the Exchequer, the transcript only is sent thither; for the court of King's Bench must award execution. 1 *Sid.* 236.

7. If a man hath a judgment, and levies part of the debt by *Elegit*, he may bring an action for the residue. 1 *Sid.* 184.

8. And in the following cases it was adjudged, that if an action of debt in the Common Pleas be brought upon a judgment, and a writ of error in the King's Bench is brought upon that judgment; yet the plaintiff may proceed in his action of debt. *Ben.* 20. But otherwise of a *Scire facias*.

9. See in 3 *Lev.* 397. where it was adjudged, that the action could not lie as upon a bare judgment, without declaring specially, and concluding *prout patet per Record* in the King's Bench. *Gale v. Till*.

1 Esp. 215. Secondly, Of Actions of Debt upon Specialties acknowledged to be enter'd of Record.

1. It is certain that an action of Debt will lie upon a Recognizance and Statute Merchant. 1 *Roll's Abr.* fol. 599. *Letter M.* pl. 1.

On Actions of Debt.

pl. 1. and see the case in *Cro. Eliz.* 594. where it was held the action would lie upon an instrument that might be intended for a Statute; but was in reality but an *Obligation*.

2. It is said not to lie upon a *Statute-Staple*, because the seal of the party is not put thereto; and it being a duty created by the statute of 15 *Hen. 7. cap. 16.* the conuzee shall have no other remedy than what was given him by that statute.

3. The conuzee of a recognizance may have an action of debt upon the recognizance, or he may have a *Scire facias*; and he may also have an action of debt upon the judgment obtained upon the recognizance. 2 *Leon.* 14.

4. If a *Recognizance* be removed by *Mittimus* out of the court of Chancery into the court of King's Bench, the conuzee may have an action of debt upon the *Tenor* of the recognizance, but not a *Scire facias*. *Dyer* 369. But there was a precedent shewn of 9 *Hen. 6.* to the contrary. 1 *Dyer* 317. *b. Brook, Tit. Record, pl. 40.*

5. Where a recognizance is acknowledged in the court of Chancery by three, and a *Scire facias* is brought against all of them, and they plead to issue, which is tried in *Banco Regis*, and it is found for the plaintiff, * and judgment be given; if an action of Debt be brought upon that Judgment, it must be brought against them all. *Dal.* 96. (P*251)

Thirdly, Of Actions of Debt on Specialties indented and Deeds Poll.

1. And here it must be observed, that this action of debt will lie for a sum reduced into a certainty, and agreed to be paid, tho' the manner of the agreement doth not expressly in terms mention that the party doth agree to pay the money; but if it can be collected therefrom that it was the intent of the parties, it is sufficient. *Jenk. Cent. Cases* 195.

2. As where the plaintiff brought an action upon *Indented Articles*, wherein there was a *Proviso*, that the defendant should out of the first profits of the office pay the plaintiff five hundred pounds; and the plaintiff avers that he conveyed the office, and that the defendant had received five hundred pounds out of the profits, and had not paid it: Upon a *Demurrer* it was adjudged that the action would well lie upon the *Proviso*, for that it was not by way of condition or defeazance, but an agreement. 1 *Lev.* 155. *Chapham v. Moyle.*

3. An action of debt may be brought for *Rent*, whether it be money or wheat, or other things. 1 *Roll's Abr.* 590 *Letter A. B.*

4. Before the act of 8 *Q. Anne, cap. 14.* this action would not lie for the *Arrearages* of a rent reserved upon a lease for life. 1 *Roll's Abr.* 594. *Letter G.*

5. But if a man had made a Feoffment in fee, reserving a rent for ten years to him and his heirs, an action of debt would lie for that *Rent* before this act, because it is but a chattel. 1 *Roll's Abr.* 595. *pl. 4.*

Readings and Observations

6. So if a man had made a lease for life, rendering a *Rent* for one year, an action of debt would lie upon it; for that is but a chattel. *Ibid.* pl. 5.

7. By that act it was enacted, "That after the first of May, any person having any rent in arrear, or due upon any lease for life or lives, may bring an action of debt for such arrearages against the tenant for life, during the continuance of the estate for life, in the same manner as he might if the rent were due and reserved upon a lease for years."

8. An action was held to lie against a *Bishop* for an *Annuity*, &c. granted by his predecessor. *Moor* 88. *House v. The Bishop of Ely*.

9. It is held in 8 *Hen.* 6. 6. *b.* That where a man can have an action of annuity, he shall not have this action. 1 *Roll's Abr.* 595. pl. 2.

10. So it is said in 5 *Mod.* 143. in the case of *Davis v. Speed*, that an action of debt would not lie for an annuity, because they require two distinct judgments; for, as to the first, the plaintiff shall recover the arrears, in the latter not.

11. Yet see *Cro. Eliz.* 268. where it was held, that if a man grants an annuity for two years, an action of debt may be brought for the arrears during the two years; for it being a grant for years, 'tis due upon the deed as a contract. 1 *Bul.* 152. *Cro. Eliz.* 893.

12. An action of debt will lie for a *Nomine pænæ* reserved in a lease. *Moore* 377. *Thyne v. Cholmley*.

13. *A.* granted to *B.* a rent of sixty pounds for sixty years, issuing out of the manor of *D.* with a *Nomine pænæ* for non-payment. The devisee brought an action for the arrears of the rent and *Nomine pænæ*; and it was held that the action would lie for the *Nomine pænæ*, as incident to the rent, tho' it was not expressly named; and this distinction is to be taken where a rent or an annuity is granted in fee, and the grantee grants it over for years; there no action of debt lies during the years; but otherwise where the original grant is for years only. *Cro. Eliz.* 895. *Benlefs v. Phillips*.

(P*252) * 14. To understand this case well, it is proper to observe what is said to be resolved in *Ognell's* case, 4 *Co.* 48. *b.* That at the common law there was a difference between an *Annuity in Fee*, a *Rent Service*, *Charge*, or *Seck*; for in the case of an annuity, altho' it does not continue, yet in some cases an action is maintainable for the arrears; as if a parson or prebendary have an *Annuity*, and the annuity is in arrear, if the parson or prebendary resign, he shall have an action of debt for the arrears; and so their executors; because the person, who ought to pay the annuity, is chargeable in a writ of *Annuity*.

15. And if an *Annuity* be granted for life, an action of debt lies not for this, during the life of the grantee. 19 *Hen.* 6. 42. a. 27

On Actions of Debt:

a. 27 Hen. 6. 35. a. But the grantee may distrain, and the land is chargeable, or he may have a writ of annuity.

16. But the party or his executors may have an action of debt after the annuity be determined. 4 Co. 49. *New Natura Brev.* 278. 27 H. 6. 1. pl. 4. because the realty is now resolved into the personality.

Fourthly, *Of Bonds and Bills Obligatory, whether void or not.*

1. What bonds are good, and what not, in *Restraint of Trade.* Moor 115.

2 Where bonds were adjudged to be within the statute of usury, and where not. Moor 397. *Reynolds v. Clayton.* Moor 752. *Ellis v. Warner.* *Yelv.* 47. *Cro. Jac.* 32. 1 Bro. 85. 1 Lut. 469.

3. A bond that was good at the time of making it, shall not be void by the statute of usury, by an usurious contract for giving a day of payment. 1 Saund. 295.

4. That a bond given to be freed from excommunication is void. Ray. 225. *The Bishop of Exon v. Starr.*

5. Whether the condition of a bail-bond varying from the writ vitiates the bond. Raym. 220. *Mildmay v. Case.*

6. Where a bond was for the performance of covenants in an indenture, whereby the grantor granted, &c. and the grant was void; it was adjudged that the bond should be void also. Ray. 27. *Capenburst v. Capenburst.*

7. Where a bond was held to be out of the statute of 13 Eliz. made concerning spiritual things. *Godb.* 29. pl. 38. *Macrow's Case.*

8. Whether a bond void by the statute of 5 & 6 Ed. 6 against selling offices. *Sti.* 29. 1 Brow. 71 *Williamson v. Barnsley.*

9. What bonds have been adjudged good, notwithstanding an objection that they were made upon simoniacal contracts. 2 Cro. 48. 274. *Lawrence v. Johns.* 3 Cro. 180. *Babington v. Wood.* Cro. 425. *Byrte v. Manning.* Moor 564. *Oldbury v. Gregor.*

10. Where a replevin-bond was held good, and made according to the statute of 13 Ed. 1. Lut. 686. *Blackett v. Cryssop.*

11. Where a bond taken by the Sheriff from his Under-Sheriff was held void. 2 Brow. 280. *Chamberlain v. Goldsmith.* 1 Brow. 5. *Norton v. Goldsmith.* 1 Brow. 63. *Norton v. Sims.*

12. What have been esteemed good bills obligatory. *Cro Eliz.* 66. *Hardman* executor against *Hardman.* *Cro. Eliz.* 726. *Shaw Sherwood.*

13. What hath been construed a good obligation, tho not sufficient to make a statute, for which it was intended. *Cro. Eliz.*

14. *Ajke v. Hollingworth.*

14. Where a bond given to a third person was held not to be within the statute of gaming. 2 Mod. 279.

15. That a bond made for the appearance of the obligor in the court of Chancery, is within the statute of 36 Hen. 6. *Sti.*

16. *Burton v. Low.*

Readings and Observations

(P*253) * 16. Where a Sheriff's bond taken for an appearance hath been held good notwithstanding an objection thereto. 2 Vent. 247, 237. *Lawson v. Haddock*.

17. A deed poll was made by A. to B. whereby A. covenants to assign lands to B. and B. covenants with A. to pay him so much money: B. delivers the deed first to A. and A. afterwards redelivers it to B. and A. brings an action of debt for the money. And this matter being disclosed by the pleadings, it was adjudged that the re-delivery of the deed had not made it to lose its force; for an uncanceled deed, tho' delivered to be cancelled, remains a good deed. *Cro. El. 483. Crofs v. Powell*.

18. Where the bond was for forty pounds, and the same is afterwards made for twenty pounds, the obligee can have no action upon the bond: And so in the case where the rats eat off the seals. Whosoever it is that cancels the bond, it is not material; if it be cancelled, no action can be brought upon it; and if a bond be razed or interlined in a material part, that will vitiate the bond; but if it be in a part immaterial, it is otherwise. 2 Bul. 246, 247. *Winchcombe v. Pigot*.

19. The breaking off the seal of one of the obligors, is no discharge as to the other; but razing a deed in any clause, will avoid the deed as to all. *Cro. Eliz. 546. Mathewson v. Lydian*.

20. That a bond is not void, with an impossible date. 2 Cro. 261. *Dobson v. Keyes*.

21. Where insensible words in a bond were supplied. 1 Brownl. 95. *Percher v. Vaughan*; and where a bond single for that reason. 2 Mod. 285. *Wells v. Wright*.

22. What hath been adjudged not a bill penal, and yet sufficient to bring an action upon it. 2 Vent. 106. *Bond v. Moyle*.

23. Where an obligation to stand to an award was construed single. 2 Brow. 290. *Vivion v. Wilde*.

24. Where the words of the condition being insensible, hath made the bond single. 2 Bul. 133. *Merker v. Crofs*. 1 Lev. 77. *W. Jones 140*.

25. Where a bond was held good upon a Demurrer, notwithstanding an objection to false Latin. 1 Bro. 110. *Dodson v. Keyes*.

26. What condition of a bond hath been held to be against law, and therefore the bond void, 2 Vent. 109. *Mason v. Watkins*.

27. Where the condition was in the disjunctive to do one of two things, and one part becomes impossible, the obligor was held discharged as to the other. *W. Jones 171, 172. Wood v. Bates*.

28. What hath been construed the delivery of a bond. 1 Lew. 140. *Chamberlain v. Stanton*.

29. Where the obligee acknowledged to have received forty pounds to the use of his master serjeant Gawdy, to be paid at Michaelmas next, under hand and seal; this is a good bill of exchange obliging

On Actions of Debt.

oblige him that sealed it to pay the money, though it mentions the money to have been received to the use of serjeant Garw-
dy. Yelv. 147.

30. Whether a clause added after the *In cujus rei Testimonium*, &c. shall be construed part of the bill. 3 Bul. 300. *Thomson v. Butcher*.

31. What hath been construed a joint bond, and what not. 3 Leon. 206. *Wigmore v. Wells*.

Other cases where bonds have been construed to be within the statute of Hen. 6. and where not.

<i>Hardr.</i> 464. <i>Norfolk's Case</i>. 2 Leon. 78. <i>Seckfor v. Woolver-</i> <i>ston</i>.	<i>Show.</i> 51. <i>Gardiner v. Dud-</i> <i>gate</i>. 4 Leon. 114. —
--	---

* Where Obligations have been adjudged void.

(P*234)

2 Cro. 603. <i>Hills v. Cooper</i>. 640. <i>Maby v. Shepherd</i>. 2 Keb. 814. <i>Bishop of Exeter v</i> <i>Starr</i>. 5 Mod. 281. <i>Cromwell v. Grunf-</i> <i>dell</i>.	<i>Cro. Eliz.</i> 726. <i>Emery v. Emery</i>. 1 Leon. 101. — 1 Leon. 25. <i>Badow's Case</i>. 282. <i>Lord Darcy v. Sharpe</i>. 1 Show. 2. <i>Thompson v. Harvey</i>. 3 Leon. 119 — 2 Show. 396. <i>Pinford v. Kide</i>.
---	---

Cases concerning the Construtions that have been put upon Conditions.

1. Where the condition of a bond was to *save harmless cer-*
tain lands from all incumbrances made by the obligor: And upon
the back there was a written memorandum, *That the condition*
should not extend to any extent of a Statute acknowledged by the obli-
gor, upon an action of debt brought on this bond against the ex-
ecutor of the obligor, he pleaded the *Condition and Memorandum*;
and upon a demurrer the question was, if the *Memorandum* should
be taken to be part of the *Condition*; and it was held, that by
the sealing of the bond any thing may be indorsed or subscribed
as the condition of the bond, and they shall stand together.
Moor 679. *Brook v. Smith*.

2. If the condition of a bond be made in this insensible man-
ner, (*viz.*) *The condition of this obligation is such, that if, &c.*
then the condition of this obligation to be void; the last words shall
be deemed repugnant, and the condition good without them.
2 Saund. 79.

3. If the condition of a bond be, *That whereas the obligee*
had constituted A. his deputy, to execute an office for six months;
now if A. shall, during the time he shall continue his deputy, pay to
the obligee all the money that he shall receive; that then, &c. the
condition shall be restrained to the money he shall receive with-
in the six months. 2 Saund. 413, 414.

4. Where

Readings and Observations

4. Where the condition of a bond is, *That whereas a Sheriff had constituted the obligor Bailiff of a hundred; now if the obligor shall execute all warrants directed to him; that then, &c.* the words (all Warrants) shall be construed to be only the warrants directed to him as Bailiff, and not any other warrants. 2 Saund. 414.

5. If the condition of a bond be altogether *insensible* and void, generally the obligation is single; that is, as if there had been no condition. 1 Saund. 66.

6. Any words whereby the intention of the parties may appear, are sufficient to make the condition of a bond, although they may be improper; but the intention of the parties will not serve to construe the condition of a bond contrary to the express words. 1 Saund. 66.

7. Whether a condition amounted to a lease. *Cro. Eliz.* 486. *Harrington v. Wise.*

8. Where words repugnant and void in a condition have been rejected. *Cro. Eliz.* 420. *Sharpleys v. Hankenson.*

9. Where the words of a condition have been taken more strongly against the obligee. 1 Leon. 85. *Lawson v. Widdrington.*

Other Cases concerning the Constructions that have been put upon Conditions.

<i>Raym.</i> 61. <i>Lawson v. Witber-</i> <i>ington.</i>	1 <i>Bulstr.</i> 174. <i>Hewett v. Pain-</i> <i>ter.</i>
1 <i>Brownl.</i> 65. <i>Pain v. Nichols.</i>	<i>Yelv.</i> 53. <i>Hargrave v. Rogers.</i>
<i>Cro. Eliz.</i> 798. <i>Nose v. Bacon.</i>	1 <i>Leon.</i> 93. <i>Hammington v. Ry-</i> <i>der.</i>
<i>Stiles</i> 242. <i>Wentworth v. Went-</i> <i>worth.</i>	102. <i>Sewerne v. Clarke.</i>
2 <i>Show.</i> 15. ———	3 <i>Leon.</i> 7. ———
	<i>W. Jones</i> 1. ———

(P*255)* *What hath been construed a Forfeiture of the Bond, and what a Performance or discharge of a Condition.*

1. Where the condition of a bond was to pay money, on or before the twenty-fifth day of March, and the obligor tender'd it upon the twenty fourth day; whether he has forfeited the bond. *Morr* 122. *Vide Cro. El.* 14.

2. Where one part of a condition cannot be performed by a stranger's not doing somewhat preceding it; yet the other part must be performed.

3. As where an action of debt was brought upon a bond, with a condition that if the Defendant delivered to the Plaintiff three bonds, or sealed or delivered a release, as should be devised by the Plaintiff's counsel before Michaelmas, then the bond to be void; the defendant pleads, that neither the Plaintiff, or his counsel, did devise any release before Michaelmas: The opinion of *Gawdy, Clench and Fenner*, was, that the plea was good; for that the defendant had his election to deliver the bonds, or to make an acquittance,

On Actions of Debt.

acquittance, as the plaintiff should devise; that if the plaintiff would not devise the *acquittance*, the defendant is discharged from the making thereof, by the default of the plaintiff, and by consequence from the delivery of the bonds: But *Popham*, it seems, was of another opinion; for, says he, if this was an absolute disjunctive condition, that the obligor might do one thing or the other, then the *election* would be in the *obligor* absolutely; and if the *obligee* disables the obligor to perform the one part, the law shall discharge him from the other; but here it's but a conditional election; that is, if the obligee will devise an *acquittance*, then the obligor hath his election either to seal an *acquittance* or deliver the bonds; but here as no such *acquittance* was devised, he was absolutely obliged to deliver the bonds; if the condition had been that he shall deliver the bonds, or seal an *acquittance* before *Michaelmas*, if required, it had been clear that he ought to have delivered the bonds: If no *acquittance* was required, *Gaudy* said there was a difference between the cases, and *Judgment* was given for the defendant; but *Quære*, whether there be any difference, *Cro. Eliz.* 396, 339. *Gremingham v. Eure*.

4. Where the condition of a bond was to deliver to the Plaintiff all the Tackle of a Ship mentioned in an inventory, signed by four men; or in default thereof, to pay so much to the Plaintiff before such a feast; which tackle was to be valued by the four men; and the defendant pleads, that the four men did not value them; this was held to be no plea; for when the defendant hath his election by the condition to do one of two things, if he cannot do one of them by the default of a stranger, or of himself or the obligee, or by the act of God, then he shall do the other. *Moor* 645. *More & al. v. Morecome*.

5. So where the condition of a bond was, that if the obligor and his wife sell the wife's lands; then if the obligor, during his life, purchase to his wife and her heirs so much land, or else leave to his wife so much money or monies worth after his death; that then, &c. the husband pleaded that the wife is dead; the plaintiff replied, that the husband and wife had aliened the land of the wife: Upon a demurrer it was adjudged for the Defendant; for the condition of the bond was for the benefit of the obligor, to give him an election to do either of two things: the which election being prevented by the death of the wife, which is the act of God; and so in law is a discharge of one part of the condition; then the condition and bond is also discharged; but it is otherwise where one part of the condition becomes impossible by the obligee's own act, or by the act of a stranger, as in the above mentioned case of counsel's devising an *acquittance*; for there, tho' one part is gone, yet he shall perform the other. *Moor* 357. *Eaton's case. Cro. Eliz.* 396.

* 6. And it is likewise said in this case, as reported in *W. Jones*, by the name of *Eaton and Butter*, that though a condition

(P* 256)

on

Readings and Observations

on of a bond becomes by the act of God impossible to be performed literally; yet if it may be performed according to the act of the parties, the obligor is bound to do all that is in his power towards a performance; as if a man be bound, during his life, to enfeof the obligee and his heirs, and the obligee dies, the obligor ought to enfeof the heir upon the authority of 2 *Hen. 4. Littleton and Cremavell's case, 2 Co. 74, 75, 76, 77, and 15 Hen. 7. 2.* where lands were given upon condition to enfeof *J. S.* and his wife, and the heirs of their bodies, the remainder to the right heirs of the husband; and the husband and wife have issue and die, the conveyance ought to be made to their issue after their death, remainder to the heirs of the husband; and if a feoffment be made to a man upon a condition to enfeof two and their heirs, and both die, the heir of the survivor ought to be enfeofed. But a difference was taken by *Hide*, between a bond with a condition to make a feoffment, and a feoffment upon condition: That in the first case, if the condition be to enfeof *John a Stiles* and his heirs, and *John a Stiles* dies, the feoffment ought not to be made to the heir; but in the case of a feoffment it should: But *Dodderidge* was of opinion that in neither of the cases the heir ought to be enfeofed; and his reason was, because the intent of the parties in both the cases is, that such heir shall take by descent, and not by limitation or purchase; and if it shall be construed that the heir ought to be enfeofed, such heir by the obligee's dying, takes by way of limitation or purchase, which is not agreeable to the intent of the parties; therefore *Quære* how the law stands as to that point. *W. Jones 180, 181.*

7. Where the condition of a bond was to make an assurance of an annuity of twenty pounds per annum to the Plaintiff, within six months after the death of *M. B.* and if he refuse, when requested by the Plaintiff, then to pay three hundred pounds; and if he sail, &c. then, &c. Tho' it is said in the book, that the defendant pleaded that the whole six months he was at Morocco in Barbary a prisoner, and that after his return he requested the Plaintiff. This case is misreported, because in the conclusion of the case it appears, that the defendant pleaded that the plaintiff made no request, and so the plaintiff replied the matter above said to be pleaded by the defendant; for the judgment of the court was that the plea was good, because the defendant had the benefit of election; and the plaintiff not making the request within six months, had dispensed with one part of the condition, and the law therefore hath discharged the defendant of the other part, (*i. e.*) because the plaintiff hath deprived the defendant of the benefit of his election: And here if the plaintiff had requested the sealing and delivering of the grant of an annuity, yet the defendant had liberty to execute it, or to pay the three hundred pounds; and where the election is on the obligor's part, neither the act or neglect of the obligee shall take it away from him; and the principal

On Actions of Debt.

pal case cited in *Moor* 645. was agreed to be law; but the rule there put was denied; *i. e.* That if by the act of God or of the party, or through the default of a stranger, it becomes impossible to do one thing in a disjunctive condition, he is notwithstanding bound to do the other; and see *Laughter's* case above mentioned likewise reported in 5 *Co.* where it is said, that when a condition consists of two parts in the disjunctive, and both are possible at the time of making the bond; and afterwards one becomes impossible by the act of God or of the party, the obligor is not bound to perform the other part. 2 *Mod.* 204. *Baskett v. Baskett.*

And see concerning the performance of a condition in the Disjunctive, 3 *Mod.* 232. *Shipley v. Chappell.*

* 8. If the condition of a bond be, *that the obligor before such a day shall make a lease for thirty-one years, if A. B. will consent to it; and if not, then for twenty-one years;* there the obligor is bound to perform one or the other. 2 *Saund.* 131. (P* 257)

9. An Action of debt was brought upon a bond with a condition, *that the Defendant shall well and sufficiently execute, to the satisfaction of the Plaintiff's counsel, a release within seven days after a decree of a moiety of the money decreed;* the Defendant pleads, *that the Plaintiff did not tender any release;* And by *Hale* Chief Justice, if advice had been necessary, then the plaintiff must have done the first act; but now it is at the peril of the defendant, that the release be to the satisfaction of the Plaintiff's counsel. *Ray.* 232.

10. Where the condition of a bond is *to make such further assurance, as the counsel of the obligee should advise;* and the obligee comes to the obligor, and tells him, that his counsel has advised him to have a lease for years; and the obligee requests the obligor so to do, and he refuses, that is a breach of the condition; but otherwise where the condition is *to make such assurance, as counsel should devise;* for there the counsel is to draw and engross it ready to be sealed. *Moor* 595. *Stafford's* case.

11. An action of debt was brought upon a bond with a condition, *that whereas the Plaintiff had distrained the Sheep of the Defendant in such a place where the Defendant claimed Common, in consideration the Plaintiff had delivered the Sheep to the Defendant; if the Defendant appeared at the Court of the Lord, at the next Court to be held for the Manor, and should there make it appear that he had Common, then, &c.* and the Defendant pleaded *that he did appear there, and was ready to have made it appear; but the Steward refused to admit him to do it;* this was held no performance, for he had undertaken to make it appear there; and therefore it was his business to procure the steward for that purpose. 1 *Lev.* 191. *Butcher v. Vane.*

12. If a man be bound *that his Lessee shall take, reap, and carry away his Corn peaceably without interruption;* and afterwards when the obligee is reaping, the obligor comes upon the land, and

Readings and Observations

and says to him, that he shall not reap any corn there, tho' he does not otherwise disturb him, it was held a forfeiture of the bond. *Godb. 22. pl. 30.*

13. Where an obligation was adjudged to be discharged. 1 *Brownl. 97.*

14. What hath been construed a breach of a condition of a bond made for the performance of covenants. *Cro. Eliz. 757. Thornhill & al^s v. King & Ux^r. 1 Bulstr. 156. Briscoe v. Knight.*

15. Whether a condition of a bond was said to be duly performed. *Cro. Eliz. 277. Trott v. Beddingfield.*

16. Where the condition of a bond is to work for the Plaintiff out a sum of Forty Pounds, at the usual prices, &c. when the Plaintiff shall have occasion for himself, or his friends, to employ him, &c. or to pay the Forty Pounds; that then, &c. the Defendant pleads, that he was always ready to have wrought out the Forty Pounds, but that the Plaintiff did never employ him: It was held that the Plea was ill, for here the Plaintiff had his election either to have the work or the money; and having brought his action, it was a sufficient request. 2 *Mod. 304.* But *Quære*, If this be good law, for every condition of a bond is to be construed for the benefit of the obligor; so it seems that the obligor had his election to have worked out the Forty Pounds, or to have paid the money, if the Plaintiff, or his friends, had any occasion for his work; but if they had not, then the Defendant was to pay the money; and whether he had or no, was only in the breast of the obligee to know; but according to the above construction, the obligee might have determined his election the next day, and have sued the obligor, which could never be the intent of the parties. *Ideo Quære.*

(P*258) * 17. If a man be bound in a bond for the performance of covenants, and before the breach of any of them the obligee releases the covenants; and afterwards one of the covenants is broken, the obligation is not forfeited; because, after the release, there is no covenant existing can be broke; therefore the bond is discharged. 3 *Leon. 69.*

18. Where a condition of a bond is to pay such Money as shall be proved to be embezzled by an Apprentice; what shall be construed proof of an embezzlement. 1 *Bulstr. 40. 3 Bulstr. 54. Gelde v. Death.*

19. Where the obligor is bound to deliver to the obligee ten Bushels of Wheat; and no place is appointed where the delivery is to be made, the obligor is not bound to seek the obligee wherever he is, as in case of payment, &c. 3 *Leon. 260.*

Where the Condition hath been adjudged well performed in bonds for the performance of Covenants, and where not.

1 <i>Cro. 352. Deux v. Jefferies.</i> 623. <i>Hodges v. Smith.</i> 835. <i>Hawksland v. Gatchel.</i> 691. <i>Cropwel v. Peachy.</i>	2 <i>Cro. 232. Elve v. Sabe.</i> 3 <i>Cro. 560. Lee v. Russell.</i> <i>Raym. 282. Baker v. Buistrade.</i> 1 <i>Leon. 152. Degory and Rex's Case.</i>
---	--

On Actions of Debt.

Where the Condition hath been performed, and where not, in bonds for the payment of Money.

- | | |
|---|--|
| <p>1 Cro. 117. <i>Pike v. Cottingham.</i>
 152. <i>Besome v. Crooke.</i>
 380. <i>Price v. Williams.</i>
 381. <i>Percy v. Bardolf.</i></p> | <p>1 Cro. 464. <i>Byrd v. Wilford.</i>
 2 Cro. 8. <i>Philips v. Ecchard.</i>
 3 Cro. 161. <i>Gilpin v. ———</i></p> |
|---|--|

Whether the Condition hath been performed, and where not, in bonds for performance of an Award.

- | | |
|---|--|
| <p>1 Cro. 7. <i>Teat's Case.</i>
 211. <i>Limmer v. Every.</i>
 212. <i>Minge v. Earle.</i>
 370. <i>Rotberam v. Crawley.</i>
 549. <i>Edmunds v. Marks.</i>
 830. <i>Risden v. Juglet.</i>
 Raym. 415. <i>Joyner v. Vyner.</i></p> | <p>2 Keble 238. <i>Bamfield v. Bamfield.</i>
 744. <i>Morris v. Creech.</i>
 273. <i>Baker v. Betesford.</i>
 1 Leon. 72. <i>Smith v. Kirfoots.</i>
 3 Leon. 62. <i>Norwich v. Norwich.</i>
 4 Leon. 94. <i>Young v. Taylor.</i></p> |
|---|--|

Conditions void and against Law.

1. Where though the condition of a bond shall be laid to be against law, and therefore the obligation void, it must be by exprefs words of the condition, and not by a matter *extra* the condition. 1 Leon. 73. *Brook v. King.*

2. A condition to indemnify the obligee against past escapes, is good; but not against future escapes. 6 Mod. 225.

3. If the condition of a bond be void in part by the statute, it is totally void; but otherwise if it is void in any part by the common law. 1 Brownl. 64.

Other Cases where the Condition hath been adjudged illegal, and where not.

- | | |
|---|---|
| <p>3 Cro. 180. <i>Babington v. Wood.</i>
 Cro. Eliz. 872. <i>Colgate v. Bachelor.</i>
 Cro. Eliz. 705. <i>Dobson v. Crew.</i>
 2 Vent. 103. <i>Mason v. Watkins.</i>
 3 Keb. 153. <i>Peirse v. Hume.</i>
 1 Cro. 873. <i>Colgate v. Bachelor.</i></p> | <p>1 Show. 2. <i>Thompson v. Harvey.</i>
 2 Leon. 118. <i>Phillips v. Stone.</i>
 210. ———
 3 Leon. 208. <i>Fetherstone v. Hutchinson.</i>
 4 Leon. 1. <i>Launton's Case.</i></p> |
|---|---|

Of

Readings and Observations

(P*259)

* OF AWARDS.

It will be proper here to speak somewhat of Awards; but as there is a particular Treatise of Awards and Arbitrations, and Mr. D'Anvers hath so copiously treated thereof in his Abridgment, I shall not here be so very particular as in other Matters incident to Actions of Debt, but shall only point out where the Cases of the most principal Matters relating to Awards are to be found.

1. An Award, by *Rassall* in his terms of the law, is described to be a determination or judgment made by some persons, at the request of two at least, for or on account of some debt, trespass, or other controversy between the parties.

2. But it is more artificially described in the Civil Law to be the determination of an Arbitrator, or one giving judgment between litigating parties with their private consent, and not by means of publick authority; i. e. not obtaining a judgment by proceedings of Law.

3. In which these five things are to be considered.

First, *The Matter of Controversy, and what may be submitted.*

Secondly, *Of the Submission.*

Thirdly, *The Parties to the Submission.*

Fourthly, *The Arbitrators.*

Fifthly, *The Giving their Judgment, in which is understood the Award itself.*

Sixthly, *Of the Performance and Non-performance.*

First, *What may be submitted.*

1. All disputes, (except criminal offences, matters relating to the enforcing or dissolving marriages, matters of freehold, or any right or title to lands or tenements) may be submitted to arbitration; but it is said that matters of freehold, or any right or title to lands or tenements, cannot be submitted to arbitration. 1 *Roll's* 242. *Letter A. pl. 1.* Nor a partition cannot be made by any Award, because it will pass no freehold. *ibid. pl. 3.* And the Lord *Rolls* says, that an arbitrator cannot make an Award of a Chattel Real, as of a lease for years. *ibid. pl. 4.* But in 21 *Hen. 7. 29. b.* it is there said, that if there be a controversy concerning the property of a Chattel Real, that an Award will transfer the property thereof, according to the Award. *Cro. Eliz. 223.* But an Arbitrator may make an Award of the arrears of a rent due upon a lease for years. 1 *Roll's Abr. 242. Letter A. pl. 6.*

2. And if an Award be that one shall permit the other to enjoy the term, this transfers no interest in the term. *Cro. Eliz. 223.*

3. What

On Actions of Debt.

3. What shall be said to be submitted. See *Danv. Abr.* 519.

Secondly, As to the Submission.

1. It may be made by word or writing. Those that are by writing, are either by obligation, or by covenant or agreement.

2. And such obligation may be either of record, as by a recognizance, or by a deed between the parties.

3. And this written submission may be absolute or conditional as that it be an Award, *so that it be delivered before such a day*; and where a submission is *ita quod fiat de præmissis*, see how such an Award is to be made, *Danv. Abr.* 539. and where the submission is general, see the same Book 533.

* Thirdly, As to the Parties to the Submission.

(P*260)

1. A person may be authorized to submit for one of the parties, and such submission will be good. *Dyer*, 4 *Eliz.* 217. a. 60.

2. Where the husband may submit himself to an Award for him and his wife, and it shall bind the wife. 21 *Hen.* 7. 29. b.

3. It is said that if an infant submits himself to an Award, it shall bind him to the performance, as well as a man of full age. 13 *H.* 4. 12. a. 10 *H.* 6. 14. a.

4. But that is said not to be law; for though he may submit to an Award, yet when he comes of age he may agree or not agree to it, as he pleases; and a Court of Equity will not decree an Award to bind an Infant, unless it be apparently for his advantage. 13 *Hen.* 4. 12. *March* 111, 1 *Jones* 164. 1 *Chan. Cases* 279.

5. That those who do not submit, and are parties to the wrong, shall have no benefit thereby, so as to work an extinguishment of the wrong. 7 *Hen.* 4. 31. b. 20 *Hen.* 6. 12. a. 20 *Hen.* 6. 41. a.

6. Where the submission gives the arbitrators a power to make an Award of matters between them jointly or severally. 2 *Ric.* 3. 18. b. 21 *Hen.* 7. 29. b.

7. Whether an Award made between some of the parties only, and not between all, and says nothing of the others, is good. See 22. *E.* 4. 25. b.

8. On a submission made without a deed, either of the Parties may countermand and discharge the arbitrators. 49 *E.* 3. *Fitz. Tit. Arbitrament*, 22. 21 *H.* 6. 30. a. 28 *H.* 6. 6. b. 5 *Ed.* 4. 3. b. 8 *Ed.* 4. 10. b.

9. And it is expressly said in 8 *Co.* 81, 82. in *Vinyer's Case*, that a submission to an Award may be revoked, though it be made irrevocable in the strongest terms; because such authorities are in their nature revocable.

10. But then the parties ought to give notice to the arbitrators of their being discharged. 8 *E.* 4. 10. b. 8 *Ed.* 4. 12. a. And

Readings and Observations

And the notice is issuable. 8 Co. 81, 82. And the revocation must be in writing, if the submission was so. *Ibid.* But if the submission be by parol, the revocation may be so. 1 Sid. 281.

11. If several persons of the one part, and several persons of the other part, submit themselves without a deed, one of the parties cannot discharge the arbitrators, without the consent of his companions. 28 H. 6. b.

12. And if the submission be by deed, one of the parties cannot revoke the power of the arbitrators. 49 3 Ed. Fitz. Tit. Arbitrament, 22. 5 Ed. 4. 3. b. 8 E. 4. 11. b.

13. If the submission be made a rule of court pursuant to the late act of Parliament, if either of the parties revokes the authority of the arbitrators, the court will grant an attachment.

14. But before that act of parliament it has been a doubt, whether the court could grant an attachment in such Cases. 1 Sid. 452, 453.

15. If a Feme Sole submits to an Award, and marries before the Award made, this is a revocation in law of the submission, 1 Jones 388.

Fourthly, As to the Arbitrators.

And here may be consider'd, *First*, Their ordinance; *Secondly*, Their authority; *Thirdly*, Their duty.

1. *First*, As to their ordinance, it is by the election of the parties, and by undertaking the charge. 20 H. 6. 41. a. 8 E. 4. 10. a.

2. *Secondly*, Their authority, it being derived from the submission, it extends no further; nor can they transfer their authority over to another.

(P*261) * 3. So that if the Award be that the parties shall stand to the Award of a stranger, that is not a good Award. 47 E. 3. 21. 8 E. 4. 10, 11. a. *contra*.

4. But yet if the arbitrators award that such an act appointed to be done, as to the manner of doing it, it shall be by the advice of counsel, such award is good. 8 Ed. 4. 11. a. 14 Ed. 4. 1. a.

5. But if the Award be, that such an act shall be done by the advice of the arbitrator himself, after the delivery of the Award; that is not good, because after the delivery of the Award, their power is determined. 19 E. 4. 1. a.

6. And it hath been held, that though an arbitrator cannot transfer his right of judging to another, and award the parties to stand to the Award of a stranger; yet if a stranger hath made an Award before between the parties, and the arbitrators award the parties to abide by such award, it hath been held that it is good. 39 H. 6. 10. a. 11. And it seems to be upon this reason, that when an Award is once made be it by whom it will, if the arbitrators Award that the parties shall stand to and abide by such an Award, it may be very properly construed the Award of these arbitrators, though made by a stranger.

On Actions of Debt.

7. If the parties submit themselves to the Award of certain persons; and if they cannot agree, then to the Award of an Umpire: If the arbitrators make an Award of Part, the Umpire cannot make an Award of what remains. 39 H. 6. 10. b.

8. But if the submission be so, that the Umpire shall make an Award of all, or of part, then he may make an Award of that part, which the arbitrators had not meddled with. 39 H. 6. 11. b.

9. Thirdly, As to the duty of the arbitrators, they being thus chosen by the parties to determine the matters in variance between them, it is the duty of these arbitrators to hear the parties; and according to the grievances laid before them, they ought to judge. 8 E. 4. 10. And such judgment as they give, which is called the Award, they ought to notify to the parties; and sometimes it is provided for, by the submission, that the Award shall be delivered to the parties; and hence it follows:

10. That an Award is no Award till it be pronounced. 8 E. 4. 21. b. And where it is provided for by the submission that the Award be delivered, it is in law no Award till it be delivered. 8 E. 4. 11 Yelv. 8 E. 4. 21. a. Choke. 1 H. 7. 5. a. 37. 8.

11. But if the submission be that the Award shall be delivered to the parties before such a day, they demanding it, and no certain day is appointed for the delivery, it is said the parties ought to take notice of the Award at their peril. 8 E. 4. 1. b. 21.

12. If several persons of the one part, and several of the other part, submit themselves to the Award of another, provided that it be delivered to the parties, or to one of them; the arbitrator need not deliver it to both the parties of the one part, or to one of the persons of both parts; but it is sufficient if it be delivered to any one of all the parties. 4 & 5 Eliz. 218. b.

13. If the submission be that the Award shall be delivered before such a day, it may be delivered by parol as well as by deed; unless it be in the submission that it shall be delivered by deed. 4 & 5 Eliz. Dyer 218. b. pl. 5.

14. If the submission be that the Award shall be delivered, it may be made in one county, and delivered in another. 5 H. 7. 2. a.

15. If the submission be by a deed, and the time appointed by the submission is past, the parties cannot prorogue the time further to make an Award, without a new submission for that purpose. 49 E. 3. 9. a.

16. But if the submission be without a deed, the parties may prolong the time which was given for them to make their Award. 9 E. 3. 9. Fitz. Tit. Award, 22.

17. If the arbitrators make their Award between the parties upon one day, they cannot make another Award between the parties at another day; although the time is still within the submission. 22 Hen. 6. 52. a. 33 Hen. 6. 28. b.

18. Nor

Readings and Observations

18. Nor can they make an Award part at one time and part at another, altho' all the times are within the time of the submission. 39 Hen. 6. 12. a. 8 E. 4. 10. b. 19 Ed. 4. 1. a. 3 Hen. 4. 1. b.

19. But the arbitrators may commune between themselves, and agree upon one thing at one day, and another thing at another day; and at last make an entire Award of the whole, and that is said to be good. 47 E. 3. 21. a. 39 Hen. 6. 12. a.

20. If the arbitrators award one thing to be done of the one part, and before they agree upon their Award of the remainder, the time in the submission expires, all their Award is void. 39 Hen. 6. 12. a.

21. In honesty and conscience the arbitrators are obliged to give notice to the parties of their Award. 8 E. 4. 10. a. 8 Ed. 4. 2. a. b.

22. But it is said that in strictness of the law the Award is notorious of itself. 8 Ed. 4. 1. b. 8 Ed. 4. 21. b. and therefore the parties to the Award are bound to take notice of the Award at their peril. 8 Ed. 4. 18, 21. 18 Ed. 4. 18. a. 1 Hen. 7. 5. a.

23. But altho' it has been said, that there is no occasion for notice to be given to the parties of the Award; yet if the arbitrators award that one of the parties shall do an act which depends upon another thing first to be done by the other party, of that he is to have notice.

Fifthly, Of the Umpire.

1. This Umpire is a person appointed to determine the matters in variance between the parties, either by the submission itself, or by a delegated power given to the arbitrators to choose such person.

2. And where *A.* and *B.* submit to the Award of *C.* and if they do not make an Award before such a day, then to the Award of *D.* an Umpire; if they make an Award of part, the Umpire cannot make an Award of the residue, because his power commences upon the arbitrators having made no Award. 39 Hen. 6. 10. b.

3. But if the submission be so, that the Umpire shall make an Award of all or part, he may make an Award of that part, where-with the arbitrators did not concern themselves. 39 Hen. 6. 11. b.

4. What is more particularly to be consider'd, is the time when he enters upon his office of an arbitrator, for he must not take upon him to judge, till the time allowed for the arbitrators is expired; nor can the arbitrators appoint an Umpire before their time is expired; for then there would be two concurrent jurisdictions at one and the same time. 1 Roll's Abr. 261.

5. As where the submission to the Award is so that the arbitrators make their Award at or upon the Twenty-seventh day of

On Actions of Debt.

rice of, otherwise it will be void for the whole : But if the submission be absolute, or without any such conditional clause, then the arbitrators may make an Award of any part or parcel of the matters in Variance, and it will be good for such part. *1 Roll's Abr. 277. Robinson v Bifs. 2 Vern. 109. Hide v. Costb.*

9. If the Award differs from the submission, it shall be as well void in equity as in law. *1 Ctanc. Cases 186. Nelf. Rep. 141.*

10. It seems by the case in *1 Saund. 32.* that tho' the submission to Awards be conditional, and the arbitrators have made an award of part of which they had notice; yet when they awarded general releases it was held good.

11. And where an Award hath been held good in part, and void only in part, and where void for the whole. See *1 Roll's Rep. 362. 1 Roll's Abr. 258, 259. and Danv. Abr. 526, 7, 8. 1 Lev. 58. 3 Lev. 413. 1 Leon. 72. 1 Roll's Abr. 244. Cro. Eliz. 758. Hob. 218.*

Secondly, *That an Award ought to be certain.*

1. If an Award be uncertain, it is void; for the arbitrators are judges of the case, and the Award ought to be certain; so that thereby the controversy be decided, lest for the uncertainty there be a new controversy. *1 Roll's Abr. 263. Danv. Abr. 543.*

2. If an Award be that one of the parties shall pay the other so much as is due in conscience, this is a void Award. *Stiles 28.*

3. So if it be that one shall pay the other for certain task-work and day-work, this is a void Award, because of the uncertainty of the sum he should pay, and it cannot be help'd by an averment. *2 Saund. 292.*

4. An Award that one shall enter into an obligation to the other, not mentioning the sum, is void for the uncertainty. *4 Roll's Rep. 263. Letter 2. pl. 2, 4.*

5. An Award that one shall pay so much as such lands are worth, is not good. *Skinner 248.*

6. But tho' the Award be uncertain as to the sum, yet if it be so as it may be reduced to a certainty, it may be good; as an Award that one of the parties shall pay such costs of a suit as the master shall tax, is good. *1 Salk. 75.*

7. An Award that one shall give the other security without saying what kind of security, is void for the uncertainty. *Cro. Jac. 314.*

8. And observe this difference between a contract or covenant, and an award, as to this last particular; for if there be a covenant that one shall give the other a bond for the payment of a certain sum, that shall be intended a bond in double the sum; but an Award which is to make a final end, shall not be good in that case for the uncertainty. *1 Lev. 88.*

Readings and Observations

- (P* 265) * 9. And for other cases concerning the uncertainty in Awards, see 1 *Roll's Abr.* 263. 1 *Syd.* 270, 358. *Sty.* 28, 365. *March* 18, 144. 2 *Lew.* 235. *Yelu.* 97. 1 *Roll's Abr.* 251. *Poph.* 16. 1 *Syd.* 59. *Cro. Eliz.* 211. 2 *Ven.* 242. 6 *Mod.* 231. 244. *Dy.* 242. 3 *Lew.* 18, 413, 414. *Cartbrow* 156. 1 *Salk.* 75.
 10. Note, Every Award ought to be expounded and intended according to the intent of the arbitrators, and not literally. 17 *Ed.* 4. 3. 21 *Ed.* 4. 39. 19 *H.* 6. 36.
 11. But if the intent of the arbitrators doth not stand with, and is consonant to the law, then the parties shall perform it according to the words taken in such sense, as is most agreeable to the law. 21 *Ed.* 4. 39 b.

Thirdly, *That it ought to be final.*

1. Every Award is to make a final determination, and to appease the strifes, debates and variances between the parties. 19 *H.* 6. 37. b. 8 *Ed.* 4. 10. 8 *Ed.* 4. 12.
2. Every Award that doth not import a satisfaction of the wrongs which are put in compromise, is not good. 43 *Ed.* 3. 28. 46 *Ed.* 3. 17. b. 2 *H.* 5. 2. a. 45 *Ed.* 3. 16. a. 19 *H.* 6. 38. a. 22 *H.* 6. 39. a. 30 *H.* 6. *Fitzh.* 27. 9 *Ed.* 4. 44. a. 9 *H.* 7. 16. b. 12 *H.* 7. 15. a.

Fourthly, *The Matter awarded to be done, ought to be beneficial to the Parties submitting.*

1. Where one person submits for another, there ought to be something awarded to be done by him, on whose behalf the submission was made. *Cartbrow* 413.
2. But note, A thing awarded may be beneficial to the party tho' it be awarded to be done to a stranger; as if there be an Award that *A.* shall pay money to the servant of *B.* this is good. 3 *Leon.* 62. But then it must appear that the servant received it to the use of his master. *New Dyer* 242.
3. And the lord chief justice *Holt* was of opinion, that a general Award of money to be paid to a stranger was good; for it shall be intended that the parties submitting were bound as trustees, or were liable to pay the same; and the payment shall be intended for their benefit, unless the contrary appear; but *Powell e contra.* *Salk.* 74.

Fifthly, *The Matter awarded ought to be lawful, reasonable and possible.*

1. And therefore an Award made to do a thing against law is void. 19 *E.* 4. 1. 21 *Ed.* 4. 6. 9 *Hen.* 7. 16. a. *Litt.* 206.

On Actions of Debt.

2. If money is awarded to be paid in the house of J. S. a stranger, it was thought not to be good, because it was unreasonable to subject the party to an action of trespass. *Sti.* 211. And a difference hath been taken where it is to be paid in the house, and where at the house of J. S. for he may pay it at the house of J. S. without being a trespasser. *1 Roll's Rep.* 6. *Sti.* 211. *Godb.* 255. 3 *Lev.* 153.

3. If an Award be unreasonable, it is void. 46 *E.* 3. 16. *a.* 43 *E.* 3. 17. *b.* 2 *H.* 5. 2. *a.* 17 *Ed.* 4. 5. *b.* 9 *H.* 7. 10. *b.* 46 *Ed.* 3. 17. *b.* 21 *Ed.* 4. 40. *a.* 10 *H.* 4.

4. If an Award be to do a thing impossible, it is void. 8 *E.* 4. 1. *b.* 8 *E.* 4. 10. *a.* 19 *E.* 4. 1. *a.* 9 *H.* 7. 16. *b.* 22 *H.* 6. 19. 9 *H.* 7. 15. 18 *E.* 4. 21. *Litt. Rep.* 30.

5. An Award which refers to the doing of a thing, or of a matter not in *rerum Natura*, is void. 21 *E.* 4. 40. *a.* 9 *E.* 4. 44. *a.* 39 *H.* 6. 10. *a.*

6. And see of the foregoing particulars in *Danv. Abr.* 522, 523, 524.

* Cases wherein there have been exceptions to Awards, and where they have been adjudged good, or ill. (P*266)

Mor 885. *Lee v. Paine.*

Cro. Eliz. 4. *Ecclethead v. Mal-*
liard.

13. *Renche's Case.*

291. *Sbarley v. Rich-*
ardson.

809. *Nuby v. Sabb.*

838. *Risden v. Juglet.*

885. *Hungate v. Mease*
& al.

849. *Barry v. Perin.*

858. *Barnes v. Green-*
well.

2 *Cro.* 149. *Gennings v. Markbam.*

200. *Middleton v. Weeks.*

277. *Sallows v. Girling.*

285. *Basposle v. Freeman*

3 *Cro.* 216. *Ward v. Unicorn.*

263. *Jennings v. Vande-*
port.

433. *Hayes v. Hayes.*

541. *Bardefsey v. Clyston.*

Godb. 12. *pl.* 18.

Stiles 39. *Terry v. Baxter.*

44. *Capell v. Allen.*

56. *Watson v. Watson.*

97. *Keniston v. Jones.*

110. *Langly v. Wylcord.*

113. 136. *Wood v. Clemence.*

Stiles 217. *Carter v. Statute.*

170. *White v. Helford.*

2 *Show.* *Adams v. Staley.*

1 *Show.* 76. *Trippet v. Eyre.*

82. *Thursby v. Halburt.*

1 *Leon.* 72. *Smith v. Kirfoos.*

Yelv. 97. *Martham v. Jenox.*

Hardr. 399. *Joice & al' v. Haines.*

43. *Hunter v. Bennison.*

3 *Bulst.* 62. *Berry v. Perry.*

2 *Brownl.* 262. *Duport v. Wild-*
goose.

2 *Mod.* 27. *Bridges v. Bedin-*
seild.

168. *Adams v. Adams.*

303. *Godfrey v. Godfrey.*

3 *Mod.* 264. *Rees v. Phelps.*

272. *Thirstby v. Helbot.*

5 *Mod.* 457. *Trippet v. Eyres.*

6 *Mod.* 34.

160. *Oates v. Bramwell.*

195.

231. *Knight v. Button.*

244. *Arnote v. Breame.*

Sixthly,

Readings and Observations

Sixthly, *Of the Performance.*

1. Before we consider of the performance, it may not be improper here to mention the late act of the ninth and tenth of King William the third, made concerning Awards: By which it is enacted, that it shall and may be lawful for all Merchants and Traders, and others desiring to end any Controversy, Suit or Quarrel, Controversies, Suits or Quarrels, for which there is no remedy but by personal action, or suit in Equity, by Arbitration, to agree, that their Submission of the suit to the Award or Umpirage of any person or persons, should be made a rule of any of his Majesty's Courts of Record, which the parties shall choose; and to insert such their agreement in their Submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the Award or Umpirage of any person or persons: Which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an Affidavit thereof made by the witnesses thereunto, or any of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court, and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by the Arbitration or Umpirage, which shall be made concerning them, by the Arbitrators or Umpire, pursuant to such submission; and in case of disobedience to such Arbitration or Umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court, where he is a Suitor or Defendant in such court; and the court on motion, shall issue process accordingly; which process shall not be stopped or delayed in its execution, by any order, rule, command or process of any other court, either in Law or Equity, unless it shall be made appear upon oath to such court, that the Arbitrators or Umpire misbehaved themselves, * and that such Award or Arbitration was procured by corruption, or other undue means.

(P* 267)

2. And be it, &c. That any Arbitration or Umpirage procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of Law or Equity; so as complaint of such corruption or undue practise be made in the court, where the rule is made, for submission to such Arbitration or Umpirage made and published to the parties; any thing in this act contained to the contrary notwithstanding.

3. Having here shewn the act itself, it is proper to shew that 'tis not only the non-performance of the Award, is a breach of the rule; but it is a breach if either of the parties shall do any act, which may prevent the arbitrators from making their Award, as if they revoke their authority.

4. And

On Actions of Debt.

4. And where they served the Arbitrators with a *Subpœna* in Chancery, whereby they could not proceed on their Award, the court granted an attachment *nisi Causa*. 1 Salk. 73.

5. But the non-performance, while the matter is *sub judice* and under litigation, as to the legality of the Award, is no breach. 1 Salk. 73.

6. It is plain that this act of parliament has regard to the ancient common law, as to controversies relating to things real, by the words "for which there is no other remedy but by personal action or suit in Equity."

7. *Quære* whether a submission by parol may be made a rule of court, it seems not by the words, and insert such their agreement in their submission or condition of the bond, &c.

8. The method of enforcing the non-performance is, as in other cases by a motion for an attachment for a contempt of the rule; but the party may bring an action upon the Award bond at the same time. 1 Salk. 73. 74.

9. This submission may be by a rule at the Assizes to refer the matter to the Foreman, or three Foremen of the Jury, or to such of them as the parties agree on; and such rule of Assize being made a rule of court, the court will grant an attachment for the non-performance; so if it be referr'd to the determination of the Judges of Assize, and tho' the Award be not made part of the rule. 1 Salk. 72.

10. And tho' in the submission it be not said that the submission shall be made a rule of court; as where the condition of the bond was, that if the obligor shall consent that this submission shall be made a rule of court, that was construed to be a sufficient indication that they consented it should be so. 1 Salk. 72.

11. The parties ought to do all that is in their power to perform, &c. 21 Ed. 4. 39. b.

12. If an act awarded is to be performed two ways, one way by himself, and the other way with the assistance of another; he ought to do it without the assistance of another. 21 Ed. 4. 40.

13. The parties shall have reasonable time to perform their Award, if no time be limited. 20 Ed. 4. 8. b. 21 Ed. 4. 41. a. b.

14. If that which is awarded by the Arbitrators to be performed by B. (one of the parties) cannot be perform'd before another act is done by A. (the other party) if A. does not do it, B. is excused from the performance of the Award. 5 Ed. 4. 7. a.

15. If the Award be that one of the parties shall pay money, and the other shall execute a release, that shall be done at one and the same time, if there be no other obligation to perform the Award. 21 Hen. 7. 28. b. But if there be a bond to perform the Award, then every one ought to perform his part at his peril. 21 H. 7. 28. b.

16. It

Readings and Observations

16. It hath been said, that if there be an obligation made to stand to an Award, altho' the Award be void in law, yet it ought to be performed, or otherwise the bond shall be forfeited. (P*268) 22 H. 6. 46. But that * if an action be brought upon a void Award, that it will not lie. 22 H. 6. But *Quere* if it be law; for if the Award be void, as being against law, the parties, it seems, are not obliged to perform it, tho' the submission be by bond, or otherwise. *Dall.* 43.

17. It hath been held, that where a thing is awarded to be done, which afterwards becomes impossible by the Act of God, there the party is excused. 21 *Ed.* 4. 70.

18. Other cases concerning the performance of an Award, and where the condition to stand to an Award shall be said to be broken. See *Danv. Abr.* 514, 515, 516, 517, 518. *Noy* 61. 3 *Leon.* 62. 2 *Mod.* 27, *Cro. El.* 54. *Cro. Jac.* 339, 525.

19. What shall be a breach of the rule of court made in pursuance of the statute. 1 *Salk.* 73. 2 *Vern.* 109.

20. And how the court will enforce the performance. 1 *Salk.* 73, 74, 83, 84. 1 *Vern.* 469, 2 *Vern.* 444.

Cases in the Court of Equity concerning Awards.

1. Where an Award was made, not binding by the strict rules of law, yet the Court of Equity decreed a specifick performance. *Norton v. Mascall.* 1 *Vern.* 24, 25.

2. The parties may make a submission to an Award a rule of the Court of Equity; but then it must be made and enforced pursuant to the act of parliament; and the method is to move that Court to confirm the Award upon the master's report; and if there be a submission to a reference by order of Court, and the Award to be made is to be confirmed by the decree of the court, without appeal or exception, yet exceptions may be taken to the Award. 2 *Vern.* 109.

3. The remedy to enforce an Award upon a rule of the Court of Chancery, is the same with the courts of law, by attachment; and if the party dies, the remedy is gone, and the executors are not bound. 2 *Vern.* 444.

4. If the submission to an Award be conditional, *Ita quod* the Award be made *de & super præmissis*, then if the Award be not of the whole, it is void; but if the submission be not conditional, then, tho' the Award be but of part of the matter referred, it is good for so much as it settles, tho' it leaves other things at large. 2 *Vern.* 109. And so in this particular an Award may be confirmed in part, and made void in part. 1 *Chan. Cases* 40.

5. Where a solicitor's consent for his client to an Award was adjudged not binding, but admitted that an attorney's assent for his client at law is. 1 *Chan. Cases* 86. 1 *Chan. Rep.* 195; 1 *Salk.* 70.

On Actions of Debt.

6. Cases in Equity concerning the Arbitrators and Umpire,
1 Vern. 100, 485. 1 Chanc. Cases 185.
7. For what causes Awards have been set aside in the Court
of Equity. 1 Roll's Abr. 374. 1 Chan. Cases 85, 87, 186,
279. Nels. Chan. Cases 87. 1 Vern. 157. 2 Vern. 251, 514,
705.

Fourthly, Of contracts without any Deed, which are express, or
implied.

First, Of Express Contracts.

1. Express Contracts are where the parties expressly contract,
and the one is to pay money to the other for somewhat sold to,
or done for the other, or by his appointment, or otherwise it is a
duty raised upon a contract raised by implication of law.

2. In Actions of debt upon a simple contract, there must be a
consideration to be as a ground or foundation for the debt; and
that consideration must not be pass'd and executed. 1 Roll's
Abr. 594. Letter T.

* 3. The consideration of Marriage, tho' with a stranger; (P*269)
for a Surgeon's curing a stranger; upon a promise to pay to a
labourer so much for repairing such a way; for work done; for
goods sold and delivered, and such like: These are all good con-
siderations; but in all these cases the sum demanded must be cer-
tain. 1 Roll's Abr. 53. i. e. the price must be agreed on as in
3 Leon. 161. Young v. Asburnham. It was held, that an action
of debt would not lie for lodging and diet, there being no
price agreed on.

Secondly, Of Implied Contracts.

1. Implied Contracts are where there is a duty certain, the
law implies a contract to perform that duty: As where a man is
in execution upon an escape, the law implies a contract from
the Sheriff, with the Plaintiff, that he would not let his pris-
oner escape; and the consideration for that contract is, the Sher-
iff's fees; and the Sheriff may have an action for his fees; for
which see 3 Cro. 286. Lister v. Bromley; and how much they
are.

2. But in order to charge the Sheriff for an escape upon this
supposed contract, there must such certainty be shewn, that the
Sheriff must be supposed to have contracted to keep his prisoner
safe, or to pay the Plaintiff a sum of money reduced to some
certainty, or otherwise the action will not lie: As where the
Plaintiff declared that a judgment was had, and thereupon an
Elegit issued, and the Sheriff returned that he had appraised the
goods, and extended such lands which he delivered to the Plain-
tiff,

Readings and Observations

tiff, *Ubi revera* he had not done, *per quod Actio accrevit*. It was adjudged that an action of debt would not lie, because the Sheriff had not returned that he meddled with the goods or with the value, and there was no certainty how much to charge him with; but the proper action was an action upon the case for a false return; but if he had returned, the goods sold for so much money certain which he had delivered, then an action of debt would have lain; for tho' 'tis not a contract, 'tis quasi *ex contractu*. Hob. 206.

3. Whether an action of debt will lie for an escape against a gaoler for an escape out of execution. Vide *Hardr.* 33, 34, 35. *Wainwright v. Griffith*. There is no doubt of its lying against the Sheriff, and against the late Sheriff. *Cro. Eliz.* 365. *Westby v. Skinner & al.*

4. And against the executors of a Sheriff for money levied upon a *Fieri facias*. 3 *Cro* 559. *Perkinson v. Guildford & al.*

5. And for an escape of one committed by the Chancellor for refusing to be examined upon interrogatories. *Moor* 384. *The Sheriffs of Bristol's Case*.

6. And against the Sheriff, tho' the process be erroneous, upon which the prisoner is in execution. 2 *Brownl.* 62. *Wentworth v. Clifford*, 1 *Lezn.* 276. *Ognell against the Sheriffs of London*. 4 *Mod.* 200. *Wolfe v. Davison*. 1 *Leon.* 3. *Gilbert v. Hart*.

7. Doctor J. recovered in an action of Trover, &c. against W. and his wife, and had a judgment against them, and both were in execution, and the marshal suffered the wife to escape; a good action lies against the marshal; so in any case where two are in execution for a debt, and the sheriff suffers one to escape, an action of debt lies against the Sheriff. 2 *Bulstr.* 320. *Suckling v. Reynill*.

8. An Attorney shall have an action of debt for his fees, and for the fees paid to Counsel. *New Nat. Brew.* 281. *Letter L.*

9. But *Quære* of a Counsel. 3 *H. 6* 3. *pl.* 26. 21 *H. 6* 4. *pl.* 6. unless the contract was made certain by a promise to pay so much *pro consilio Impendendo*. 37 *Hen.* 8.

10. It lies by the Lord against a Copyholder for his fine. *Keb.* 166. *Wheeler v. Honour*.

(P*270) * 11. No action of debt will lie for interest of money. *Va* 198.

12. Nor will it lie against the acceptor of a bill of exchange. *Hard.* 487.

13. An action will not lie for three quarters salary upon a contract for so much a year. 3 *Mod.* 153. *Countess of Plymouth v. Throgmorton*.

14. An action will lie for an amercement in a Court Leet. *Moor* 426. *Lord Norris v. Barret*. *Earl of Lincoln v. Fijber*.

15. An action of debt was brought for a fine upon an admission to a copyhold estate, and it was argued that the action would

On Actions of Debt.

would lie; for tho' a fine favours of the realty, yet 'tis a certain duty. In all cases where an action of debt will lie upon a simple contract, an *Assumpsit* will lie; likewise, 'tis true, this doth concern the inheritance; but yet 'tis a contract that the tenant shall be admitted paying the fine.

16. It was said in arguing, that it hath been also maintained for money had and received out of the office of register for the Plaintiff's use, and for scavage-money due to the mayor and commonalty of London, which is also an inheritance; and this is a contract implied in law, and therefore the action is well brought, and judgment was given for the Plaintiff, by the opinion of *Dolben, Eyre, and Gregory*: But the Chief Justice was of another opinion; for he held, that if the defendant died indebted by bond, and had not assets besides what would satisfy this bond, if the executors had paid this fine, it had been a *Devastavit*. 3 *Mod.* 240. *Shuttleworth v. Garnet*.

17. Upon a partition between two, and one promises the other twenty pounds for the equality of partition, an action of debt will lie for it. 14 *E. 3. Fitz. New Natura Brev.* 183. *Letter H.* for the promise upon the partition made it a duty.

18. This action may be brought for any thing bought at a certain price. *New Natura Brev.* 272.

19. For other cases where this action will lie, and where not, see the following books and cases. *Danv. Abr.* 468. and to 500. 1 *Roll's Abr. Tit. Debt.* fol. 593, 594, 595, 596, 597, 598, 599, 600, 601. *New Natura Brevium* 272, and from thence to fol 285. *Doctor and Student* 137. 28 *Hen. 8. Dyer* 22. 11 *H. 6. 39. pl. 31. 4 Ed. 3. 9. pl. 7. 42 Ed. 3. 9. pl. 7. 6 H. 4. 8. pl. 33. 4 Co. 49. 3 Co. 22. 3 H. 6. 33. pl. 26. 21 H. 6. 4. pl. 6. 9 Co. 87. Dyer 248. pl. 79. 130. pl. 56. 4 Co. 30. a. 94. 5 Co. 89. 27 Ed. 3. 87. pl. 37. 9 Ed. 4. 1. 27 Hen. 8. 25. 33 H. 6. 55. pl. 50. Dy. 6. pl. 17. 3 Co. 44, 52, 71, 72. Dyer 241. pl. 47. 24. pl. 149. 8 Co. 41, 142. Dy. 275. pl. 46. 10 Co. 61, 278. pl. 5. 32. pl. 5. 4 Co. 48, 49. 37. pl. 62. 9 Co. 92. 306. pl. 63. 44 *E. 3. pl. 23. 2 Ric. 2. Debt 4. 20 Hen. 7. 1. pl. 2.**

How a Debt may be apportioned, released, or discharged.

1. Part of a debt upon a bond may be attached as it may be released, or otherwise discharged. 22 *Hen. 6. 48.*

2. If a debt upon a recovery be released, or otherwise discharged in part by the act of the party, it is discharged as to the whole. *Owen* 21:

3. If a man releases a recognizance, tho' it is said for one hundred pounds, part of two hundred pounds contained therein, this shall discharge the *Whole*; but he may release part of the sum contained in the recognizance, and it shall only discharge that sum. 1 *And. 235.*

4. Where

Readings and Observations

4. Where the rent shall not be apportioned so as to bring an action for part. *Godb. 95. Wiseman v. Wallinger.*

5. Where part of the debt may be released without falsifying the Plaintiff's writ to make the verdict good. *Sti. 175. Barber v. Pomeroy.*

6. Where an *Obligee* in trust releases to the *Obligor* all demands upon his account, that shall not be a release of the bond. *1 Lev. 272. Stokes v. Stokes 235. Offly v. Warde.*

(P*271) * 7. If an *Obligor* is made an executor by the *Obligee*, and administers but part, and dies before the probate, the debt is extinguished, and the *Administrator* of goods not administered by the *Executor*, can have no action for that debt. *Salk. 299.*

8. And if *A.* an *Obligor* is made an *Executor* with *B.* and *A.* refuses to administer, and dies before the other who does administer, yet the debt is extinguished. *Salk. 308.*

9. If several are jointly bound, and the *Obligee* makes one of them his executor, either sole or jointly with others, the debt is released, tho' the *Obligor* never administers. *Salk. 301, 309. 8 Co. 136.*

10. So if the *Obligee* makes the *Feme* of one of the *Obligors* his executor, this is an extinguishment of the debt, for the suspension was by the act of the *Obligee*. *Hob. 10.*

11. But where the *Executor* of one of the *Obligors* having no assets is made executor to the *Obligee*, that is no extinguishment of the debt. *Salk. 305.*

12. If the *Obligee* is made *Executor* to the *Obligor*, and there are no assets, he may sue the heir. *Salk. 304. 3 Cro. 372. W. Jones 345. 2 Show. 401. Pidgeon v. Pitts, Hob. 10. Fryer v. Gildridge.*

13. But it is said if the *Obligor* makes the *Obligee* his executor, and he agrees thereunto and administers, the debt is released: But in that case the *Obligee* may retain goods to the value of the debt; but if he refuses to be executor, and does not administer, then he may well sue for the debt. *W. Jones 345.*

14. If one *Obligor* makes the executor of the *Obligee* his executor, and leaves assets, the debt is deem'd satisfied, for he has power, by way of retainer, to satisfy the debt; and neither he nor the *Administrator de bonis non, &c.* of the *Obligee* can ever sue the surviving *Obligor*. *Hob. 10.*

15. But if two are bound jointly and severally to *A.* and the executor of one of them makes the *Obligee* his executor; yet the *Obligee* may sue the other *Obligor*. *2 Lev. 73.*

16. And if the *Obligee* makes the executor of the *Obligor* his executor, this is no release or discharge of the debt, and that especially if he had fully administered the goods of the *Obligor* so that he may sue the surviving *Obligor*, for he has this debt in *Autor droit*. *W. Jones 345. Hob. 128.*

17. If a man seised in fee makes a lease for years, rendering rent, and enters upon the *Lessee*, and makes a Feoffment; the *Lessee*

On Actions of Debt.

Lessee enters upon the *Feoffee*, the rent shall not be extinguished. 1 *And.* 4.

18. If an *Executor* proves the will, and dies intestate, tho' his *Administrator* cannot be *Executor* to the first testator; yet in that case the debtor being made executor, the debt is so far extinguished, that tho' the *Administrator* cannot continue the executorship, yet that inability will not revive the debt. *Salk.* 309.

19. Yet where a debtor is made executor, the debt is assets; for in that case the debt is extinguished not by way of *Release*, but by way of *Legacy*. *Salk.* 303.

20. If the *Executrix* of the *Obligee* marries the *Obligor*, that is no extinguishment of the debt; but otherwise if the *Obligee* herself marries the *Obligor*. *Salk.* 305, 6. 8 *Cro.* 114.

21. If the *Obligee* grants to the *Obligor* not to sue him or molest him upon the bond before such a day, this is no *Release*; but it shall be taken only as a covenant; if it had been never to sue him upon the bond, it seems it had been a *Release*.

22. Administration granted by the ordinary is no *Release* or extinguishment of the debt, by its being made to the *Obligor*. 8 *Co.* 136. 1 *Keb.* 313.

* 23. If one had a rent-charge out of the lands of *A.* and devised to *A.* this rent-charge for years, the remainder over; *Quare* if the rent-charge is extinguished. *Dy.* 140. (P* 272)

24. If a debt is due by simple contract or on a promise, and the debtor gives a bond for it, this extinguishes the *Debt*; otherwise of a debt due for *Rent*. 2 *Vent.* 184.

25. If *lessee* for years grants a rent-charge out of his lands to his *Lessor*; the *Lessor* grants the remainder to the *Lessee*, this is an extinguishment of the rent. *Godb.* 137.

26. If the husband of the *Obligee* makes the *Obligor* his executor, it is no extinguishment. 2 *Show.* 247.

27. If a bond is given to a feme with condition to leave her at his death one hundred pounds; and after they intermarry, the debt is not extinguished by reason of the intent of the parties. *Salk.* 326.

28. Where the condition of a bond was for the payment of four hundred pounds yearly, during the life of the *Obligee*, at the feast of *St. Michael* and at *Lady-day*, or within thirty days after every of the said feasts, and the *Obligee* died within the thirty days: The court held, that her death discharged the debt due at the feast before. *Cro. Eliz.* 380. *Price v. Williams.*

Secondly, *By and against whom to be brought.*

1. Where the action lies only for *C.* to whom the money was payable, and not for *C.* and *D.* to whom the promise was made; but otherwise in case of a covenant. 1 *Roll's* 592.

2. For the assignee of a grantee of an annuity *pro Consilio*, &c. *Moor* 5. *Baker v. Brooke.*

3. For

Readings and Observations

3. For the grantee of a term against the assignee, and not the first Lessee. 1 *Brownl.* 56.

4. For the grantee of the reversion after attornment. 1 *Roll's Abr.* 591. *Letter B. pl. 2.* 3 *Cro.* 183.

5. For the successor of a Chamberlain of London, notwithstanding an objection that the action was once suspended. *Cro. Eliz.* 464. *Board v. Windford.*

6. For a Parson against a Vicar for not setting out Tithes. 3 *Cro.* 183. *Beard v. Cudmore.* 3 *Cro.* 35. *Bannister's Case.*

7. It must be observed, that to an action of debt for rent, it is necessary there be a privity in point of contract, or estate in deed or in law, and the rent is incident to the reversion: If a Lessee for years assigns all his interest to another, yet the Lessor may have an action of debt against the Lessee, for the arrears incurred after the assignment, for the privity of contract remains; and the Lessee, by his own act, shall not prevent the remedy of the Lessor against him upon his contract. 3 *Co.* 22.

8. Or if the Lessor will, he may bring the action against the assignee. 4 *Legn.* 17. 3 *Co.* 24. *b.* and that is by reason of the privity of estate; but if the Lessor accepts the rent from the assignee, he shall not after charge the Lessee for rent due after the assignments 3 *Co.* 24. *b.* *Marrow v. Turpin.* *Moor* 600. *pl.* 829. *Cro. Eliz.* 715. 2 *And.* 133. 1 *Syd.* 402. For by acceptance of the rent, he hath determined that election he had of suing either the Lessee or the Assignee.

9. And in the acceptance of the rent from the assignee, it is implied that he had notice of the assignment. *Cro. Jac.* 334. *March v. Brace.* 2 *Bul.* 152, 153. 2 *Roll's Rep.* 366.

10. And tho' the Lessor at first refuses to accept the assignee for a tenant, yet he may afterwards charge him in an action for the rent if he pleases. 2 *Saund.* 181. *Devereux v. Barlow.* *Moor* 351.

(P*273) * 11. Cases, whether it lay against executors after an assignment, very much clash as to the point: The case of *Marrow and Turpin* was, an action of debt was brought against the defendant as administrator of *G. Turpin*, upon a lease for years made to the Intestate for rent incurred after his death; and the defendant pleads, that before the rent incurred he assigned over the term to an Estranger, who enter'd, and the plaintiff knowing of that grant, afterwards accepted rent from the Stranger; and it was resolved, that the defendant was not chargeable; for if he sells the term for the payment of debts, it is not reasonable he should still be chargeable with the rent: And the case of *Walker v. Harris* in 3 *Co.* was denied to be law by *Andersson Walmsley*, and *Glanwill.* *Cro. Eliz.* 715. *Moor* 600.

12. But then in 1 *Sid.* 266. where the Lessee for years made his executor and died, and assigned over his term; and the Lessor brought an action of debt against the executor, for the rent that incurred after the assignment; it was adjudged that the

On Actions of Debt.

of *March* then next; and if they make no Award, then if the Umpire makes his Umpirage on the same day, it was resolved that the Umpire could not make his Umpirage on the Twenty-seventh of *March*, the arbitrators having all that day to make their Award. 2. *Vern.* 100.

6. But this difference is to be understood, when the Umpire is named by the submission, the Umpire can by no means make his Umpirage; because there would then be two concurrent jurisdictions of one and the same thing. 1 *Salk.* 71.

7. But when he is to be named by the arbitrators, he may make his Umpirage on the same day limited to the arbitrators, and it will be good; because they had determined their power before by chusing an Umpire. 1 *Lev.* 174. 1 *Salk.* 72.

8. Where an Award was set aside, the Umpire being chosen by the arbitrators in a ludicrous manner. 2 *Vern.* 285.

(P*263)

And for other Cases relating to this particular, see

Roll's Abr. 261, 262.

Bulstr. 184.

Lev. 285.

Sid. 428.

Saund. 133.

1 *Lutt.* 544.

1 *Salk.* 71.

2 *Mod.* 168.

2 *Ven.* 113.

T. Jones 168.

Sixthly, Of Awards.

As an Award is *quasi* a judgment, and is supposed to be the partial decision of the Judge, (that is, the arbitrator) relating to the matters in variance between the parties, in order to make them friends, and put an end to strife, pursuant to an authority given him by the submission for that purpose; from hence follows, That Awards must be

1st, Made according to the Submission, with Respect to the matters submitted, and the persons submitting.

2ndly, The Award ought to be certain.

3rdly, It ought to be final.

4thly, What is awarded to be done, ought to be beneficial to the party.

5thly, It ought to be lawful, reasonable, and possible.

6thly, That an Award must be made according to the submission as to the Matters submitted.

Hen. 6. 40. b. 19 *Hen.* 6. 39. b. 9 *Ed.* 4. 44. a. 19 *Ed.*

a. 7 & 8 *Eliz.* Dy. 242. b. 10 *Co.* 57. 36 *Hen.* 6.

b. *Co. Litt.* 285. 8 *Hen.* 6. 18. b. 9 *Ed.* 4. 44. 17 *Ed.*

Vol. II.

Y

4. a.

Readings and Observations

4. *a.* 9 *Co.* 79. *Keilw.* 99. *Stile* 170. 3 *Bulstr.* 311. *Cro. Jac.* 639, 640. 1 *Roll's Abr.* 342, 246. *Moor* 3. pl. 8. *Hardr.* 45, 399. 2 *Saund.* 190. *Cro. Jac.* 400. 1 *Roll's Abr.* 243, 257. 1 *Lev.* 133. 6 *Mod.* 221, 222. 1 *Salk.* 76.

1. That an Award must be made according to the submission with respect to the persons submitting, are the following cases in point.

1 *Roll's Abr.* 241, 261. *Stiles* 471. 1 *Lev.* 139, 140. *Cro. Car.* 433. 10 *Co.* 131. *b.* *Osborn's Case.* *Hardr.* 399. 3 *Lev.* 17. *Bendl.* 167. *Cartberw* 412.

2. In some cases, it is true, that if an Award appoints a thing to be done by a stranger, it is void in the whole; and in some cases void only as to that part which relates to the stranger, and good for the rest, and a difference is taken in the books where the stranger is to do only a ministerial act and where a judicial act; concerning which see the following cases.

17 *Ed.* 4. 5. 10 *Co.* 131. 1 *Roll's Abr.* 242, 244, 247, 248, 251. 1 *Leor.* 304. *Godb.* 165. 2 *Roll's Rep.* 46. 1 *Ed.* 4. 23. 2 *Lev.* 6. 235. 19 *E.* 4. 1. *Palm.* 147. *Cro. Eliz.* 726. *Cro. Jac.* 315. 1 *Sid.* 258. 8 *Ed.* 4. 11. 39 *H.* 6. 10.

3. And in some cases an Award which directs somewhat to be done to a stranger, is good; and in some cases not: If the arbitrators award that one of the parties shall do an act to a stranger, as to make a Feoffment or such like, such Award is void. 22 *H.* 6. 46. *b.* 17 *Ed.* 4. 23. *a.* 19 *Ed.* 4. 1. *b.* 5 *H.* 7. 12. *Danv. Abr.* 520, 521.

4. If an Award is made to pay a certain sum of money to a stranger, who is not in the Award, such Award is void. 10 *Co.* 131. And for other cases relating to this particular, see 1 *Roll's Abr.* 243, 247. 3 *Lev.* 62. *New Dy.* 242. 1 *Salk.* 71, 72. *Cro. Eliz.* 758. 1 *Sid.* 12.

(P*264) * 5 Other cases where the Award hath been said to be agreeable to the submission, and where not.

39 *H.* 6. 11. *b.* 12. *Yelv.* 203. *Cro. Jac.* 216, 352, 353, 340, 399. 1 *Roll's Abr.* 242, 294, 250, 251, 254, 257, 258, 252, 260. 2 *Brown.* 137. *Cro. Eliz.* 66. *Poph.* 134. *Mod.* 85, 86. 2 *Mod.* 169, 170. 3 *Lev.* 88. 2 *Lev.* 3. 2 *Cro.* 278, 577. 2 *Mod.* 77. 1 *Bulstr.* 110. 3 *Mod.* 330, 331. *Bulst.* 311, 319. 1 *Salk.* 75, 76.

6. How Awards are to be made. See *Danv. Abr.* 524, 525, 526, 527, 528, 529, 530, 531, 532, 533.

7. What shall be an Award of all, and what not. 53 *H.* 6. 10. 535.

8. The courts of law and equity have made a distinction where the submission to an Award be conditional, viz. So that the Award be made of the premisses, and where there have been such words that import such a condition; for in the first case the Award must be made of all matters that the arbitrators have

On Actions of Debt.

tion would lie, against the opinion of *Overton* and *Sydall's* case, reported in *Walker's* case, 3 Co. 24. And the reason of their judgment, that the executor shall be charged for rent incurred after his assignment was, on the privity of contract of the testator; for as an executor shall be charged for other contracts made by the testator, so long as he hath assets, so ought he to be charged here.

13. Agreeable to this in 3 Mod. 326 an action of debt was brought against the defendant as administrator; the defendant pleaded, that before the rent became due he assigned the term, and that the plaintiff had notice of the assignment before the action; and judgment was given by the opinion of the whole court for the plaintiff, against the authority of *Overton* and *Sydall's* case, where a prebendary leased for years rendering rent, and this was confirmed by the dean and chapter; and the Lessee died, and his executor assigned over the term; and after the prebendary resigned, and a new prebendary was made, it was held the successor shall not have this action against the executor of the first Lessee for rent due after the assignment, for the successor was no party to the contract, but only privy in law; and by the assignment of the term, the cause of the charge is removed. *Cro. Eliz.* 555.

14. My Lord *Coke*, mentioning this case in his third report, affirms, that it was resolved by *Popham* chief justice, and the whole court, that if an executor of a Lessee for years assign his interest, debt will not lie against him for rent due after such an assignment: But my Lord *Popham* himself, in reporting that very case, tells us he was of another opinion, which was, that so long as the covenant in the lease hath the nature and essence of a contract, it shall bind the executor of the Lessee, who, as well to that as to many other purposes, represents the person of the testator, and is privy to his contracts.

15. 'Tis true, my Lord *Popham* held in that case that the action did not lie; but because it was brought by the successor of a prebendary upon a lease made by him in his life-time, who being a single corporation, the personal contract was determined by his death.

16. But the same case, reported by others, is said not to be adjudged, for the court was divided in opinion.

17. The case of *Manwood* and *Turpin* is the same; but there the defendant pleaded the acceptance of the rent after the assignment, which was not done here.

18. Now if both these cases should be admitted to be law, and parallel with this, yet the later resolutions have been quite contrary; for 'tis now held, and with great reason, that the privity of contract of the testator is not determined by his death, but that his executor shall be charged with all contracts so long as he hath assets; and therefore such executor shall not discharge himself by making of an * assignment, but shall still be (P*274) liable

Readings and Observations

liable for what rent shall accrue after he hath assigned his interest; nay, if the testator himself had assigned the term in his lifetime, yet his executor shall be charged in the *Detinet* so long as he hath assets.

19. *A.* seised of lands in fee, demised to the defendant for twenty-one years, rendering rent during the term, and then grants the rent only without the reversion to the plaintiff and his assigns, during the term; and the defendant attorns, and for rent in arrear the plaintiff brings an action of debt; and on *Nil debet* pleaded, it was found for the plaintiff; and it was moved in arrest of judgment, that the action would not lie for want of privity; the court was divided, and no judgment was given. *Raym.* 11, 12.

20. It was adjudged, that if the *Lessee* for years assigns his term, an action of debt will lie against the *Lessee* for the rent by the *Lessor* or his *Heir*; but if the *Lessee* assigns his term, and the *Lessor* the reversion, the privity is determined, and an action of debt will not lie for the grantee of the reversion against the first *Lessee*. *Moor* 351. *Walker v. Harris.*

21. An action of debt for the arrears of rent ought to be brought against all the tenants that are liable. 1 *Saund.* 284.

22. But if brought for the arrears of a rent only against some of the persons of the profits, and not against all, no advantage can be taken of it, unless it be by pleading. 1 *Saund.* 284.

23. Where the action was held not to lie against an assignee after acceptance of the rent by the lessor. 2 *Bulstr.* 151. *March v. Brace.*

24. Where it was held to lie against a parishioner upon his covenant to pay his proportion of the charges of a suit brought by the Vicar against the plaintiff. 3 *Lev.* 429. *Sanders v. Murke.*

By Husband and Wife.

1. If a *Man* is bound to *Husband* and *Wife* by a bond, 'tis said the *Husband* alone shall have the action. 3 *H.* 6. 37. or it may be in both their names. 39 *Ed.* 3. 5. 43 *Ed.* 3. 10. 3 *H.* 6. 37. 16 *Ed.* 4. 8.

2. And an action of debt may be brought by the *Husband* for debt, damages and costs, recovered by both. *Cro. Eliz.* 844. *Butler v. Debt.*

3. Where the *Husband* shall have the arrears incurred during the coverture. 1 *Roll's Abr.* 345. *Letter H.* pl. 4. and by the statute for the arrears of the rent incurred before the coverture, which at common law he could not; so of tenant in dower of a rent. *Fitz. Nat. Brev.* 121. 14 *H.* 6. 26. 26 *Ed.* 3. 64. 5 *Co.* 51.

4. Where *Husband* shall not have a bond made to his wife, without taking out administration to the *Wife*, because it is a *Chese in Action.* *Co. Litt.* 120.

5. Where

In Actions of Debt.

5. Where the husband's executor, and not the wife, shall have the action against a receiver; because this was a chattel, and a duty vested in the husband by the receipt. 1 Roll's Abr. 350. Letter D. pl. 6.

6. Where the wife shall have the residue of a rent, and also the arrears in a writ of annuity, because they participate of the nature of the principal, and the executor of the husband shall not have the arrears. Ibid. pl. 8.

7. Where the husband shall have an action of debt for the arrears of an annuity, because it is more than a bare chose in action, but not for a bare chose in action before the coverture, and why. Fitz. Nat. Brev. 121. 39 H. 6. 26.

8. Where the wife shall have an action for the arrears during the coverture. 1 Roll's Abr. 350. Letter D. pl. 4.

9.* Where she, and not the executors of the husband, shall have an action for the arrears incurred during the coverture. Ibid. Pl. [P* 275]

3.

10. If a Woman lets lands at will, rendering rent and marries and rent is in arrear, they may join in this action. 5 Co. 10.

11. The husband alone may bring an action for rent, because grounded upon the duty, and not upon the nature of their estate; and there is no difference where husband and wife are joint lessors, nor where they were joint purchasers. Nooth v. Wiard. 2 Bulst. 233, 234. But quære, whether the action may not be brought by the husband and wife joint. 1 Bulst. 21. Litt. Rep. 13. Palm. 207. 2 Bulst. 234. 1 Roll's Rep. 52.

12. Where it hath been said that the wife must have joined if the term had continued. 2 Bulst. 234. 1 Roll's Rep. 52.

13. The husband and wife may join in an action of debt for not setting out tithes, if the husband be seised or possessed of the rectory in right of the wife, or in jointure with her. Moor 912. Wentworth v. Crispe. W. Jones 325. Cro. Eliz. 608, 613.

14. Where a bond was made to a feme sole, and she marries and dies, and J. S. takes out administration, it is no plea to say, that she was married, and that the debt became due to the husband. Stiles 104. Cowley v. Lockton.

15. Where the obligor makes a feme executrix, and dies, the administration of the wife must not bring the action without taking out administration de bonis non of the testator. Stiles 225. Ley v. Anderton.

16. Where J. S. made his wife executrix, and died, and J. D. a debtor to him married the wife, and J. D. made his executor, and died; and a creditor of J. S. sued the wife as executrix: it was held that the wife might have an action against the executor of her husband. 1 Leon. 320. Crossman v. Read.

VOL. II.

Z

Against

Readings and Observations.

Against Husband and Wife.

1. An action of debt for rent, upon a lease for years made to Baron and feme ought to be brought against both. 1 Roll's Abr. 348. Pl. 1. Letter X, but it had been doubted in 2 Hen. 4. 19. b.

2. But 43 Ed. 3. 11. is, that it lies against both, because it is for the benefit of the feme. Ibid. Pl. 2. sed Quære.

3. the same law where it is brought upon a lease for life made to them, the action shall be brought against both. Ibid. Pl. 3.

4. If baron and feme accept a fine rendering rent; if the agrees to the estate after the death of the baron, she shall be charged with the rent. 1 Roll's Abr. 349. Letter Z. Pl. 1.

5. If lease for years be made to baron and feme, rendering rent, after the death of the baron; if the feme agrees to the lease, debt lies against her for all the arrearages incurred in the life of the baron. Ibid. Pl. 2.

6. If a feme sole binds herself in an obligation, and takes husband, the baron shall be charged for this during her life. 1 Roll's Abr. 351. Letter F. Pl. 1.

7. If a feme be indebted to another, and takes husband and dies, the baron shall not be charged in debt for this after the death of the feme because this was but a chose in action. 1 Roll's Abr. 351. Pl. 2.

8. If a feme lessee for life, rendering rent, take husband and dies, the baron shall be charged in an action of debt for the rent incurred during the coverture, because he took the profits out of which the rent ought to issue. 1 Roll's Abr. 351. Letter G. Pl. 1. Ray. 6.

[P* 267] 9. *If A. takes B. an executrix to wife, against whom an action of debt is afterwards brought as executors, and judgment given against them to recover de bonis testatoris, and thereupon a fieri facias issues to levy the debt and damages; and the sheriff thereupon returns a devastavit, and after the feme dies; whether execution upon this judgment may be sued against the baron, there not being any judgment upon the return of the devastavit to recover de bonis propriis. 9 Car. B.R. between Trotman and James, Tr. 9. Rol. 715. 1 Roll's Abr. 351. Pl. 5.

10. If there be a judgment in debt against a feme sole, and she marries and dies, the baron shall not be charged therewith, for he is not liable to her debts before coverture, unless recovered in her lifetime. Letter G. Pl. 2.

11. But where a judgment in debt upon a bond against a feme sole, and she marries, and after upon a second scire facias against the baron and feme, and nibils returned, judgment is thereupon had against the baron and feme, and so it rests for a year and a day.

In Actions of Debt.

day; and then the wife dies, a scire facias will lie against the baron, to shew cause why execution should not go against him upon the first judgment, for the award of execution was absolute against the baron and feme; and so it became his debt; whereas before it was only the debt of the wife. Hill. 3 Jac. between Obrian and Ram. 1 Roll's Abr. 351. Pl. 7. and 3 Mod. 186, &c. adjudged upon a writ of error upon a judgment in Ireland, and that judgment affirmed accordingly.

12. An action of debt for rent was brought against the husband upon a lease made to the wife dum sola, and the term expired and the wife died; and it was adjudged, that the action will lie against the husband, in respect of his receiving the profits, and therefore shall be chargeable; and not like the case of a bond entered into by the wife before marriage, and not sued for till after her death. 1 Lev. 25. Vane v. Minshall. Raym. 6 reported by the name of Paine v. Minshall.

13. Where an action was held to lie against husband and wife suggesting a devastavit. Lut, 671. Baron & al' v. Barkley.

Where by the Heir.

1. The executor and not the heir shall have an action for a debt due to his ancestor. Fitz. New Natura Brev. 277.

2. Nor shall the heir have an action of debt, living the executors, tho' the obligor is bound to the obligee and his heirs; nor shall he have detinue for a deed bailed by his father.

3. But it is said, that if the ordinary does not grant administration, the heir may have an action of debt. 19 H. 6. 4. 48 Ed. 3. 12.

4. Where the grantee shall have an action of debt for the penalty, and his heir after his death; because it is an inheritance, and may continue. Fitz. New Natura Brev. 276.

5. Where the heir or executor shall have an action for rent. Cro. Eliz. 575. Pilkington v. Dalton.

Where against the Heir.

1. This action will lie against an heir upon a specialty made by his ancestor, whereby the ancestor bound his heirs by name, otherwise not, nor unless he hath lands in fee simple from the ancestor. Fitz. New Natura Brev. 277.

2. See a special judgment against the heir on a nil dicit. Dyer 344. and when it lies against the executors of the heir, if the eldest son enters after the death of the father, and dies, an action of debt lies* against the younger son as heir to the father. Dyer 365. [P* 277] see Fitz. New Natura Brev. 277. the Lord Hale's notes in the Margin.

3. A. seised of one acre at common law, and three acres in gavelkind, obliges himself and his heirs by bond to B. and

Readings and Observations

dies, having three sons, C. D. and E. E. aliens his purparty; B. brings an action of debt against C. and D. and pending the writ repurchases: If the eldest son had not affets at common law, it seems of necessity that the writ ought to be against all of them. 11 H. 7. 12. 38 H. 6. 22. and so of a *vouchee*, for they are in *eodem gradu*: If the elder took by descent at common law, it seems that he shall be charged sole; *Quære de hoc*, for thereby his purparty in gavelkind would be also liable; and therefore adjudged 11 E. 3. Det. 27. contra; but where he has affets at common law, see 38 E. 3. 22. it seems there may be one action against them, and several counts, viz. against E. as heir general, and against C. and D. as heirs by gavelkind; for if he does not count severally, he shall not have execution but of the lands in gavelkind; *Quære* 11 E. 3. Det. 7. and so in case of Voucher 4 E. 3. 55. per Will: the writ ought to be against C. D. and E. though E. has nothing; but if C. had affets at common law, and D. and E. nothing, it should be brought against C. alone; but if the writ had been against all, seeing E. had nothing, the whole should have been levied on the others. 11 E. 3. 7. 6 E. 3. 50. Although the heir aliens and re-purchases before, or pending the writ, he is yet liable. 26 Hen. 8. 1. 27 E. 3. 82. 10 E. 3. 15. Adjudged 19 H. 6. 48 E. 3. 32. 40 E. 3. 10. if the writ were brought against the elder son only, and pending that the land in gavelkind had descended to him and the other, the writ should abate, per Shard. 11 E. 3. Debt 7. See 11 H. 7. 12. if A. seised of land on the part of his father, binds himself, and dies without issue, several actions may be brought against the several heirs, but only one execution: *Quære*, and note, it seems that by the repurchase he shall abate the writ against the elder only. Dyer 230 and 204. Debt was against three heirs in gavelkind, they were outlawed, and two purchase a charter of pardon, they shall not plead nonage of the third because he is out of court, but must answer alone. Dyer 224. See where the heir shall have debt on an obligation to his ancestor. 49 Ass. 4. See debt by the heir on an obligation made to his father and his heirs. The defendant pleads a release by the father's executors, but was forced to answer to the deed of his father. 14 E. 3. See 19 Hen. 6. 41. a difference between debt and detinue by the heir. See 14 E. 3. Det. 135, 139, 140. Fitz. New Natura Brev. 278. Lord Hale's notes in the margin.

4. In some cases the heir of the grantor shall be chargeable, though the grantor himself was not: as if A. grants an annuity to B. for years, to have and to hold to the grantee and his heirs, after the death of A. the grantor, and grants for himself and his heirs for the payment thereof; there although A. himself never can be charged upon that grant, inasmuch as it is not to be paid till after his death; yet as he hath bound himself and his heirs, his heir shall be charged if he hath affets; as

well

In Actions of Debt.

well as where a man binds himself, and his heirs, to pay money after his death.

5. But if a man grants an annuity, and charges only the heir with the payment, this is a void grant. 2 Roll's Abr. fol. 70. Letter A. pl. 1, 2. Hob. 174.

6. A man makes a feoffment of a manor, &c. *excepting and reserving Blackacre and Whiteacre* to himself for life, *habendum except before excepted*, to the use of A. in tail: it is held, that here was no limitation of the use of the two acres, but they resulted and descended to the heir, and are assets, whereby he is liable to the bond of A. his ancestor. *Wilson v. Armorer.* 1 Lev. 287.

7. Where the heir shall be bound by the bond of his ancestor; and see a difference where the condition contains a duty vested in the obligee, and where it is to do a collateral act. *Ray.* 415. [P* 278] *Joyner v. Viner.*

8. Where the heir shall be liable, as if it were his own debt upon *riens per descensum*, being pleaded by him. 3 Leon. 64. *Hind v. Lyon.*

By Executors or Administrators.

1. The executors of a lord of a manor may have an action of debt for relief; but quære if the lord can. *Dal.* 17.

2. An action of debt may be brought either against the heir of a debtor, or against his executor, at the election of the creditor. 1 And. 7.

3. An executor recovered in an action of debt, and died intestate, the ordinary commits the administration *de bonis non*, the administrator shall not have a *scire facias* upon the judgment, but a new writ in an action of debt, as administrator to the first testator, who is now dead intestate: but if administration of both be committed to any person, quære if a *scire facias* lies. *Moor* 4. *Levet v. Lewknor.*

4. An action of debt was brought by executors: the plaintiffs declare, that their testator was seised for another's life of tithes, and demised them to the defendant for years, rendering rent; and for four hundred pounds in arrear they brought an action: the opinion of the court is said to be, that the executors shall not have this rent, because it appertains to the reversion. *Raym.* 18. *Tippin v. Grover.*

5. Where an action is brought by executors, all of them, although some are within age, ought to be named in the bill or writ; and those that are of age, may make an attorney for those that are under age. 2 Saund. 213.

6. Where an administrator obtains judgment, and sues out an execution for a debt or duty due to the intestate; and afterwards administration is repealed, the defendant shall be discharged.

Readings and Observations

charged as against such administration, and be liable to the new administrator in a new action. 2 Saund. 149, 150.

7. A lease was made for life, and afterwards for ninety-nine years, after the death of the lessee for life, if the lessee for years should so long live; and if he died within the term, the lessor granted that the lands should remain to his executors and assigns for twenty-one years, after the death of the survivor of both the lessees; the lessee for ninety-nine years assigned the lease for twenty-one years, rendering rent, and died intestate, having survived the lessee for life; and his administrator brought an action of debt against assignee or lessee of the term of twenty-one years for the rent; and it was adjudged that the action did not lie, because the executors and assigns came to the lands by way of purchase, and it never was in the intestate himself to grant or dispose of, and there is no executor or assignee to take; for if a lease be made to such a person as J. S. shall appoint, that is void for the incertainty of the person of the lessee; but otherwise it is if a lease be made to J. S. for so many years as another shall name, and an administrator cannot take a thing limited in purchase to an executor. Moor 666. Spark v. Spark.

8. This case is reported in Cro. Eliz. 666. and there it is said, that it was adjudged by all the justices of the common pleas, that this term was vested in the lessee, and that his administrator should have it, and it would be assets, and that it would go to his executors or administrators as assignees in law, and as a thing which came to them from the testator, and not as a purchase from themselves: for justice Walmisley said, that if these two terms had been in two clauses, there is no doubt but that it would have vested in the lessee; as if it had been *habendum* for eighty years, if he live so long, and for forty years after his [P* 279] decease to his executors; but it is here devised to the lessee for eighty years, if he live so long, remainder to his executors for forty years; yet notwithstanding it is all one, and the executor shall have it as executor, and it shall be assets.

9. This case in Moor, which is there reported in 44 & 45 Eliz. is reported in 1 Cro. 840. Hill. 43 Eliz. Roll. 503. and no resolution given; but the court then agreed, that this term for forty years did not vest in the lessee, but in the executor by purchase; this case is likewise reported in Yelv. 9. 1 Roll. 603, 916. upon a special verdict in ejectment.

10. If a tenant for life makes a lease for years, if the tenant for life shall so long live, and the rent is reserved annually, but to be paid quarterly at four feasts, or within thirteen weeks after every of the said feasts; and the tenant for life dies after one of the said feasts, and before the thirteen weeks expire, whether the rent be due at the feast, or not till thirteen weeks after.

Quære 2 Cro. 309.

In Actions of Debt.

11. And if the ancestor makes such a lease, and dies after Michaelmas, and before the end of the thirteen weeks, whether the rent shall go to the heir or to the executor; and if the lessor doth release all actions and demands after Michaelmas, and before the thirteen weeks expire, whether the rent be released. See the case above, and 10 Co. 128. b. 3 Cro. 575. Cro. Jac. 288, 233. Co. Litt. 262.

12. That an administrator may have an action of debt for an escape, in the life of the intestate. Stiles 32. Boomer v. Payte.

13. Where money is awarded, and not paid to his executor, yet it shall go to them, and they may have the action. 2 Ven. 249. Dawney v. Vesey.

14. Where a deed is to pay an apprentice so much when he is out of his time, and he dies within the time, the executor cannot sue upon the bond. Godb. 153. Pl. 199.

15. If twenty pounds is conditioned to be paid, and there is no mention to whom, the executors may bring the action, and so he might if it had been to pay the money to the obligee's assignee. 1 Bro. 77. Peace v. Stilman.

16. That an action of debt lieth for an executor for not setting out tithes. 2. Keb. 502. Moreton v. Hopkins.

17. A rent was granted to the husband and wife for their lives, and the rent came in arrear, and the husband died, and afterwards more rent was in arrear; then the wife died intestate: It was held, that the action might be brought by her administrator for the arrears due in the life-time of the husband and after, because the arrears survived to the wife, as well as the rent itself. Cro. Eliz. 791. Temple v. Temple.

Where against Executors or Administrators.

1. An action of debt for rent reserved upon a lease to the intestate incurred after his death; the administrator pleaded, confessing the lease, the death of the intestate, and that administration was granted to her; but that before the rent became due she assigned over the lease, that the plaintiff had notice of the assignment before the action brought, and no mention of any acceptance; the court held against the resolution in Overton and Sydall's case, Cro. Eliz. 555. and Marwood v. Turpin, Cro. Eliz. 715.

That the privity of contract of the testator is not determined by his death, but that his executor shall be charged with all his contracts so long as he hath assets; and therefore such executor shall not discharge himself by making an assignment, but shall still be liable for the rent that shall incur after the assignment of his interest in the detinet, so long as he hath assets. 3 Mod. 326. Coghill v. Freelove. [P^a 280]

2. And it lies upon a lease expired in the testator's life-time, and it is to be preferred before a bond, because it favours of the reality,

Readings and Observations

realty, and the determination of the lease made no alteration in the contract. 4 Mod. 44. *Newport v. Godfrey*.

3. In a special verdict the case was, viz. A. being tenant in fee of lands, demised the same to B. for seven years; B. redemises the same lands to A. for the said term of seven years, reserving twenty pounds rent per annum: A. dies, his wife enters as guardian to the heir of A. her son, and receives the profits; B. brings debt against her as executrix de son tort in the debt and detinet; and whether this action would lie, or not, was the question. Serjeant Pemberton did not doubt but that debt would lie upon the contract, where the whole term was assigned, and that there may be an executor de son tort of a term; but he said, that which was the principal point in the case, was not stirred: The question was, Whether an action of debt will lie against the defendant as executor de son tort, where there is no term at all; for 'tis plain there was none in being in this case, because when the lessee redemised his whole term to the lessor, that was a surrender in law, and as fully as if it had been actually surrendered; and therefore this is quite different from the case where lessee for years makes an assignment of his whole term to a stranger, debt will lie upon the contract there, because an interest passes to him in reversion; and as to this purpose, a term is in esse by the contract of the parties; and so it would here against the first lessor, who was lessee upon the redemise; but now because of the surrender the heir is entitled to enter, and the mother who is the defendant, enters in his right as guardian, which she may lawfully do.

4. If therefore debt only lies upon the contract of the testator, as in truth it doth where the whole term is gone, the plaintiff cannot charge any one as executor de son tort in the debt and detinet. 2 Mod. 174. *Lloyd v. Langford*.

5. Where payment by an executor hath been adjudged a devastavit, so as to make him chargeable. Moor 752.

6. Where the executors gave a bond for money, which the testator was bound by his bond to pay; it was held that the executor might retain so much in his hands, as if he had actually paid the money. Moor 260. *Stamp v. Hutchins*.

7. When executors and administrators shall be chargeable out of their own goods by reason of a plea found against them.—Moor 69.

8. What hath been construed assets in the hands of an administrator. Moor 236. *Crossman v. Read*.

9. Where the action was held to lie against an executor upon the statute of ministers for the fifths. Raym. 57. *Hole v. Bradford*.

10. Where a bond is made by the testator to A. and B. in trust for C. for the payment of three thousand pounds to C. and C. is made executor to the testator; whether she can retain in her hands

In Actions of Debt.

hands so much money, and plead it, and that she hath not assets ultra. Raym. 483. Roskelle v. Godolphin.

11. What shall be intended by the words in an inquisition returned by the sheriff, that the executors have sold and disposed of the goods and chattels of the testator. 2 Saund. 403.

12. If it be found that the executors have sold, &c. they shall be charged of their own proper goods, though there be no devastavit. 2 Saund. 403.

13. Where it was adjudged that an action would not lie against an administrator upon a simple contract of the intestate. Cro. Eliz. 121. Hewson v. Webb.

14.*Whether an action lies against an executor upon a *Concessit* [P* 281] *solvere*. Stiles 139. Hodges v. Jane.

15. An action will lie for an executor against an executor, suggesting a devastavit in the life of the plaintiff's testator. 6 Mod. 125. Berwick v. Andrews.

16. Whether an action of debt will lie against an administrator on an award. Cro. Eliz. 600. Boyer v. Garland.

17. The like against an executor. Hampton v. Boyer. Cro. Eliz. 557.

18. Where the action was held to lie for an executor against an executor of an heir, who was to pay a relief. Cro. Eliz. 833. Lord St. John v. Bandring.

19. An administrator of a rightful executor shall be liable to a devastavit. 3. Mod. 114.

20. An administrator may be sued *pendente lite* of the legality of the will. 2 Show. 69. Impe v. Pit.

21. Whether a feme executrix is chargeable by a waste by husband and wife. 3 Keb. 602. Hony v. Daniel.

As to the power of Executors and Administrators relating to this action.

1. An executor of his own wrong may retain goods to satisfy himself. Cro. Eliz. 630. and where an executor may retain. 1 Leon. 111.

2. See whether an administrator may retain assets to pay the intestate's bond, in which the administrator was an obligor.—Godb. 149. Pl. 194.

3. If an executor releases a debt, he cannot afterwards renounce. 2 Brown. 58. Wickenden v. Thomas.

4. The authority of an administrator, during the minority of an infant, is not determined by the infant's arrival at his proper age, to take upon him the administration, so as to discharge the defendant in an execution at the suit of the administrator out of execution. Godb. 104. Pl. 122.

5. See what shall be construed the minority of an executor. 2 Brow. 247. Bromehead v. Rogers.

6. An

Readings and Observations

6. An executor of an executor shall not be chargeable for a devastavit of the first executor. 3 Leon. 241. Tucke's case.

7. If an executor hath goods of a testator, and he with his own money pays the testator's debts, the property of the goods so far are vested in the executor. 2 Leon. 31.

8. If one makes another executor, and a stranger takes the goods, but does no act which concerns the office of an executor, as paying debts or such like; the bare meddling with the goods does not make him executor of his own wrong, but he is a trespasser to him who is the rightful executor. 3 Leon. 57.

9. Where it was said that an executor cannot waive the term. Yelv. 103. Howse v. Webster.

10. Where it was adjudged an executor may not retain. 2 Mod. 51.

11. An executor ought to pay rent before bonds, tho' the lease be expired. 4 Mod. 44. Newport v. Godfrey.

12. Whether the ordinary can revoke the administration. 2 Keb. 12. Pierce v. Parks.

13. The ordinary may appoint a curator of the personal estate, but cannot make a guardian of the body or land; and a bond given by such guardian is void. 3 Keb. 611.

[P* 282]

*Of Affets.

1. Upon a special verdict in an action of debt the case was, That a woman executrix married the testator's debtor, and the husband died, and an action was brought against the woman, who pleaded *plene administravit*; and the question was, whether the debt due to her as executrix was affets: And it was adjudged that this debt was not affets, for by the marriage the debt, which the executrix had in another's right, was not extinguished but suspended; and the action was revived against the executors of the husband. Cro. Eliz. 114.

2 Where an executor pleaded that he had nothing in his hands but certain goods distrained and impounded, it was adjudged no affets to charge him. Cro. Eliz. 23.

3. What was affets in the hands of the heir upon *riens per assent* pleaded. 2 Mod. 286. Brittain v. Charnock.

Other Cases concerning Affets.

Godb. 29. Pl. 39. Kitley's case.

Cro. Eliz. 405. Wilcocks v. Watson.

2 Cro. 55. Richardson v. Dewell.

3 Cro. 161. Gilfil v. ———

4 Leon. 102. Keighley v. Keigh.

1 Leon. 87. ———

4 Leon. 82. Jermy's case.

2 Leon. 119. Gearing's case.

1 Leon. 224. Alexander v. Gresham.

3 Mod. 257. ———

2 Keb. 841. Lawrence v. Beverleigh.

is t
Bre
2
and
v. L
3
4
with
Kin
5
net,
spec
6.
bond
cred
ecut
to a
had
the r
oblig
Harr
7.
8.
verdi
verit
been
tator
charg
9.
upon
bar, l
* 10.
husba
able f
Rep. 2
11.
the w
life of
12.
goods
of adn
ther, a
by Co
devasta

In Actions of Debt.

Of a Devastavit.

1. If an executor pays a debt due by bond or a statute, which is but a pocket record before a judgment, 'tis a devastavit. 2 Brow. 81. Bearblocke v. Read.

2. Where the executor shall be chargeable *de bonis propriis*, and what hath been construed a devastavit. See Stiles 54. Eels v. Lambert. 3 Cro. 519. 3 Cro. 526. Mounson v. Bourn.

3. What hath been construed not a devastavit. 2 Cro. 271.

4. What hath been construed a devastavit, in husband and wife. 3 Cro. 603. and whether the husband shall be chargeable, Kings v. Hilton & Ux.

5. In an action of debt against an executor, in *debet* and *detinet*, upon a surmise of a *devastavit*, the defendant was held to special bail, and so ruled upon a motion. 1 Ven. 355.

6. If an executor pays a debt upon a simple contract before a bond, of which he has no notice, it is no devastavit; and if the creditor, upon the simple contract, recovers a judgment, the executor may plead that judgment in bar: if an obligor enters into a recognizance, in the nature of a statute, and judgment is had upon the bond, the executor may pay the money due upon the recognizance, having no notice of the judgment against the obligor, and it will be no devastavit. 3 Mod. 115. Harman v. Harman.

7. What shall be deemed a *devastavit*. 3 Keb. 691.

8. If it be returned by a verdict, and found accordingly by the verdict, that the executor *vendit, elongavit & in usum proprium convertit*, to the value of the debt, it is as well as if a devastavit had been returned and found; for if the executor does retain the testator's goods in specie, so as the sheriff cannot levy, he shall be charged *de bonis propriis*. 1 Saund. 307.

9. *Quare* if the releasing a bond by one executor, (an infant) upon payment to him of all that is due in enquiry, though not a bar, be yet a *devastavit* or not. 3 Cro. 490.

10. If a *feme* executrix commits a devastavit, and then takes a husband, tho' no asset comes to the husband, and he is chargeable for the *devastavit* of the wife before the coverture. 1 Roll's Rep. 269. [P* 283]

11. If a recovery is had against husband and wife as executrix, the wife dies, an action of debt, suggesting a *devastavit* in the life of the wife, does not lie against the husband. Lut. 674.

12. Debt is brought against an administrator, he confessed goods in his hands to the value of the debt, but that his letters of administration were lawfully revoked and committed to another, and found by a verdict that the administration was revoked by Covin; if the sheriff cannot levy the debt, he may return a *devastavit*. Yelv. 220,

Readings and Observations

13. The party may have a *scire fieri inquiri*; and if the party appear, he may traverse the devastavit that was returned by the sheriff. 3 Cro. 527.

14. The plaintiff recovered against an executor, and upon the *feri facias* it was returned *devastavit*, the plaintiff may take forth an *elegit de bonis propriis*. Mod. 299.

15. If A. takes goods of the testator before they come to the executor's hands, and agreed between the executor and A. that A. shall pay so much money, and A. does not pay the money, this is a devastavit. Jones, Car. 2. 89.

16. Debt upon a devastavit lies against executors, 1 Saund. 216. not against the executor of an executor, Ven. 292. nor upon a devastavit without judgment. Ven. 315.

17. If an executor pays a debt contracted by usury, it is a devastavit. Noy 129.

18. The sheriff may return a devastavit on the first *fi. fac.* Salk. 310.

19. If judgment is had against an executor, and another action is brought, and he does not plead the judgment, and judgment is had on that action, and a devastavit returned, he cannot give in evidence the first judgment. Ibid.

20. An executor may have an action of debt on a judgment on a devastavit by the testator. Salk. 314.

21. So a *scire facias* against an administrator on a *devastavit* by intestate, he may plead *plene administravit*. 2 Show. 585.

Who are to join in this Action.

1. Where three were bound in a bond by these words, *We bind ourselves and every one of us jointly*, the obligee brought an action of debt against one only; and it was held that the action would not lie, for the word *jointly* made it a joint bond, and the words (every of us) did not make it separate. Moor 260. pl. 47.

2. What hath been construed a joint-bond. 1 Brow. 221. Lut. 696. 2 Bulst. 70. Hankinson v. Sandilans. And when the action to be joint, and when not. W. Jones 203. Cro. Eliz. 720.

3. Where an obligatory bill ran thus; *That the defendant acknowledged to have received four hundred pounds, to be equally divided between A. and B.* and the action was held to be well brought by one alone. 1 Brow. 82. Whormwood v. Shaw; it must be understood for his respective moiety.

4. Where a lessee for thirty years makes a lease for twenty-eight years, rendering rent, and afterwards devises the rent to three several persons, to each an equal part; in this case separate actions will lie against the tenant for each of the devisees. Moor 549.

5. Where

In Actions of Debt.

5. Where tenants in common should join in an action of debt. 1 Brow. 78. Brook v. Smith. 3 Mod. 109.

6. Who are to join in this action. 2 Cro. 191. Foxall v. Corderoy.

7. Who may bring the action for not setting out tithes. 3 (P 284) Cro. 38. Bannister's case.

8. Where that the lord Rich was tenant in tail of part of the reversion, and tenant in fee-simple of the other part; and the counsel would have it, that he ought to have two actions of debt for rent, because he hath two reversions; but it was resolved by all the court, that if a man have a reversion of part in fee-simple, and of the other part in tail, and makes a lease for years, rendering rent, he shall have but one action, both being in the hands of one; but otherwise it had been if the reversion had been in several hands, they should not join in debt: And for that Fenner put this case: two coparceners are of a reversion, and they make partition, now the rent is apportioned, and they shall sever in debt; but if one dies without issue, and the part descends to the other parcener, now he shall have but one action of debt again: and so it is if A. makes a lease of two acres, rendering rent, and after grants the reversion of one acre to J. S. and of the other acre to J. N. now they shall sever in debt for this rent; but if J. S. and J. N. grant their reversion again to the first lessor, he shall have but one action of debt; and so the exception disallowed by all the court, and the judgment given for the plaintiff according to the verdict. 2 Brown. 207.

Thirdly, Where the Action is well bought, and where not.

1. Where this action is brought upon a specialty for less than the whole sum, it must be shewn how the other was discharged. 3 Mod. 41. Marsh v. Cutler.

2. An action of debt upon a penal law ought to be brought in the proper county. 4 Mod. 158.

3. If a man brings an action of debt upon a judgment, the action must be laid in the same county where the first action was laid in. Yelv. 218. *Quare de hoc.*

4. In what county an action shall be brought upon a recognizance enrolled at Westminster. Moor 883. Hall v. Wingfield. Cro. Eliz. 682. Wilford's case.

5. An action of debt brought by the assignees of the reversion for rent is local, and ought to be brought in the county where the lands lie, and not elsewhere; for such action is maintainable by reason of the privity of estate only. 1 Saund. 238. Cro. Eliz. 636. Buskin v. Edmunds.

6. Where

Readings and Observations

6. Where an action of debt upon the statute of the 32 H. 8. cap. 9. against embracery, was held not to be brought in the proper county. Cro. Eliz. 735. Pomfrett v. Brownfall.

7. In what county the action is to be brought for rent. W. Jones 43. Trakearne v. Cleabrooke.

8. If an action be brought in Middlesex upon a bond dated at London, it is ill; but if there be no place mentioned where the bond is dated, it may be alledged to be made at any place.

9. If one is indebted by bond, or other specialty, that is a debt where the specialty is; but if it were upon a simple contract, it follows the person of the debtor. 1 Cro. 472.

10. If an action of debt be brought upon a judgment, and a writ of error be brought upon that judgment, yet the plaintiff may proceed in his action of debt. Ben. 20. 2 Keb. 450.

11. Whether the action to be brought, pending a writ of error. 2 Ven. 261. Biddulph v. Dashwood.

[P* 285] 12. Where the action is to be brought for payment of money at several days. 1 Leon. 208. Jenk. Cent. Cases 335.

*13. Where money was to be paid at fifteen days after the plaintiff's return, &c. he proving his being there, the court were divided whether the proof ought to be precedent or subsequent, as a proper foundation for the action. 1 Brow. 65. Sturges v. Dean.

14. Whether the action for not setting out tithes properly brought. 2 Cro. 68. Champernoon v. Hill.

15. An action was brought for an annuity, payable at Lady-day, or within twenty days after; the original being sued out within the twenty days, it was held an apparent fault, inasmuch as the action appeared to be brought before the cause of action accrued. Cro. Eliz. 765. Blunden's Case.

16. If A. B. debtor to C. D. upon a simple contract, dies, and before his death is a bankrupt, the assignee, under the commission, must bring an action upon the case, and not debt, against the executor. W. Jones 223. Morgan v. Greene.

17. Where a proviso, in articles, to pay money out of profits was construed a covenant, upon which the party might bring an action of debt. 1 Keb. 842. Clapham v. Moyle.

18. Whether an action of debt lieth for rent payable within the jurisdiction, when the lands lay out of the jurisdiction of an inferior court. 1 Keb. 528, 555. Drake v. Beer.

19. Where it is said an action of debt is the proper remedy, the interest in the lands is determined. 1 Keb. 72. Robins v. Warwick.

20. Whether an action of debt lieth upon a judgment after goods levied by an elegit for part of the debt. 1 Keb. 496. Glascock v. Morgan.

21. Whether

In Actions of Debt.

21. Whether an action of debt may be brought upon articles to pay money for hops to be delivered. 2 Keb. 225. Birch v. Weaver.

22. That an action of debt lieth for a rent-seck. 1 Keb. 42. Coxe v. Warwick.

23. Whether the action may be brought upon a covenant to stand seised, where there appears no consideration to raise an interest in the covenantee. 1 Keb. 34. Lady Dacres v. Hazell.

24. Whether an action of debt may be brought upon a bond to perform covenants in a void indenture; but held that it lies where it is only for want of interest in the grantor. 1 Keb. 130. Cavenhurst v. Cavenhurst.

25. Whether the action to be brought against one or several. Cro. Eliz. 422. Sower v. Bradfeild.

26. That it lieth upon an account. 1 Leon. 219. Gawton v. Dacers.

27. Where it lieth not after acceptance of the rent. 1 Keb. 330. Perkin v. Underwood.

28. An action was brought by A. to whom the rent was reserved on a lease, and held good, though the demise was made by A. and B. 2 Keb. 314. Wright v. Augur.

Where the Party may have an Election to bring this Action, or take another Remedy.

1. Where a bond was made with a power for the obligee to levy the money; it was held, that the obligee might bring an action, or levy the money at his election. 3 Leon. 223.

2. Where the plaintiff may have an action of debt or account at his election. Cro. Eliz. 644. Earl of Lincoln v. Topcliffe.

3. Where the party may have an action of debt or covenant at his election. Cro. Eliz. 737.

*Fourthly, Of the Process in Debt.

(P* 286)

1. In debt, if it be demanded by original, the process is summons, attachment, and distress; and for default of sufficiency, upon a nihil returned, process to the outlawry; if the summons or attachment be returned, an essoin lies; and wager of law lies, if the count be upon a simple contract; and if the parties be living, which make the contract or debt against an heir, the writ shall be brought in the debt; but when it is brought against an executor or administrator, or of chattels, it shall be in the *destinet tantum*:
The

Readings and Observations

The judgment in debt, where the demand is in the *debet* and *detinet*, is to recover the debt, damages, and costs of suit, and the defendant in *Misericordia*; but if the defendant denies his deed, then a *capias* for his fine issued out before the statute of 9 W. 3. and if the original be in the *detinet* for a chattel, then the judgment is to recover the thing in demand, or the value thereof, and costs and damages; and the process of execution is a distress to deliver the chattels, or the value and damages: and if the cause of action be against executors or administrators, the judgment is to recover the debt and damages of the testator's goods, if the executor hath so much in his hands; and if he hath not, then the damages of the executor's or administrator's proper goods; and if the sheriff upon a *scire facias* return a *devastavit*, then a *fieri facias* or *elegit* may be sued out to levy the debt and damages of the executor's or administrator's proper goods; and if the executor pleads that he never was executor, and it is found against him, that he had administered but one penny, the judgment shall be to recover the debt and damages of the executor's own goods; and in debt brought upon a record, the execution shall be brought where the record remains. 1 Bro. 50.

2. A. and B. lessees for years by the demise of C. rendering rent, A. assigns over his part to E. B. the other lessee makes his will, and makes T. his executor, and dies, rent is in arrear after the assignment, and after the death of B. the other lessee; and for this rent an action was brought against E. the assignee, and T. the executor of the other lessee in the *debet* and *detinet*, and there it was urged that here the defendants have divided possession and divided interest, and therefore they ought to have been severally charged; yet the court were clear that the action was well brought in this manner: for severance of the land will not make a severance of the plaintiff's action, and the action is always grounded upon the demise, which continues one and the same, notwithstanding any alterations made by the tenants. 2 Bull. 211. the bailiffs of Ipswich against Martin & al.

3 If an action be brought by an executor upon a tort or contract done or made with himself, the action must be brought in the *debet* and *detinet*; but if it be upon a tort committed and done to the testator, or if his action is founded upon such tort or contract, he must bring it in the *detinet* only.

4. As an executor being a lessee for years of a rectory in right of the testator, may have an action of debt upon the assent of E. 6. for not setting out of tithes, and lay it in the *debet* and *detinet*; because it is founded upon a wrong in his own time, and that action is given by the statute to the party grieved. Cro. Jac. 545, 546.

On Actions of Debt.

5. But if one, as executor, obtains a judgment in debt, and takes the defendant in execution, and the sheriff suffers him to escape, &c. here, inasmuch as the first action was in the *detinet*; and this action for an escape being founded upon the same record, it ought to pursue it. Cro. Eliz. 326. See the case of *Reynell v. Langcastle* to the same purpose, where all the judges agreed that the action ought to be in the *detinet* only.

6. If an executor brings an action of debt upon a bond (P 287) made to the testator, where the day of payment incurred after death of the testator; yet the writ shall be in the *detinet* only, because he brings the action as executor. 20 H. 6. 5. b. 1 Roll's Abr. 602. Letter P. pl. 2.

7. So if A. binds himself to the testator to pay him one hundred pounds, when such a thing shall happen; if it happens after the death of the testator, yet the writ shall be in the *detinet* only. Ibid. pl. 3. 20 H. 6. 6. b.

8. So generally where the action is of such a nature that the plaintiff ought to name himself executor, it shall be in the *detinet* only. 1 Roll's Abr. 602. Letter Q. pl. 1.

9. If an executor recovers a judgment in trespass for goods taken out of his own possession, there upon an action of debt upon that judgment, the writ ought to be in the *debet* and *detinet*, for he need not name himself executor. Ibid. pl. 2.

10. If a man is possessed for a term of years, makes an under-lease, rendering rent; if an executor brings an action of debt for rent incurred after the testator's death, the writ shall be in the *detinet* only. Ibid. pl. 3.

11. If a rent be granted to another for years, the executors of the grantee, in an action of debt for the arrearages of this rent incurred after the death of the testator, shall lay it in the *detinet* only. 1 Roll's Abr. 602. Letter R. pl. 2.

12. If an executor recovers in an action of debt, due upon the contract of the testator, the writ shall be in the *detinet* only. Ibid. pl. 3.

13. And the reason it is so in the aforementioned cases is, because it is founded upon the testator's contract; but if an executor takes a bond for a debt due to the testator by contract, in an action of debt on this bond, the writ shall be *debet* and *detinet*. 1 Roll's Abr. 602. Letter Q. pl. 5.

14. So if the executor sells the goods of the testator for a sum certain, in an action of debt for that sum the writ shall be in the *debet* and *detinet*. Ibid. pl. 4.

15. If an executor having lands by extent upon a statute made by the testator, and naming himself executor, by a lease lets the same for three years, in an action of debt for the rent the writ must be in the *debet* and *detinet*; and the reason thereof and of the foregoing case is, because the action is founded

Readings and Observations

upon the testator's own contract. Cro. Jac. 685. *Holman v. Chute*.

16. So in an account an executor recovers a debt due to a testator, in an action of debt for the arrearages of that account, the writ shall be in the *debet* only; for though the action of account is converted into an action of debt, yet it is for the same thing received in the life of the testator. 1 Roll's Abr. 602. Letter R. pl. 1.

17. An action of debt was brought against the heir, who pleaded nothing by descent; after a verdict for the plaintiff, it was moved in arrest of judgment, that the action ought to be in the *debet* and *detinet*; and it was held ill in the *detinet* only. 1 Lev. 130. *Goodwin v. Newton*; where the court held it cured after a verdict. 1 Lev. 224. *Combers v. Watton*.

18. Where an action of debt is brought against an executor, there the writ shall be in the *detinet* only. 1 Roll's Abr. 603. Letter S. pl. 1.

19. And if it be brought for rent, where part incurred in the time of the testator, and part after his death, the executor may be charged in the *detinet* for the whole. Allen 76. Stiles 118.

20. But where he is charged in the *detinet* only, there he shall only answer out of the testator's estate. Allen 40. Stiles 79.

(P* 288)

21. In an action of debt against the executor, for rent incurred in the life of the testator, the writ shall be in the *detinet* only. 1 Roll. 603. Letter S. pl. 9.

22. If an action of debt be recovered against an executor of the goods of the testator, and the plaintiff brings an action of debt upon that judgment, there the writ shall be in the *detinet* only. Ibid. pl. 2.

23. And it hath been said, that a writ in debt doth not lie in the *debet* and *detinet* against an executor upon a suggestion of a *devastavit*. Ibid. pl. 4; *sed Quære*. And that it doth not lie upon a judgment on a *devastavit*, whereby the executor is chargeable *de bonis propriis*. Carter 2.

24. If a man recovered in an action of debt against an executor, and upon a *feri facias* the sheriff returns *nulla bona*, the plaintiff upon a suggestion of a *devastavit* could not have a writ in the *debet* and *detinet*. Ibid. pl. 5.

25. But at this day *Quære* if it be law; for in the case of *Wheatley and Lane* in 1 *Saunders* 216. it was there adjudged that an action of debt would lie in the *debet* and *detinet*, upon a suggestion of a *devastavit*. But *Saunders* seems not to be satisfied with this resolution, and concludes the report, that the conveniences and inconveniences are not yet known; and

see

On Actions of Debt.

see an excellent argument of *Pemberton* against laying the action in the *debet* and *detinet* in this case; with the several inconveniences by him suggested thereto.

26. It hath been held, that in an action of debt upon a bond of the testator, it will not lie in the *debet* and *detinet* on such a suggestion of a *devastavit*. 1 *Vent.* 321. *Ept. v. Withers*.

27. If an executor obliges himself to pay a debt due by contract by the testator, in an action of debt upon this bond the writ must be in the *debet* and *detinet*; because the bond made it his own debt. 1 *Roll's Abr.* 663. Letter S. pl. 8.

28. If an action of debt is brought upon a bond against the heir of the obligee, it shall be in the *debet* and *detinet*; not only because he hath assets in his own right, but because he is bound by express words in the bond. 5 *Co.* 36. a. *Cro. Eliz.* 712, 350. 2 *Leon.* 11. 2 *Brownl.* 204.

29. But if he be charged in the *detinet* only, 'tis good after a verdict. 1 *Lev.* 224. 1 *Sid.* 342.

30. Where a lessee for twenty years lets the land for ten years, rendering rent, and dies, his executor or administrator shall have an action in the *detinet*, for the rent incurred after the death of the testator. 1 *Roll's Abr.* 603. Letter S. pl. 7.

31. So it is said 1 *Roll's Abr.* *Ibid.* pl. 9. that in an action of debt against the executor, for rent incurred in the life of the testator, the writ shall be in the *detinet* only.

32. But in an action of debt against an executor for arrearages of rent, reserved upon a lease for years, and incurred after the death of the testator, the writ shall be in the *debet* and *detinet*, because the executor is charged in his own possession. 1 *Roll's Abr.* *Ibid.* pl. 10. This matter hath been variantly adjudged; but now it seems to be clearly settled, and upon good and weighty reasons.

33. In *Hargrave's* case in 5 *Co.* 31. where *Body* made a lease for years, rendering rent, the lessee died intestate, an action was brought against *Hargrave* for rent in arrear in his time, after the death of the intestate, in the *debet* and *detinet*; and it was adjudged that the action would lie in that manner; for when an executor or administrator takes the profits, nothing shall be assets but the profits over and above the rent; as if the lessee for years, at five pounds *per ann.* dies, and *A.* his under-lessee holds it at ten pounds *per ann.* nothing shall be assets but the five pounds *per ann.* which is over and above the rent.

*34. But in 2 *Cro.* 225. in the case of *Reynell v. Langcastle*: (P* 289) This case above of *Hargrave* is said to be reversed in the exchequer upon the point of the *debet* and *detinet*, according to the authority of 10 *H.* 7. 5.

Readings and Observations

35. And again, in the case of *Smith v. Norfolk*, in 3 Cro. 225. it is said that *Hargrave's* case is not law: and justice *Jones* said he knew it to be reversed in point of judgment for this cause; and in 1 Cro. 712. *Hargrave's* case is said to be reversed for that point.

36. But then again, 2 Brownl. 200. in the case of *Rich v. Franke*, where the lord *Rich* brought an action of debt against *Franke*, as administrator of one *Franke*, for a rent reserved upon a lease for years, made to the intestate, and due in the time of the administrator in the *debet* and *detinet*; it was adjudged by all the judges *contra Yelverton*, that the action was brought in the *debet* and *detinet*; and as to what had been said by *Yelverton*, that in all cases where executors are charged by the name of executors or administrators, that there the action shall be in the *detinet* only; *Fleming* chief justice answered, that true it is in all personal actions, where they be named executors or administrators, the action shall be in the *detinet* only; but as this is an action for rent reserved upon a chattel real, and an executor is *quasi* an assignee in law, and so charged as privy in estate, and not merely as executor; and if he hath no more assets than the rent which he is to pay, he may plead that he has nothing in his hands; and if the rent be more than the term, he may waive the term; but if he hath assets he may not waive it, as it is said in this case.

37. This case of *Rich* and *Franke* is reported in 1 Bulstr. 23. and in reporting the case, the reporter tells us, it was said that *Hargrave's* case was reversed upon other reasons.

38. In the case of *Bolton v. Cannon*, 1 Ven. 271. it was adjudged, that if the rent be of more value than the annual profits of the land, to an action brought in the *debet* and *detinet*, he may plead that matter in discharge.

39. A patentee of felons goods ought to declare in the *detinet*. 1 Keb. 497. The corporation of Southampton v. Richards.

40. For other cases where the action may be brought against executors in the *debet* and *detinet*, or in the *detinet* only, see the following cases.

<i>Popham</i> 120. <i>Overton v. Sydall</i> .	1 Mo. 185.
<i>Stiles</i> 52. <i>Vandicote's</i> case.	Cro. Jac. 238.
1 Lev. 127.	1 Brownl. 56.
<i>Allen</i> 76. <i>Cornish v. Crawsy</i> ; the	2 Ven. 209. <i>Coghill v. Freuden-</i>
same case in <i>Stiles</i> 118. by	1 Show. 244. <i>Kellow v. Row-</i>
the name of <i>Cornish v. Crawsy</i> .	den.
<i>Allen</i> 34. <i>Cale v. Joslin</i> , and	57. <i>Brookes v. Cooke</i>

W. Jones

On Actions of Debt.

W. Jones 69. *Ward v. Kedsgrave.*

3 *Leon* 206. *Walcot v. Powell.*

2 *Bulstr.* 211. *Bailiffs of Ipswich v. Martin.*

3 *Bulstr.* 211.

Cro. Jac. 549.

Roll's Rep. 132.

Palmer 116.

1 *Sid.* 266.

Moor 566.

2 *Brownl.* 206.

Cro. Car. 225.

1 *Lev.* 127.

Cro. Eliz. 840. *Stark v. Spark.*

3 *Cro.* 225. *Smith v. Norfolk.*

Stiles 61. *Kale v. Joceline.*

232. *Martin v. Hendlye.*

2 *Mod.* 176.

1 *Keb.* 858. *Symms v. Purchase.*

923. *Helier v. Casebrooke.*

2 *Keb.* 259. *Cumber v. Walton.*

463. *Richards v. Colin.*

2 *Keb.* 135. *Cornwall v. Lisset.*

3 *Keb.* 407. *Fruin & Ux' Administrator, &c. v. Paynter.*

2 *Keb.* 431. *Wheatly v. Lane.*

788. *Temple v. Forrest.*

*Fifthly, Of Declarations in Debt.

(P* 290)

In Actions of Debt upon Bonds.

1. Where a man declares upon a specialty, or upon a contract, which is a sum that must be certainly demanded, and no other, the demand cannot be of a lesser sum; but it must be shewn how the rest was satisfied; but in an action, upon an act of parliament, which gives a certain sum for the penalty, tho' the sum recovered be less than that which the plaintiff alledges the defendant ought to pay, it is good. *Cro. Jac.* 498. *Pemberton v. Shelton*, 1 *Cro.* 436. 5 *Hob.* 279. 1 *Cro.* 331. 2 *Cro.* 247.

2. Where the plaintiff declared *super quoddam scriptum suum obligatorium*, without *sigillo* of the defendant *sigillat*, the defendant pleaded that it was given by *duress*; after a verdict for the plaintiff the declaration was held good. *Vent.* 70. 2 *Cro.* 420. 1 *Lut.* 408. *Stiles* 128.

3. The plaintiff declared upon a bond, and omitted the date, and that it was sealed and delivered; yet it was held well enough; but the plaint being *de placito quod reddat ei*, without saying *quas et debet & injuste detinet*, it is said to be adjudged ill. 6 *Mod.* 306. *Woodcock v. Morgan.*

4. Where

Readings and Observations

4. Where the plaintiff declared upon a deed, comprehending diverse covenants, for the performance whereof the defendant obliged himself in the penalty of forty pounds, and sets forth, that the defendant had broke the covenants; the defendant pleaded *non est factum*, and it being after a verdict, it was adjudged to be good; but it would not have been good upon a demurrer, because it would have been double, in regard that the breach of any one of the covenants would have entitled the plaintiff to the penalty; and some of the covenants were such, as the plaintiff ought to have assigned a breach upon them. 1 Ven. 114, 126. Barnard v. Mitchell: And Hales said, as reported in Keeble 766. that in case of a penalty the party should assign but one breach.

5. In action of debt upon a bond brought by the plaintiff, who was chief bailiff of the liberty of Pontefract in Yorkshire; but he did not declare as *capitalis ballivus*; but yet by the whole court it was held good; for otherwise the defendant might have cravedoyer, and have it entered *in hæc verba*, and then have pleaded the statute of 2 Hen. 6. that it was taken *colore officii*; but now it shall be intended good upon the demurrer to the declaration: and Ellis justice said, that so it was lately resolved in that court, in the case of one *Conquest*; and judgment was given for the plaintiff. 2 Mod. 36. Simpson v. Ellis.

6. A declaration must not be according to the letter of the bond, but according to the operation of the law thereon: as if A. binds himself in a sum to B. *solvendum* to C. who is a stranger to the bond, a payment to C. is a payment to B. but in an action upon the bond, the declaration must be upon a bond *solvendum* to B. And if A. makes a bond to B. *solvendum* to such a person as he shall appoint; if B. does appoint one, payment to him is a payment to B. and if B. appoints none, it is to be paid to himself. 6 Mod. 228. Robert v. Harnage.

7. In an action of debt upon a *bill penal* for the payment of money at several days; the plaintiff alledged that the money, nor any part thereof, was paid at the days; this is double, but it would be good, unless upon a special demurrer. 2 Vent. 222.

8. In debt against husband and wife upon a bond entered into by the wife, before the coverture brought in the *detinet* only, and held naught. 5 Co. 36.

9. The want of bringing the bond into court in Cro. Jac. 30. in the case of Dawbeney v. Banister was held to be a fault in substance; but the latter resolutions have been otherwise.

(P* 291) *10. When a bond is dated beyond sea, (to wit) at *Alvano* in *Ireland*, 'tis necessary to say that *Alvano* is in *England*, in the

On Actions of Debt.

the county where the action is laid. Cro. Jac. 76. Higham v. Flower, 6 Mod. 228.

11. In a declaration upon a bond where there is false *latib*, as *viginti libris* for *viginti*; the declaration must be *viginti*, and then the court will construe it a variance or not. 2 Show. 155.

12. Where the declaration hath not been good upon a bond with the condition set forth, which was for the payment of legacies. 2 Bulstr. 19. Dowty v. Forene.

13. The like with a condition to deliver beer. 3 Bulstr. 210. Ratcliffe v. Clarke.

14. The like for payment of money. 2 Bulstr. 244. Melitine v. Hall.

15. Where there are two obligees, and one dies, the survivor must suggest the death of the other. Stiles 50. Blackwell v. Ashton.

16. Where a declaration upon a bond made to the wife *dum sola* was held good, concluding *ad dampnum ipsorum*. Stiles 134.

17. Where an exception was taken to a declaration upon a sheriff's bond. Stiles 241. Feilder v. Tovey. Lut. 685. Blewet v. Applebee.

18. Where a declaration upon a bond taken in the King's name was held good. The King v. Castle.

19. An exception to a declaration upon a bond where one county is in the margin, and another in the body of the declaration. Cro. Eliz. 465. Shirley v. Shackville.

20. Where to charge an heir upon the bond of his ancestor, it is said the declaration ought to have been special. 3 Cro. 151. Jenks v. ———

21. Other exceptions to a declaration upon a bond against an heir. Forger v. Sales. 3 Cro. 147.

22. Where A. brought an action against C. and D. as heir to E. upon a bond made to A. and B. and B. dying, A. declares as upon a bond made to himself, upon *non est factum* pleaded; and this being found by a special verdict, it was held that the plaintiff could not recover in that action: and a case was cited, where W. S. was bound in a bond to H. by the name J. S. and upon the bond an action was brought by the name of W. S. upon *non est factum* it was held, that the plaintiff could not recover; but the plaintiff ought to have declared by the name which he signed the bond by. 1 Leon. 322. Dennis v. Sir John.

23. For other cases where exceptions have been taken to declarations upon bonds, see

Cro.

Readings and Observations

<i>Cro. Eliz.</i> 153. <i>Lee v. Scurve-</i> <i>ton.</i>	2 <i>Cro.</i> 32. <i>Darwenny v. Ban-</i> <i>nister.</i>
737. <i>Penson v. Hodges.</i>	2 <i>Cro.</i> 76. <i>Higham v. Flower.</i>
840. <i>Brown v. Hol-</i> <i>land.</i>	146. <i>Perry v. Dale.</i> 290. <i>Els v. Clarke.</i>

Exceptions taken to Declarations upon Judgments.

1. Where a declaration upon a recovery in a court baron was held ill, not alledging that the court was held ill before the suitors. *Brownl.* 97. *Clempson v. Bate.*
2. An exception to a declaration upon a judgment. 3 *Mod.* 41. *Marsh v. Cutler.*
3. Where the plaintiff declared in an action of debt in the common pleas upon a judgment, upon which a writ of error was brought in B. R. it was held, that though the action would lie, the plaintiff ought to declare specially upon the whole matter; that a writ of error was brought, and that the judgment remains in its full force, as appears by the record transmitted into the court of King's bench, and not merely upon a judgment in the common pleas. 3 *Lev.* 396. *Gale v. Til.* Note, *nil debet* was pleaded to this action; but *Quare de hoc.*

(P* 292)

*To Declarations upon Recognizances.

1. Several exceptions to a declaration upon a recognizance against bail, where the condition was, that the defendant in the original action should appear eight days after warning; and if judgment, &c. 1. That the action ought to have been brought against the bail jointly. 2. That it was said *Yaliter processum*, without shewing what were the proceedings these exceptions disallowed. 3. That it did not appear that the defendant had notice to appear: three judges against two held this a material exception. 2 *Cro.* 45, 45. *Hargrave v. Rogers.*
2. Where a condition of a recognizance was, that A. B. should render himself or pay the money; and the plaintiff declares that A. B. did not render himself; this is not enough, because he might have paid the money; so that it is necessary for the plaintiff to alledge that A. B. had done neither. *Trevois's case*, *Skinner* 300.
3. Where a man declares upon a recognizance taken before a judge of the common pleas, at his chambers, which is to be by him delivered to be recorded, it is necessary that the plaintiff do declare in that special manner; for if he declares, as of a recognizance

On Actions of Debt.

recognizance taken before the chief justice *et feciis suis*; upon *nil tial record* pleaded, there will be a failure of the record; therefore care must be taken of the declaration in such cases. 6 Mod. 42. Chetley v. Wood.

To Declarations in Debt for Rent.

1. Where the breach was held to be well assigned in declaring in debt for rent, upon the custom of a manor, notwithstanding an objection that the breach was not assigned, according to the custom for a copyholder's wife, to have a moiety of her husband's lands. Raym. 58. Baker v. Brinsford.

2. In a declaration upon a lease at will, there must be an averment that the lessee occupied the lands; but it is otherwise upon a lease for years. 1 Ven. 41, 108. Calthorpe's case.

3. Where a lessor enters by force of a condition for non-payment of rent, and afterwards brings an action of debt for a subsequent rent, he ought to shew a re-entry to revive the rent. 1 Bulstr. 205. Collins v. Goldsmith.

4. Where a declaration by the bargainee of the reversion in an action of debt for rent was held ill, after a verdict for not shewing in what court the deed was enrolled. 1 Brownl. 114. Woolby v. Purnby.

5. How B. and D. ought to declare, where A. B. and C. were jointenants in fee, and C. granted his part to D. and afterwards A. B. and D. demised; and A. died, and B. and D. bring the action. 2 Leon. 112. Barefelt v. Luter.

6. If a man declares as assignee of the reversion, he ought to convey his title by a deed or fine. 1 Cro. Car. 143. Long v. Nethercoote. Bord v. Cudmore, 183.

7. If a man declares upon a deed enrolled, he must shew in what court it was enrolled, and to say that it was *juxta formam statuti* is not sufficient. 2 Cro. 291. Warley v. Purley.

8. To declare in debt for rent, setting forth the deed by the words, it is witnessed by such a deed, is ill in debt, though not in covenant. 1 Keb. 570. Lynox v. Drury. 3 Keb. 94. Cogger v. Childe. 2 Keb. 383. Cogner v. Came.

9. A declaration for a year and half's rent, when the rent was to be paid yearly, is ill. 2 Keb. 804. Hulme v. Saunders.

10. If there be a lessor for years of land, and the lessor (P 293) accepts a surrender of part of the land, there shall be an apportionment of the rent; and the lessor, in an action of debt for

Readings and Observations

for the rent, must shew the apportionment, and demand what is due; and where part of the lands is evicted, he that pleads the eviction, ought to shew the value of the lands evicted, and tender what is due. 2 Cro. 160.

11. Where an action of debt was brought by an executor upon a lease made by the testator for rent in arrear, after the testator's death, without shewing whether his estate is in fee, or for years, or in reversion; after a verdict it was held good, but 'tis laid it would be naught upon a demurrer. 1 Sid. 218.

12. Where it was adjudged in an action of debt for rent brought by an executor, he must shew that the testator, at the time of the lease made, was possessed for years. 2 Ven. 262. And where 'tis brought by an heir, he must shew that the reversion descended to him.

13. In an action of debt for rent, where the plaintiff declared, that at the time of the lease, he was possessed of a term of years *adunc & adhuc ventur.* it was held good. 2 Vent. 282.

Other Cases where Exceptions have been taken to Declarations in Actions of Debt for Rent.

1 Brownl. 108. *Smith v. Newsham & Ux.*

102. *Appleton v. Baily.*

105. *Berwick v. Foster.*

80. ———

*Tregonwell Exec', &c.
v. Sherwin.*

2 Ven. 129. *Welby v. Phillips.*

Stiles 256. *Tracy v. Bloom.*

Yelv. 73. *Carpenter v. Collins.*

1 Bulstr. 48. *Smith v. Newton.*

65. *Burgesse v. Standish.*

2 Leon. 99. *Alexander v. Dyer.*

1 Show. 71. *Lewis v. Weeks.*

6 Mod. 70. *Pye v. Brereton.*

Exceptions to other declarations in Debt.

1. An action of debt was brought upon the statute of 14 Hen. 8. for practising physick at Westminster, not being approved of under the seal of the college, and doth not say it was within seven miles of London; the declaration was held bad. 4 Mod. 47 The college of physicians against Bush.

2. In an action of debt upon the statute of 2 Ed. 6. for tithes, the plaintiff declared that he was the rector of St. Martins All-Saints, and that by reason thereof he ought to have the tithes of two acres of land in the said parish of St. Martins All-Saints,

On Actions of Debt.

All-Saints, and the tithes of eighty acres of land in the parish of St. Martins Gernavelee, without shewing how he became entitled to the tithes of lands out of his parish; and this was held by the court to be well enough after a verdict: another exception was taken, that the plaintiff had not alledged that the defendant was *subditus domini regis*; but that was likewise to be intended after a verdict. Hardr. 173.

3. In an action of debt for using a trade without being an apprentice, *contra formam statuti* 50 Eliz. without averring that it was a trade at the time of making the statute, it being an offence created by the statute, and no offence before, the declaration is naught: But where a penalty is given to the King with several exceptions, it is sufficient for the King to say the offence is *contra formam statuti*, and it will be incumbent on the defendant to shew himself to be within the exceptions. 1 Sid. 303. 2 Keb. 125.

4. Where a declaration for costs in an inferior court was held ill for repugnancy. 1 Brownl. 72. Sawyer v. Crompton.

*5. Where a declaration upon a *concessit solvere*, according to (F* 294) the custom of Bristol, was made good by the defendant's plea. Godb. 49. pl. 61.

6. Where a declaration was held ill, the *dampnum* being in figures. Stiles 165. Ibson v. Beale.

7. Where a bill brought by an executor abated for want of naming them all. 1 Brownl. 101. Smith v. Smith.

8. Where an exception was taken to a declaration upon a sheriff's bond. Stiles 241. Feilder v. Tovey. Lut. 685. Blewet v. Applebee.

9. Where a declaration upon an emisset was held ill after a verdict. 1 Brownl. 81. Stone v. Goddard. 1 Brownl. 72. Bacon v. Bayne.

10. Where a declaration upon an escape was held good, notwithstanding an exception taken to it, that it was not said the sheriff made his warrant and delivered it to the bailiff, but that the bailiff by virtue of a warrant arrested the party, the exception was disallowed. Brownworth v. French. 1 Brownl. 79. 2 Cro. 3. Weaver v. Clifford.

11. Where a declaration upon a bond taken in the King's name was held not good. The King v. Castle.

12. Where a declaration was held insufficient for want of the word *dicit*. 1 Brownl. 96. Feild v. Hunt.

13. Where exceptions have been taken to declarations upon by-laws. 2 Ven. 247. Mayor of Guildford v. Clarke. 1 Brownl. 176. Gravensend's case, 1 Keb. 330. Player v. Pettit, 2 Keb. 799. The corporation of Coopers v. Allen.

Readings and Observations

14. To a declaration for an amercement in a court-leet. Godb. 49. pl. 60. The like in a court-baron. Godb. 68. pl. 53. Cro. Eliz. 581. Lincoln v. Fisher, 1 Keb. 451. Bathurst v. Coxe, 2 Keb. 367. Earl of Exeter v. Smith.

15. Where exceptions have been taken to declarations upon bills obligatory. 3 Cro. 515. Baynes v. Bitton. Lud v. Lewen. Lut. 612. Cro. Eliz. 256. Bright v. Metcalf. 537. Woodward v. Pary.

16. To a declaration upon the statute of 5 Eliz. cap. 9. for not appearing as a witness. Cro. Eliz. 130. Awbrey v. Harvey.

17. To a declaration against an infant for apparel. Cro. Eliz. 583. Mackerell v. Bachelder.

18. To a declaration upon a retainer to do work for a third person. Cro. Eliz. 880. Lady Shandos v. Simpson.

19. Where to charge the heir upon the bond of his ancestor, it was said that the declaration ought to have been special. 3 Cro. 151. Jenks v. ———

20. Other exceptions to a declaration upon a bond against an heir. Forger v. Sales.

21. In debt for an annuity. Lucas v. Fulwood, 1 Bulstr. 151.

22. In debt as assignee of the King, of money levied by an extent. Hardr. 158. Young v. Pennington.

23. Upon a *concessit solvere*. 4 Leon. 105. Godb. 336. Owfeild v. Shierft.

24. Upon the statute of 1 Jac. c. 15. concerning bankrupts. 2 Bulstr. 26. Powell v. Stuff.

25. Upon the statute of 5 Eliz. cap. 9. for perjury. 3 Bulstr. 147. Cockerill v. Aphorpe.

26. Upon a recognizance in London. 1 Leon. 130. Chamberlaine v. Thorpe.

27. In a declaration against a witness upon the statute of 5 Eliz. for not giving evidence; the plaintiff must set forth how he was injured for want of the defendant's evidence. W. Jones 430. Goodwin v. West.

(P* 295) *28. Where A. retains B. to prosecute a suit for C. as his attorney, and promises to him his fees; B. cannot declare in an action of debt against A. but he may against C. but B. in this case may have an action upon the case against A. Cro. Car. 140. Sands v. Treyilian, 107, 193.

29. Upon the statute of Eliz. for using a trade not being apprentice. 4 Mod. 145. White v. England.

30. In an action of debt upon a bond for the performance of covenants for the payment of rent, where the breach was adjudged well assigned. Cro. Jac. 499. Thomson v. Field.

31. What

On Actions of Debt.

31. What comes after the word *scilicet* shall be rejected, and *posse* be sufficient to denote the legality of an act, as to the time. 1 Keb. 569. *Sherrard v. Kirkman*.

32. A declaration in debt for subtracting seventy loads of peas and beans, was held good; though it did not set forth the particular quantity of each. 2 Keb. 306. *Townsend v. Clerke*.

33. An exception to a declaration that the statute therein mentioned was misrecited. 2 Keb. 804. *Dreyden v. Leet*.

34. To a declaration in debt upon a sheriff's bond, conditioned to appear before his Majesty's Justices *in Banco Regis*, and not said *coram domino rege*. 3 Keb. 598. *Storke v. Cullen*.

35. To a declaration upon a bill obligatory to pay money for a house and land, not alledging it was conveyed, &c. 2 Keb. 533. *Cole v. Perdage*.

36. A declaration against the occupier for an annuity, and shews no mean assignments, but only alledges that the term came to the defendant by diverse mesne assignments, &c. 2 Keb. 87. *Cotes v. Wade*.

37. Exceptions to a declaration upon a bye-law. 2 Show. 258. *Mayor of Exon v. Starr*.

38. To a declaration upon an award. 1 Mod. 36. 1 Lev. 292. 2 Keb. 622, 659. 1 Cro. 422. *Sower v. Bradfield*.

Declarations upon a Charter-party.

1. An action of debt was brought upon a charter-party, where the plaintiff as executor to *Wynne* the master, and other freighters, covenanted that the ship should go and return home in twelve months, the perils of the seas excepted: The plaintiff assigns a breach that it did not return within the twelve months, though the dangers of the seas did not hinder: The defendant pleads that the ship was well manned at her departure, and that it failed to *Maderas* in the *Canaries*, and *Jamaica*, that six of the seamen left her, and the master did not provide others, and therefore he could not return within the twelve months; the plaintiff demurs, and after several arguments, judgment for the plaintiff. 2 Show. 384. *Wynne v. Fellowes*.

2. In debt for 150l. the plaintiff, as a master of a ship, declared against the merchant upon a charter-party, which contained divers mutual agreements; and (*in performance conventionum præd' ex parte dicti magistri ipse obligasset se dicto mercatori in æquali summa 150l. & ad perfectionem convention' præd'*

Readings and Observations

ex parte dicti (the word *ipse* wanting) *mercator obligasset se dictis magistro, &c. in simili pœnali summa* 150l. &c.) the declaration was held ill for want of the word *ipse*, by Pollexfen Chief Justice: *Powell and Rokeby* against the opinion of *Ventris*. 2 Ven. 196. *Hatelwood v. Mansfield*.

3. Where an exception was taken to a declaration upon an indenture of charter-party, it not expressly saying that the defendant was indebted to the plaintiff, but only as appears by an indenture, &c. *Stiles* 133. *Frere's case*.

(P* 296) *Declarations by Executors and Administrators.

1. Where a declaration by an administrator *durante minori ætate* was held ill. Cro. Eliz. 602. *Pigot v. Gascoyne*.

2. Where a declaration upon a sheriff's bond was held ill. Lut 622. *Prince v. Crompton*.

3. Where an administrator entitles himself by an administration granted by a peculiar, he ought to alledge a right in the peculiar to grant administration, because of right it belongs to the ordinary: And Holt Chief Justice held it not to be form only, but matter of substance; for it is the committing administration by one having a legal authority, that vests the cause of action in such administrator; and the least that ought to be said in that case is, that it was granted by such a one, *cui de jure pertinuit* to grant administration. 6 Mod. 241, 242. *Denham v. Stevenson*. But it is aided after a verdict. 4 Mod. 133. *Mason v. Hanson*.

4. If a man declares as an administrator upon an administration, granted him by the ordinary, in the absence of an executor, the declaring that it was granted *debita legis forma durante absentia*, is good, and the court will imply that it is intended an absence beyond sea: but it is necessary to shew that such absence continues. 6 Mod. 304. *Slater v. May*.

5. Where a bill brought by an executor was held ill, for not naming all that were executors. 1 Brownl. 101. *Smith v. Smith*.

6. Where a declaration in an action brought by an administrator was held ill, by alledging that administration was granted to him by *A. B. sacre theologie professorem*, omitting the words *loci illius ordinarii*. Moor 367. *Morgan v. Williams*.

7. Where the executor need not set forth what estate the testator had in the land in an action of debt for rent. 1 Keb. 771. *Bickerstaff v. Purlew*. 1 Keb. 422. *Sower v. Bradfield*. 1 Keb. 431. *Morgan v. Williams*. Vide Cro. Eliz. 879. *Skidmore v. Winston*.

On Actions of Debt.

Of Declarations in Debt against Executors and Administrators.

1. Where an action of debt is brought against an administrator, it is said not to be good without shewing that administration was granted to him; but that 'tis not necessary to shew that the executor proved the will: *Quære* if the first part of this case be law, for the common practice is otherwise. 2 Vent. 84.
2. *Quære* if it be sufficient to declare against the defendant as an executor, without naming him executor in the commencement of the declaration. 1 Saund. 112.
3. Exceptions to a declaration against an executor for Fleemish money. Cro. Eliz. 536. *Bagshaw v. Plaine*. 1 Brownl. 91.
4. If a man marries a feme administratrix, *Quære*, if the plaintiff calls them both administrators, whether it will vitiate the declaration. *Prideaux's Case*, Godb. 40. pl. 44.

Where there have been Exceptions to Declarations in Actions of Debt for Rent by and against Executors and Administrators.

- | | |
|---|---|
| Cro. Eliz. 712. <i>Body v. Hargrave</i> . | Stiles 139. <i>Dunce v. Smith</i> .
3 Bulstr. 223. <i>Cutts v. Benne</i> |
| 1 Brownl. 48. <i>Scot v. Herbert</i> . | Telv. 135. <i>Appleton v. Doily</i> . |

To Declarations in Actions of Debt upon an Escape. (P* 297)

1. Where a declaration upon an escape was held good, notwithstanding an exception taken, that it did not alledge that the sheriff made a warrant, and delivered it to the bailiff, but only that *virtute warranti*, &c. the bailiff arrested the party. *Brownsworth v. French*. 1 Brownl. 79.
2. To a declaration in an action of debt upon an escape of one in execution, upon a plaint having been levied *secundum consuetudinem civitatis prædictæ*, that the custom appeared to be unreasonable. 2 Leon. 29. *Dewered v. Radcliffe*.
3. In an action of debt for an escape, the plaintiff declared upon an escape in another county; and it was held good after verdict, for it shall be intended he had him by a *Habeas Corpus*, or fresh pursuit. 1 Sid. 164.

What

Readings and Observations

What Declarations have been adjudged good,
and what not.

<i>Cro. Eliz.</i> 169. <i>Alexander v. Dyer.</i>	3 <i>Cro.</i> 137. <i>Baylye v. Offord.</i>
383. <i>Thynn v. Cholmei.</i>	571. <i>Scavage v. Hawkins.</i>
702. <i>Humble v. Fisher.</i>	2 <i>Cro.</i> 117. <i>Offley v. Pardine.</i>
791. ———	124. <i>Mathewson v. Ro.</i>
905. <i>Wallerv. Campion.</i>	227. <i>Barwick v. Foster.</i>
	291. <i>Warley v. Pulley.</i>
	<i>Lut.</i> 643. <i>Letten v. Wynne.</i>
	2 <i>Cro.</i> 192. <i>Watts & al' v. Onnell.</i>

Cases where Exceptions have been taken to Declarations in Actions of Debt for not setting out Tithes.

2 <i>Cro.</i> 70. <i>Dagge & al' v. Penkevion.</i>	2 <i>Keb.</i> 492. ———
252. <i>Hunson v. Cockett.</i>	<i>Stiles</i> 122. <i>Hobart v. Boraston.</i>
1 <i>Brownl.</i> 98. <i>Willot v. Spencer.</i>	103, 108. <i>Southcot v. Southcot.</i>
86. <i>Campier v. Hill.</i>	228. <i>Cane v. Pell.</i>
94. <i>Mann v. Somerton.</i>	212. <i>Gibbon v. Kent.</i>
71. ———	2 <i>Bulstr.</i> 221. <i>Babington v. Mathews.</i>
<i>Yelv.</i> 126. <i>Oliver v. Collins.</i>	119. <i>Tipping v. Swan.</i>
63. <i>Champernoon v. Hill.</i>	83. <i>Wheeler v. Hayden.</i>
<i>Hardr.</i> 173. <i>Phillips v. Kettle.</i>	65. <i>Arnold v. Bidgood.</i>

Cases where Exceptions have been taken to Declarations upon Bills Obligatory.

1 <i>Brownl.</i> 56: ———	1 <i>Brownl.</i> 102. <i>Peirson v. Pons- teis.</i>
59. <i>Hammond v. Gethrell.</i>	<i>Hardr.</i> 9. <i>Crawley v. Fenne.</i>

(P* 298) *Sixthly, Of the Pleadings in Actions of Debt.

In which are to be considered,

First, Of General Pleas, which are termed the General Issue.

Secondly. Of pleading specially.

Of Pleading Non est Factum.

1. If a deed be not merely void, but only voidable, the party shall not plead *non est factum*, because it is his deed; but he ought to conclude *whether the plaintiff ought to have judgment.* 5 *Co.* 119. *Whelpdale's case*, 14 *Hen.* 8. 28. a. 8 *Hen.* 7. 15.

2. If

On Actions of Debt.

2. If a feme covert makes a bond, she may plead *non est factum*; so if the deed be razed. 14 H. 8. 28.

3. If a bond be made to a *feme covert*, and the husband disagrees to it, he may plead *non est factum*. 5 Rep. 119. a.

4. But if an infant executes a deed, or it be executed by *duress*, there the party is not to plead *non est factum*, but must conclude whether the plaintiff ought to have his action. 14 H. 8. 28. Moor 43. pl. 132.

5. If two are bound in a bond, and the seal of one is broken off, and an action is brought against another whose seal is entire, yet he may shew that matter, and plead *non est factum*; so if it be razed or interlined, or delivered in another manner, to an ignorant man that cannot read, than he intended. 5 Co. 23. 11 Co. 25.

6. But *Quare*, whether as to the seals being torn off it is not to be understood, that it is, where the bond is joint, and not joint and several; for in Mathewson's case, 5 Co. 23. if three covenant separately, and the seal of one is broken off, that shall not avoid the whole deed, but only against him only whose seal is torn off; but rasure of a deed goes to the whole.

7. If *non est factum* be pleaded, and afterwards the seal be eaten off by rats before the day of trial, if the jury find it to be the deed of the party, at the time of the plea pleaded, they shall give a special verdict, and find the special matter. 36 H. 8. Dyer 59. a. 5 Co. 119. a.

8. If the party once confesses the deed, he shall not afterwards plead *non est factum*. 9 Hen. 6. 37. 22 Hen. 6. 52.

9. If A. makes a bond to B. and delivers it to C. to the use of B. and C. offers it to B. who refuses it, whereby the obligation has lost its force, it is said in Dyer 167. that A. cannot plead *non est factum*, because it was once his deed; but that hath been said in 5 Co. 119. b. not to be law; but *Quare*, for in the case in Dyer, a difference is taken where an instrument is delivered to one to the use of another as an *escrow*, and where to one, as the obligor's deed, to the use of another. See Ven. 75. 1 And. 4. Dal. 33, 105. Moor 10, 28, 30, 43. 11 Co. 27. a. Owen 8.

10. It was held no good plea to say that *factum prædictum* was made and delivered without a date, and that the plaintiff put a date to it, and so not the defendant's deed, for having called it a deed at first, he is concluded to say that it is not his deed, but he should there have pleaded *non est factum*. Cro. Eliz. 800. Cospey v. Turner.

11. So where a schedule was pleaded to have been annexed to a bond, which was then not annexed, *non est factum* was no plea. Moor 43.

12. Note, where the plea was, that the deed was delivered as a schedule till such an act be done, and then *ut scriptum*,
VOL. II. B b that

Readings and Observations

that was held well, without saying *ut factum*. 2 Keb. 692. Twiford v. Barnard.

(P* 299) *13. When a deed is materially razed or delivered, as an escrow, the best way to plead is generally *non est factum*, and not specially; because, upon *non est factum*, the proof of its being a deed lies upon the other side. 6 Mod. 218. Vide Moor. 66. pl. 179.

14. A deed cannot be delivered to the party himself as an escrow, because then a bare averment, without writing, would make void every deed. Cro. Eliz. 884. Williams v. Greene.

15. Other cases concerning pleading a deed as an escrow. Vide Cro. Eliz. 520. Whyddon's case 835. Hawkland v. Gatchell. 1 Ven. 9. 3 Keb. 142. Manning v. Bucknell.

16. If one delivers a release, as an escrow, to be re-delivered to J. S. as his deed, upon a certain condition to be performed at a certain day; and the condition is not performed, and yet he delivers the deed, *Quare*, whether the party may plead *non est factum*. 27 H. 6. 7.

17. Against a deed enrolled the party cannot plead *non est factum*. 39 H. 6. 32. 9 H. 6. 60.

18. If a bond, or other writing, is made void by act of parliament, yet the parties cannot plead *non est factum*; but he must plead the special matter, and may take advantage of the act of parliament; as if a bond be made to the use of the sheriff against the statute of 23 Hen. 6. so likewise of a bond against the statute of 13 Eliz. c. 8. 5 Co. 119. a.

19. To an action of debt upon a bond, the defendant pleaded that he delivered the bond to the plaintiff upon a certain condition to be performed, or otherwise that he was to have it as an escrow; and said further, that the condition was not performed, *et sic non est factum*; in this case it was adjudged that it is no bar; but otherwise had it been if the delivery had been to a stranger to the use of the plaintiff. 19 Hen. 8. 8. a.

20. If the defendant pleads payment to an action of debt upon a bond, which is a confession of the bond; and says further, that the bond was delivered to the obligee instead of an acquittance, and that the plaintiff took it out of his possession with force, *and so not his deed*: The better opinion is (it seems) that it is no plea; for having by implication confessed the deed by pleading payment, he cannot afterwards plead *non est factum*; but he ought to conclude *si actio, &c.* 22 Hen. 6. 52.

21. If a deed of another be pleaded against an estranger, he cannot plead *non est factum*; so note, that none can plead *non est factum* but the party himself, or his representative. 22 E. 4. 1. a.

22. Where

On Actions of Debt.

22. Where *non est factum* was held no plea in an action brought against an assignee. 1 Keb. 670. Bisnor v. Robinson.

23. If two are jointly bound in a bond, and an action is brought upon it against one only, he cannot plead *non est factum*; but he may plead in abatement of the writ. 5 Co. 119. a. nor cannot demur in that case. 1 Saund. 291.

Of pleading Nil debet.

1. There is *nil debet per legem*, and *nil debet per patriam*; *nil debet per legem* is when the defendant wages law.

2. My lord Coke tells us that it is called wager of law, (*i. e.*) *Vadiare legem*, because the defendant finds sureties to make his law. Co. Lit. 124. Agreeable to which Sir Henry Spelman, in his glossary 364. describes it thus: *Vadiare legem est cautionem dari de perimendo legis exigentiam in re litigata ut de prestando sacramento ad indictam diem cum indicto consacramentalium seu conjuratorum numero.*

3. Wager of law, when considered in relation to an action of debt, is the means appointed by law for a person to get discharged from an action brought for a debt due upon some parcel contract or agreement, *where the party bars the plaintiff of (P* 300) his action, by some private transaction between the plaintiff and him, that he is supposed not to have sufficient testimony to prove.

4. And therefore this wager of law lieth not where there is a specialty or deed to charge the defendant, but when it groweth by word of mouth, and by it the plaintiff is perpetually barred, for the law doth presume that no man will forswear himself for any worldly thing: but says my lord Coke, mens consciences are now grown so large, (especially in this case) it passing with impunity, by which he means the party cannot be indicted for perjury in forswearing himself, that men choose rather to bring actions upon the case, wherein damages are to be recovered, and the defendant cannot wage his law, than an action of debt. Co. Lit. 295.

5. So my lord Vaughan in his reports, fol. 101. tells us, that a man can never wage his law for a demand which is uncertain, because he cannot swear he paid that which consisted in damages only.

6. In waging law the defendant is to plead *nil debet per legem* whereby he makes his election to bar the plaintiff of his action in this manner, not leaving the matter to be tried by a jury

Readings and Observations

(i. e.) *per patriam*, but by his own oath, that he owes the plaintiff nothing, which some of his neighbours of credit, after the party himself has sworn it, are to swear that they believe in their consciences to be true; so that the party himself is sworn *de fidelitate*, and those neighbours *de credulitate*. Co. Litt. 295.

7. The number of those neighbours, which are called compurgators, are said in Co. Lit. 295. and in 2 Roll's Reports 235. to be eleven; but I do not find it is certain that these are to be just eleven; for in 2 Vent. 171. it is said they may be less than that number.

8. As to the method of proceeding in wager of law, see Salk. 683. and as it is now almost out of use, I shall only insert the cases relating thereto, without mentioning the particulars. Vide 2 Roll's Abr. 106. Letter A. 107. Letter C. 108. Letter E. Ibid. 110. Broo. Ley Gager 11, 34. 4 Co. 10, 103. 11 Co. 10, 103. Dyer 22, 219. Co. Lit. 295. Cro. Eliz. 161, 250, 646, 648, 818. Hob. 295. 1 Bulstr. 186, 194. 3 Bulstr. 263. Goldsb. 251, 65, 80. Godb. 248, 327. 3 Lev. 212, 213, 258. Stiles 199, 386. 2 Mod. 140. 1 Ven. 261, 296. 1 Sid. 366.

Of Nil debet per patriam.

1. An action of debt was brought by A. against B. in the common pleas upon an indenture; wherein the plaintiff covenanted to transfer twenty-five shares, &c. and B. covenanted that he would receive and pay for the transfer, and bound himself in the penalty of 280*l.* for the performance; the court of common pleas, upon *nil debet* pleaded, gave judgment against the defendant upon the insufficiency of the plea.

Upon a writ of error to reverse this judgment in the King's bench, the arguments to support the plea, are said to be these:

That where-ever a matter of fact is mixed with a specialty, or with a record, *nil debet* is a good plea; as in debt upon an account before auditors, *nil debet* is a good plea. 21 Hen. 7. 14. Kelw. 153. b. 5 Rep. 43. 6 Rep. 44. a.

The argument on the contrary, and for the support of the judgment was, that the debt in this case arises merely upon the deed, and not on any collateral matter *de hors* the deed; and in such case the defendant should have denied the deed, or have pleaded some other matter to avoid it; for if he once owns the deed, 'tis then a good debt; and therefore *nil debet* is not good, because 'tis a plea which contains so many issues.

On Actions of Debt.

*2. In an action of debt against a sheriff or gaoler, for an escape of one in execution, though the plaintiff must declare upon the judgment, *nil debet* is a good plea. 1 Saund. 38. (P* 301)

3. So to an action of debt upon the statute of 2 Ed. 6. for not setting out of tithes; so to an action of debt upon a judgment against an executor upon suggesting a *devastavit*. Cro. Car. 513. Hutton 100. Hob. 224.

4. 'Tis no good plea to an action of annuity, nor to an action of debt on a bond brought by an administrator; 'tis true, 'tis a good plea to an action of debt brought upon a lease for years; but the reason is, because the demise is the foundation of the action, and the deed is only an evidence of a demise; and so 'tis a good plea to an action of debt brought upon penal statutes, and to actions of debt brought upon awards, or to accounts before auditors; and the reason is, because these are not the deeds of the parties; but here the deed of the party himself is the *lien*, and not any thing in *pais*; and the *gist* of the action is for the payment of money: 'tis no good plea to an action on a policy of insurance, nor to an action on a bail-bond, though there is something to be done *de hors* to charge the insurers and the bail. See the argument *ex inconvenienti* in the conclusion of the case, Modern Cases in Law and Equity 106, 324. Warren v. Consett in page 382. It is there reported that this action being founded upon the articles, and the particular facts being but auxiliary to the deed, the plea of *nil debet* was no good plea.

5. In debt upon the statute of 23 Hen. 8. c. for the arrearages of an annuity devised to the plaintiff's wife for life, who was dead before the action brought against the administrator of the tenant and occupier of the land, out of which, &c. the defendant pleaded *nil detinet*; upon which the plaintiff demurred, and the question was upon the demurrer, whether this were a good plea or not in this action; because the action is grounded upon a writing which, as was urged, is equivalent, and to a deed it were not a good plea, as in case of debt upon a bond; or otherwise upon Specialty; but where an action of debt is grounded upon matter in *pais* only, as upon a prescription or upon a deed; that is not requisite to maintain the action, as for rent reserved upon a lease by deed, there it is a good plea; and the books go upon this difference. Vide 19 Hen. 8. 9: 22 Ed. 4. 51. 5 Hen. 7. 23. 9 Ed. 4. 53. 10 Hen. 7. 24. 21 Hen. 7. 24. 21 Hen. 7. 14. But per Hale chief baron, the cases are not alike, for a will is not a deed; though it be as effectual to pass a thing as a deed is, yet it is not a deed in its own nature, because there needs no sealing nor delivery to a will, which is essential to a deed; and therefore *nil detinet* is a good plea to an action of debt grounded upon a will; as well

Readings and Observations

as to an action of debt upon a tally; and the action here is not so much grounded upon the will itself, as upon a statute law, which enables men to dispose of their lands, and of rents out of lands, by their wills: in an action of debt, upon a grant of a rent, *nil detinet* is a good plea; because the plaintiff has other remedy to levy it, viz. by distress; but it is not a good plea to an action grounded upon a grant of a bare annuity, because the grantee in such a case has no remedy by distress; and therefore in that case the defendant must avoid it by matter of as high a nature, as by acquittance under seal, or the like; but because it appeared to the court that the action was brought in Middlesex, and that the houses out of which this annuity was devised lay in London, which makes the action local by reason of the permanency of the profits; the whole court inclined against the plaintiff, and adjourned. *HARDR. 332. Wilson of the middle temple v. ———* Quære, if it be a good plea to an action of debt upon a recognizance against bail.

(P* 302)

*Of special Pleas in Debt.

In *pleading specially*, these following Rules are to be observed.

- First, *It is required that there be sufficient certainty as to the matter pleaded, and the time and place.*
- Secondly, *That pleas must have proper inducements to the matter pleaded, and proper commencements and conclusions.*
- Thirdly, *They ought to have all their proper averments.*
- Fourthly, *That pleas are not to be double.*
- Fifthly, *That every plea is to be taken most strongly against the party pleading.*
- Sixthly, *That insufficient declarations may be made good by the defendant's plea; so the plea, replication, &c. may be made good by the plea of the adverse party.*
- Seventhly, *That pleas amounting only to the general issue are not good; but the general issue must be pleaded.*
- Eighthly, *That in some instances where the issue is joined upon a matter insufficient, there shall be a repleader.*
- Ninthly, *The pleadings upon a view of the whole are to be coherent and concomitant one with another; and therefore if the plaintiff replies matter not pursuant to his declaration, and does not fortify it, or the rejoinder does not fortify the plea, or the surrejoinder*

On Actions of Debt.

the replication. they are in law called departures: Of which see hereafter in title departures.

Tenthly, *That when a material matter is alledged in the declaration, plea, replication, &c. the denying of which determines the point in question, it is necessary to take a traverse to bring the whole controversy (complicated with several circumstance) to one single point, and is one of the greatest benefits of the common law: Of which see more hereafter under title traverse.*

And lastly, *There is an impediment or bar to an action or plea, which arises from the party's own act; who otherwise might have had his action or defence, and is called an estoppel: Of which see more hereafter under title estoppel.*

I shall only give a few instances to illustrate the foregoing rules, and for others refer the reader to the following general titles of pleas in debt.

First, Of sufficient Certainty of the Matter pleaded;
and the Time and Place.

Of Certainty as to the Matter pleaded.

1. It is sufficient that a bar be good to a common intent^t
31 H. 6. 9. 5 Rep. 121. a.

2. But that intendment must be necessary, and not require a strained construction to make an intendment: as where an action of debt was brought by an executor upon a bond made and dated the twelfth of January, the defendant pleaded that the first of May, which was three months after the date alledged, he caused the deed to be written, and delivered it as his deed to A. to be delivered to the testator; and the testator refused it; it was adjudged no plea, for that cannot be intended to be the same bond. Dyer 167.

3. Where the defendant pleads that the plaintiff held in (P 303) common, he ought to shew how, because it might be several ways, viz. by alienation of the parceners, or joint-tenants.
3 Hen. 6. 96. But see 22 Hen. 6.

4. If

Readings and Observations

4. If a man be obliged to discharge a bond of one hundred pounds, pleading a general discharge without shewing how, is not good. 35 Hen. 6. 10. b. 11.

5. But where the condition of a bond is, that the obligor shall deliver all writings concerning such land; to an action of debt upon that bond, it is a good plea to say generally, that he had delivered all the writings, &c. Dyer 28. 4 Hen. 7. 12.

6. If a man be obliged to come at such a place at such a certain day, and that there he or another would shew to the plaintiff a sufficient discharge of an annuity of twenty pounds, or to shew it to the plaintiff's counsel: it is no plea to say that the defendant offered to W. N. and R. D. the plaintiff's counsel, a sufficient discharge of the annuity, and that they refused to see it, without shewing what discharge it was; for it lies in the judgment of the court to judge it. 22 E. 4. 40.

7. But it is there agreed, that if a man is obliged to account, &c. to an action of debt upon that bond, it is a good plea to say that no auditors were assigned without shewing of what things he would make his account. 22 Ed. 4. 40, 41, 42.

8. Where a bond was made to pay for so much bread, when so much shall be delivered as amounts to ten pounds, when it shall be required; to an action of debt upon that bond, it is no plea to say that he was not required, unless he shews in certain how much of the bread was delivered. 33 Hen. 6. 8.

9. And pleas are to be so far certain, that they are not to be made so by bare inference or argument.

10. If a condition of a bond be that the defendant shall ratify and confirm such a demise, it is not sufficient to say that he hath ratified and confirmed, &c. but he ought to shew how, and plead the confirmation by a deed. Dyer 229. b.

11. If a man be obliged to warrant lands, to plead to an action of debt that the defendant peaceably enjoyed them, is no plea; because it is only an argument that he hath warranted them, and that argument fallible; for the party might enjoy peaceably without having a warrant. Dyer 42. b. 2 Co. 3.

12. It is not good to say that *in indentura testator quod demisit*, for that is but an argument that he had demised. Dyer 118. a.

13. So where the defendant, taking a protestation that there was no award, for plea avers, that it was not delivered to him in writing; and the plaintiff replies, that by an award made in writing, and delivered to the parties before the day, it was awarded, and so assigns a breach; this replication is not good, because it is only argumentative that the arbitrators delivered the award. Dyer 243. b.

On Actions of Debt.

14. Every affirmative ought to be answered with an express negative, and it is not sufficient to answer it with another affirmative; for that is no more than an argument, unless the case be so that the cause cannot be otherwise tried. Co. Lit. 126. 18 H. 6. 8, 9, 10.

15. As if one be named to be dwelling at F. it is no plea to say that he is an inhabitant at D. unless he concludes in the negative, and not at F. 19 Hen. 6. 1

Several other illustrations of this Rule may be observed hereafter.

Note; There ought likewise to be a sufficient certainty as to time and place.

*Of Certainty as to the Time.

(P* 304)

1. As where a bond was dated the 10th of Nov. 12 Jac. upon which the plaintiff declares, and the defendant pleads in bar an indenture of defeazance, but doth not shew the date of the indenture any otherwise than by the words *eisdem die & anno*: that refers to the date of the plaintiff's bond alledged in his declaration, and therefore the plea was held to be insufficient for the uncertainty.

2. For it shall be intended to bear date before the bond, which proves likewise the fifth general rule here laid down, that every plea is to be taken more against the party pleading, than for him. 7 Hen. 7. 5. Dyer 26. b. 27. a.

3. To an action of debt upon a bond for the performance of covenants to pay money, upon taking an assurance the defendant pleads payment on such a day; but does not shew when the assurance was made, and the plea was held ill. 2 Mod. 33.

4. Where an action affirms the defendant to be tenant at such a time, the defendant need not shew himself tenant at that time. 32 Hen. 6. 16.

Of Certainty as to the Place.

1. Where one pleads an attornment, he ought to shew the place where the attornment was made. 2 R. 3. 13.

2. So

Readings and Observations

4. If a man be obliged to discharge a bond of one hundred pounds, pleading a general discharge without shewing how, is not good. 35 Hen. 6. 10. b. 11.

5. But where the condition of a bond is, that the obligor shall deliver all writings concerning such land; to an action of debt upon that bond, it is a good plea to say generally, that he had delivered all the writings, &c. Dyer 28. 4 Hen. 7. 12.

6. If a man be obliged to come at such a place at such a certain day, and that there he or another would shew to the plaintiff a sufficient discharge of an annuity of twenty pounds, or to shew it to the plaintiff's counsel: it is no plea to say that the defendant offered to W. N. and R. D. the plaintiff's counsel, a sufficient discharge of the annuity, and that they refused to see it, without shewing what discharge it was; for it lies in the judgment of the court to judge it. 22 E. 4. 40.

7. But it is there agreed, that if a man is obliged to account, &c. to an action of debt upon that bond, it is a good plea to say that no auditors were assigned without shewing of what things he would make his account. 22 Ed. 4. 40, 41, 42.

8. Where a bond was made to pay for so much bread, when so much shall be delivered as amounts to ten pounds, when it shall be required; to an action of debt upon that bond, it is no plea to say that he was not required, unless he shews in certain how much of the bread was delivered. 33 Hen. 6. 8.

9. And pleas are to be so far certain, that they are not to be made so by bare inference or argument.

10. If a condition of a bond be that the defendant shall ratify and confirm such a demise, it is not sufficient to say that he hath ratified and confirmed, &c. but he ought to shew how, and plead the confirmation by a deed. Dyer 229. b.

11. If a man be obliged to warrant lands, to plead to an action of debt that the defendant peaceably enjoyed them, is no plea; because it is only an argument that he hath warranted them, and that argument fallible; for the party might enjoy peaceably without having a warrant. Dyer 42. b. 2 Co. 3.

12. It is not good to say that *in indentura testator quod demisit*, for that is but an argument that he had demised. Dyer 118. a.

13. So where the defendant, taking a protestation that there was no award, for plea avers, that it was not delivered to him in writing; and the plaintiff replies, that by an award made in writing, and delivered to the parties before the day, it was awarded, and so assigns a breach; this replication is not good, because it is only argumentative that the arbitrators delivered the award. Dyer 243. b.

On Actions of Debt.

14. Every affirmative ought to be answered with an express negative, and it is not sufficient to answer it with another affirmative; for that is no more than an argument, unless the case be so that the cause cannot be otherwise tried. Co. Lit. 126. 18 H. 6. 8, 9, 10.

15. As if one be named to be dwelling at F. it is no plea to say that he is an inhabitant at D. unless he concludes in the negative, and not at F. 19 Hen. 6. 1

Several other illustrations of this Rule may be observed hereafter.

Note; There ought likewise to be a sufficient certainty as to time and place.

*Of Certainty as to the Time.

(P* 304)

1. As where a bond was dated the 10th of Nov. 12 Jac. upon which the plaintiff declares, and the defendant pleads in bar an indenture of defeazance, but doth not shew the date of the indenture any otherwise than by the words *eisdem die & anno*: that refers to the date of the plaintiff's bond alledged in his declaration, and therefore the plea was held to be insufficient for the uncertainty.

2. For it shall be intended to bear date before the bond, which proves likewise the fifth general rule here laid down, that every plea is to be taken more against the party pleading, than for him. 7 Hen. 7. 5. Dyer 26. b. 27. a.

3. To an action of debt upon a bond for the performance of covenants to pay money, upon taking an assurance the defendant pleads payment on such a day; but does not shew when the assurance was made, and the plea was held ill. 2 Mod. 33.

4. Where an action affirms the defendant to be tenant at such a time, the defendant need not shew himself tenant at that time. 32 Hen. 6. 16.

Of Certainty as to the Place.

1. Where one pleads an attornment, he ought to shew the place where the attornment was made. 2 R. 3. 13.

Readings and Observations

2. So in an action for an annuity, or in debt upon a bond, or for a rent-charge, the place ought to be shewn where the deed bore date; but otherwise of a release pleaded. 5 Hen. 7. 24. 28 Hen. 8. Dyer 14. 9 Ed. 4. 139. 14 Hen. 8. 16. a.

3. If a man pleads that a deed was made by durefs, he ought to shew where it was made. 5 Hen. 7. 24.

4. If a man is bound to enfeof another of the manor of D. if the defendant pleads performance to an action of debt upon that bond, he ought to shew where the feoffment was made. 15 Ed. 4. 14. b. 15. b.

5. If an action of debt be brought upon a bond, and no place is shewn where it was made; if the defendant pleads durefs at such a place, that makes the declaration good which proves the sixth general rule. Dyer 14.

6. In a plea of expulsion to an action of debt for rent, the defendant must shew the place of the expulsion. 2 Keb. 762. Mathews v. Cross.

7. If one is obliged to pay money at A. if the defendant pleads payment *secundum formam conditionis*, without saying at A. it is ill upon a special demurrer. 3 Leon. 345.

8. Where a person is alledged to be alive, it must be at the place in the declaration; if it be in a matter that is transitory, otherwise it is ill. 1 Lut. 14.

Secondly, That Pleas must have a proper Commencement and Conclusion, and proper Inducement to the Matter pleaded.

1. Every plea ought to have its proper conclusion, as pleas to the writ must conclude to the writ, and pleas that go in bar must conclude to the action, and estoppels must rely upon the estoppel. Co. Lit. 303.

(P* 305) 2. For if a man pleads in abatement of the writ, and concludes with *petit judicium si querens actionem habere debet*; that conclusion affirms the writ, and so the plea is repugnant in itself: but if one pleads in bar of the action, and concludes with *praying judgment of the writ*; that is *said to be good, because that the plaintiff can have no writ, if he has no action. 36 Hen. 6. 17. 34 Hen. 6. 1. a.

3. So that if one pleads sufficient matter in bar, and demands judgment of the writ, the plea shall be taken to be in bar of the action, and not according to the conclusion of the plea. 37 Hen. 6. 24. 4 Hen. 6. 27. 6 Mod. 103. Show. 4. 155. 1 Lut. 34, 35.

On Actions of Debt.

4. If another court ought to hold plea of the matter pleaded, the party ought not to conclude to the writ, but to the jurisdiction of the court. 38 Hen. 6. 18.

5. Where the conclusion of a plea was, and being seised died, that has been said not to be good; but he ought to have alleged that the party died seised of such an estate. Dyer 143. a.

6. In an action brought by the husband only, where the wife ought to be named in the writ, the defendant must not demand judgment of the action. 11 Co. 52. a. Nor if he pleads an estoppel. *Ibid.*

7. To an action of debt upon a bottomree-bond, the defendant pleads that the ship was lost; and the plaintiff replies that it was not lost, and concludes *to the country*; and it was good without shewing a breach of the condition. 1 Show. 148, *Meredith v. Allen.*

8. If the defendant pleads *non detinet*, and does not conclude *to the country*, it is ill. 1 Saund. 283. 1 And. 202.

See more of this hereafter in title REPLICATIONS.

Thirdly, That they ought to have proper Averments.

1. If an award be made for the payment of money upon finding *A.* in an action of debt upon that bond the plaintiff need not aver that *A.* is alive; for that shall come on the other side. Dyer 329.

2. There needs no averment of a matter, the certainty of which appears by a necessary implication; as to say the late bishop, implies that he is not now bishop. 10 Co. 59. a.

3. So if one pleads a lease at will, by force of which he entered, and was and now is possessed by force of the lease at will, that implies that the lessee is alive; for if he was dead, the lease would be determined, and then he could not be possessed by force of the lease. *Ibid.*

4. To say that such a one was and now is seised in his demesne as of a fee, that implies that the person is alive. Dyer 304. a.

5. If one claims as heir in an action, he need not shew that his ancestor is dead; for it is implied; for otherwise he could not be heir. 33 Hen. 6. 54.

6. If one entitles himself by a devise of all lands, it seems need not be shewn that the lands are socage-tenure, and so inevitable; for that shall be intended. Dyer 329, 330.

7. If

Readings and Observations

7. If a man pleads that another was seised and enfeoffed him, he need not aver or shew that the seoffment was to his use; for that shall be intended till the contrary appears. 5 Hen. 7. 33.

8. To an action of debt upon a bond, with a condition to perform an award, the defendant pleads an award to pay so much money, which he tendered to the plaintiff, who refused it; the plaintiff replied the money was awarded in full satisfaction, and that the defendant *non o tulit*, &c. and concluded to the country. *Quare* if good. 3 Lev. 165.

9. The declaration or plea need not aver what will come properly from the adverse party. Hob. 72, 78, 124.
See more of this in the several titles of PLEADINGS.

(P* 306) *Fourthly, What Pleas ought not to be double.

1. In pleading to an action of debt for rent, where the defendant pleaded as to part *nil debet*, and as to the residue *nil habuit in tenementis*, as to the other part it makes the plea double. 4 Mod. 254.

2. Pleas which contain *duplicity* or multiplicity of matter, to one and the same thing, being distinct matters to which several answers are not good. Co. Lit. 304. a. Comb. 239, 240.

3. One defendant cannot plead several matters, every of which goes to the whole. Co. Lit. 303, a.

4. But if one pleads two matters, when he is compelled to shew both, that does not make the plea double. Flow. Com. 194. a.

5. If the defendant pleads no such award made or delivered to him, that is a double matter; but if he pleads by way of protestation, that no such award was made, for plea that none was delivered to him, that is good. 5 H. 7. 7. 10 E. 4. 6. b. Dyer 242. a. 15 H. 7. 10.

6. If a defendant pleads to an action of debt upon bond, that it was made by *duress* of imprisonment, and by *menace* of imprisonment, it is said that is a double plea. 19 E. 4. 4.

7. Where an action of debt was brought by a bishop, the defendant pleaded that he paid the money at the day, according to the bond, to J. S. the plaintiff's bailiff, to the use of the plaintiff, and by his command, and avers that it came to the use of the plaintiff; that averment makes the plea double for if the bailiff received it by the command of the plaintiff notwithstanding it never came to his use, yet it is a good discharge to the defendant. 22 E. 4. 25. a.

8. If the duplicity consists of matter that is surplusage that does not make the plea double. 1 Hen. 7. 19. Dyer 42. b.

On Actions of Debt.

9. If one pleads a concord by an award, and payment, that is said not to be double. 1 Hen. 7. 16.

10. In an action of debt for rent upon a lease, to plead that the plaintiff levied the money by a distress, and so no rent is in arrear, that is not a double plea. 1 Hen. 7. 16.

11. To an action of debt for four marks rent, the defendant pleaded that one mark only was due; and pleads further, as to part a tender, and as to another part, an entry before the day that it became due: These three pleas are said to be not allowable, because one of them goes to the whole; but if he had taken the two first by protestation, that is said to be good. 3 H. 6. 16, 19. 7 H. 6. 26.

12. To an action of debt upon a bond, the defendant pleads that he was *illiterate*, and that the bond was falsely read to him; and further, that it was delivered as an escrow, and the condition on the part of the obligee not performed, and so not his deed; it was held that this plea was not double, because he concludes and so not his deed; for when the party concludes and so not his deed, he may plead twenty matters, to shew that it is not his deed. 38 H. 6. 26, 27.

13. Though it is said that two pleas shall not be allowed, each of which goes to the whole; yet if the defendant pleads a sufficient plea in bar, and traverses the plaintiff's title, that is said not to be double, because the traverse waves the plea in bar. 9 Hen. 6. 26.

Fifthly, That every Plea is to be taken more (P 307) strongly against the Party pleading it.

1. If a Plea is capable of two constructions, it shall be taken more strongly against the party pleading it; because every man is presumed to have made the best of his own case. 3 H. 7. 2. Co. Lit. 303. b. Hob. 234. Jenk. Cent. Cases 118, 176.

Sixthly, That insufficient Declarations may be made good by the Defendant's Plea; so the Plea by the Replication, may be good by the Plea of the adverse Party.

1. If a declaration, bar, or replication be {defective in respect of the omission of some circumstance, as time, place, &c.

Readings and Observations

&c. it may be made good by the plea of the adverse party; but if it be insufficient in substance, it cannot be made good. Co. Lit. 303. b. Hob. 82.

2. It is necessary in a declaration upon a bond to set forth the place where it was made; but if the defendant pleads duress (whereby he confesses the deed) at such a place, that makes the declaration good; for it shall be intended to have been made there. 28 H. 8. Dyer 14.

3. If a plea be double, and an issue be taken upon the matter pleaded, the plea is made good and single. 5 E. 1. 4. 124 a. 4 E. 4. 55.

4. If the plea of the defendant be insufficient, and by the replication of the plaintiff it appears that the plaintiff has no cause of action, he shall not have judgment; but when the plea is a confession of the point of the action, there if the plaintiff replies, and shews matter which doth inforce his case, notwithstanding the replication be in law insufficient, yet the plaintiff shall have judgment. 8 Co. 120. 9 Co. 110. b.

5. An action of debt was brought upon a bond by the plaintiff as chief bailiff of the liberty of *Pontefract* in *Yorkshire*, but he did not declare as *capitalis ballivus*; yet by the court it was held good, for otherwise the defendant might have craved Oyer, and have entered it *in hac verba*, and then have pleaded the statute of Hen. 6. that it was taken *colore officii*; but now it shall be intended good upon a demurrer to the declaration. 2 Mod. 36. *Simpson v. Ellis*.

Seventhly, That Pleas amounting only to the General Issue are not good, but the General Issue must be pleaded. Hob. 127. Carthew 188.

1. But every plea which amounts to the general issue is not therefore ill. 2 Mod. 176.

2. To an action of debt upon a lease for years, the defendant may plead an entry into part, upon which follows suspension; and it doth not amount to the general issue only. 1 Ven. 2. *Mathews v. Gros*.

3. Where a plea goes by way of confession and avoidance, such plea shall not be construed to amount to the general issue. Skinner 362.

See more as to this point in title *Issue*.

Eighthly,

On Actions of Debt.

Eighthly, That in some Instances where the Issue (P 308) is joined upon a Matter insufficient, there shall be a Repleader.

1. If the bar be good, altho' that there be an ill issue joined, yet the plea shall stand, and there shall be a new replication by way of repleader; but if the plea be ill, both parties shall replead. 21 H. 6. 14.

2. If the jury do not find assets to a certain value, the verdict is insufficient, and the court will grant a repleader, and the issue must be tried by another jury. 6 Mod. 3.

3. Where the court awarded a repleader in an action of debt for rent. 4 Leon. 19. *Jocelin v. Jocelin*.

4. Where a repleader was granted upon an immaterial issue in an action of debt upon a bond against an executor. 2 Mod. 139. *Read v. Dawson*.

Of Oyer.

1. The party to the record shall have Oyer of it in the same court, as it is said by Bryan, because he cannot traverse it; otherwise if in another court. 5 Hen. 7. 24. 1 Saund. 9. But *Quere* whether the party can have Oyer of a record in the same court, for the practice is otherwise. 9 Hen. 7. 17. 7 Ed. 4. 18. For the party may have recourse to the record, without aid of the court.

2. If one pleads a devise to a stranger, the other party, against whom the devise is pleaded, cannot have Oyer of the testament; because it does not belong to him that pleads it, but to the stranger. 3 H. 6. 46.

3. It is said that he, who is party to the record, shall not have Oyer of it when the record is pleaded by way of bar; but otherwise where the record is to be executed against him. 22 H. 6. 38.

4. When a deed is pleaded with a *profert hic in curia*, the very deed itself is by intendment of law immediately in the possession of the court; and therefore when Oyer is craved, 'tis of the court, and not of the party. 3 Salk. 119. And after Oyer is craved, the deed is become part of the record, and the court must judge upon the whole; and the demand of Oyer is a kind of plea which may be counterpleaded. 3 Salk. 119.

5. And

Readings and Observations

5. And if the plaintiff makes an unnecessary profer of the deed, the court will not grant Oyer. Salk. 497.

6. And if upon Oyer, where it was unnecessary for the plaintiff to have granted it, the plaintiff sets forth a wrong deed, and the defendant, setting forth the deed which he had Oyer granted of, pleads performance of the covenants, and the plaintiff shews an indorsement upon the deed: The defendant should there have set forth the deed himself, being a party to it, and then have pleaded performance. Now as the defendant was not obliged to give Oyer of the indenture, the setting it forth shall not be to his peril, as where he is obliged to set it forth, and therefore is not excluded from saying that there is more contained in the indenture; so that as the defendant was by law obliged to set it forth, so he should have supplied this omission of the plaintiff, and then have pleaded performance, to have made his plea compleat. Salk. 498, 499. *Cook v. Remington.*

7. The want of a profer is only matter of form, and cured by a verdict. Salk. 497. *And by the act of the amendment of the law of the 4 & 5 Annæ, it is cured after judgment upon an enquiry, and must be set forth specially, for cause upon a demurrer.*

(P* 309) *8. Where the deed is not in court, no Oyer can be granted. 1 Saund. 9. 3 Salk. 119.

9. The entry upon the roll was, that the defendant prayed Oyer of an indenture for the performance of covenants, which was not brought into court; there, upon a general demurrer it shall be intended to be the true indenture, and that it is in court, tho' it does not appear so on the record. 1 Saund. 9.

And after Oyer of the condition the defendant ought to shew the indenture, and not the plaintiff; and the entry always supposes it to be brought into court by the defendant. *Ibid.*

And if the defendant swears that he never had a counterpart of the indenture, or that he hath lost it, the court will sometimes compel the plaintiff to give a copy of it; but that is *ex gratia curiæ*, and not *Ex debito justitiæ*. *Ibid.*

To illustrate which the case was, that in an action of debt against an administrator upon a bond of the intestate, the defendant demanded Oyer of the bond and condition, (*Et ei legitur*) which words are the act of the court, and the condition was for the performance of covenants in an indenture made between the plaintiff and the intestate; and then the defendant prayed Oyer of the indenture mentioned, tho' it was not brought into court by a profer *in curiâ*, and says in his plea *et ei legitur in hæc verba*, and then pleaded; to which the plaintiff demurred, so that the indenture was no otherwise in court than by the defendant's setting it forth in this manner, which should have been produced by the defendant in his plea, under the

On Actions of Debt.

hand and seal of the intestate, and the place where it was made, and the substance of it; that if it should be misrecited, and a wrong deed set forth, the plaintiff might plead *non est factum*, which here he could not do; because the defendant had not alledged that it was the intestate's deed, and therefore the defendant could not crave Oyer of it, and get it truly entered; and the plaintiff having demurred, it shall be intended the true deed; but it is said the plaintiff might have complained to the court. 3 Salk. 119. 1 Saund. 8, 9.

10. The defendant appeared and accepted a declaration of Trinity term, and the attornies of both sides discoursing about the original, the plaintiff's attorney told the defendant's attorney the original was filed; but he had a copy of it. whereof the gave the defendant's attorney a copy, who pleads in abatement; and after a *respondeas custer* awarded by the court, he gives the plaintiff's attorney a plea, setting forth Oyer of the original; and the question was, whether the plaintiff's attorney should be obliged to receive this plea. Holt Chief Justice doubted for these reasons: 1. That after an imparlance one could not demand Oyer; for an imparlance is always to another term. 2. After a plea in abatement one could not have Oyer even the same term to plead another dilatory matter; but what stuck with him was, whether this being of the same term, the party might not crave Oyer, in order to demur to the declaration, and shew a variance between that and the writ, or have it entered on record, in order to move in arrest of judgment, or take advantage upon a writ of error, without being put to the charge of a *certiorari*; and, says he, after a plea in abatement to a bond the defendant may have Oyer; and if he insists on it, he must enter the prayer for it on record, and the plaintiff may counterplead or demur to such prayer, that if the court gives judgment against the defendant, he may have his writ of error; and tho' granting Oyer, where it ought not to be, is no error, yet denying it is: And *Powell's* argument was, that where the party is entitled to Oyer he need not plead without it; but (says he) sure the defendant cannot, without Oyer being granted to him, enter a demand and of Oyer's being granted; for then the defendant's attorney might set forth the matter falsely, which tho' it could not ensnare the other side, because the plaintiff might set forth the right writ, yet it would be tedious and inconvenient; and for other reasons there mentioned the defendant was denied the Oyer; and *Powell* took notice that formerly all demands of Oyer were in court, as it is now in case of an appeal. 6 Mod. 28. Salk. 498. (P* 310)

11. 'Tis said that a deed remains in court all the term it is produced; but it is said to be otherwise of a will or letters of administration; for that they do not remain in court, because

Readings and Observations

because the party may have occasion for them elsewhere. Salk. 497. 36 Hen. 6. 30.

12. Where the party cannot demand Oyer of letters patents. 1 Mod. 69.

13. Where the defendant sets forth an indenture in his plea, and the plaintiff in his replication craves Oyer of it, there the indenture is part of the defendant's plea; and if upon such Oyer it appears, comparing the indenture with the defendant's plea; he has pleaded a false plea; the plaintiff shall have judgment. 1 Saund. 316. 3 Salk. 120. And see the case after in title—Of Affignment of Breaches.

14. Where letters patents are pleaded, if they are recorded in the same court where the plea is pleaded, it is said the party need not shew them; but where they are recorded in another court, he must plead them with a profert *in curia*, or the exemplification of them under the great seal. Salk. 497.

15. Where a declaration is upon an agreement, and the writing set forth only an evidence; there the court will not grant Oyer, but will in some cases order a copy. 2 Keb. 430. *Sufter v. Cowell*.

16. If the defendant craves Oyer of a deed, to which there is a schedule, he shall likewise have Oyer of the schedule. 2 Keb. 4. pl. 8.

17. If a release be pleaded, and the plaintiff craves Oyer of it; if the defendant will not grant it, the plaintiff may sign judgment as for want of a plea. 6 Mod. 122. *Carthew* 453. 454. 517.

18. If Oyer be demanded and not given, and judgment be signed, the court will on motion set it aside. 2 Keb. 275. pl. 37.

Other Cases concerning Oyer.

1 *Sid.* 50.

2 *Lev.* 142.

Hutton 33.

Popham 202.

1 *Keb.* 32. pl. 85. 104. pl. 111.

381. pl. 89. 382. pl. 91.

415. pl. 124. 424. pl. 150.

486. pl. 25. 513. pl. 28.

694. pl. 12. 937. pl. 54.

2 *Keb.* 102. pl. 31. 275. pl.

37. 542. pl. 4. 544. pl. 11.

564. pl. 68. 568. pl. 76.

3 *Keb.* 76. pl. 11. 135. pl. 66.

191. pl. 40. 480. pl. 19.

491. pl. 33. 34. 605. pl. 49.

708. pl. 43. 716. pl. 1.

Of

On Actions of Debt:

Of Pleading a Tender:

1. This rule is laid down, that if the condition of a bond be collateral, as to perform an award after a Tender and a Refusal; the party need not say that he is yet ready, &c. but it is peremptory to the party who refuses; but otherwise if the condition be the essence of the bond, as to pay money. Dyer 150. 22 Ed. 4. 25.

2. An action of debt was brought upon a bond conditioned to pay twelve pounds on the fifteenth of August and on the fifteenth of February, by equal portions; the defendant pleaded that on the fifteenth *of August there was six pounds (P* 311) due, which on that very day at B. *obtulit solvere*, and was ever after ready to pay: and afterwards, viz. on the fifteenth day of December he did pay it to the plaintiff, who accepted; and upon a demurrer to this plea it was adjudged ill, because the defendant pleaded a Tender without a Refusal to accept, and his accepting it afterwards will not help it; 'tis true, if there had been a certain place of payment mentioned in the condition of this bond, and the defendant had shewed that the plaintiff was not there ready to receive it; this might be good, but here was no certain place appointed. 3 Salk. 342.

3. If a man be bound in twenty pounds for the payment of ten pounds, he cannot plead a Tender and Refusal, without pleading that he is yet ready to pay the same. 1 And. 4.

4. But if a man be bound in two hundred quarters of wheat for the delivery of one, there tender and refusal only is a good plea. Co. Lit. 207. a. Because they are *bona peritura*; and 'tis a charge to the defendant to keep them. Ibid. 9 Co. 79. a.

5. If a bond is made; and afterwards there be a defeazance for the payment of a lesser sum; there tender of that lesser sum is good, without pleading that he is yet ready. 1 Cro. 755. But otherwise of an obligation with a condition.

6. So where an action of debt was brought on a bond; and the defendant pleaded that the plaintiff, by his deed indented, agreed, that the defendant should pay him such a sum at such a day, and that then the bond should be void; at which day he tendered the money; and the plaintiff refused; there it is a good plea without saying he is yet ready; for there the indenture is as a collateral covenant, and not part of the bond, as a condition is. Moor 36, 37.

7. In debt upon a bond to give and grant a thing, to plead that he was ready always so to do, is no good plea. 1 Bro.

Readings and Observations

8. But where an action of debt was brought for rent on a lease for years, the defendant pleads that Christmas day being the quarter day, he was at the said messuage for the space of an hour before sun-rising until sun-setting of the same day; and that neither the plaintiff or any other, on her behalf, came or was ready there to receive it, and that always since that day he hath been and yet is ready to pay the same; the plaintiff demurred, for that the defendant had not alledged a tender, but only that he was there ready to pay; but it was adjudged for the defendant, for there need not be a tender, but where there is a condition. Raym. 418, 419. Crouch v. Falstoffe, 3 Salk. 342.

9. So where an action of debt for rent incurred at two half-years was brought, and as to one of them the defendant pleaded *non debet*, and as to the other *actio non*; because he says he was ready to pay it at the day and place, and has been ever since, and a *profert in cur'* of the rent, *ideo petit iudicium de damnis*; to which the plaintiff demurred, for that he did not say *quod obtulit*, for the time and place is certain, *semper paratus* is no good plea without an *obtulit*; for the defendant it was said, that the plaintiff ought to reply a demand. 1 Inst. 34. 'Tis a good plea for the heir in dower to save his damages, to say that he was always ready, &c. Raft. Ent. 159. *Semper paratus* is pleaded without an *obtulit*; so 1 Rolls 573. no mention is made of a tender.

But then another fault was found, that it was pleaded in bar, whereas it ought to have been in bar of the damages, and not to the action; and this was agreed to be fatal; but the court held the plea to be naught for the other cause also. 1 Vent. 322. Osborn v. Beversham.

(P* 312) 10. If one be obliged that a stranger shall execute a bond to the obligee, it is sufficient for the obligor to say, that a stranger tendered *it; and the obligee refused, without saying that the stranger was always ready. 10 H. 6. 16. 27 H. 8. 1. a. 19 H. 8. 12. a.

11. In debt upon a bond, if the defendant pleads that the plaintiff was beyond sea at the day of payment, he must plead that he is yet ready to pay the money. 1 Sid. 30.

12. To plead *uncore prift*, (i. e.) that the defendant was always ready, is not to be pleaded after a general imparlance. 2 Mod. 62.

13. Where it was held necessary for the defendant to plead that he is always ready to pay the money. Ray. 416. Lee administrator, &c. v. Garret & Ux'.

14. If one is obliged to release upon payment of money, he is bound so to do upon a tender and refusal, as if the money were

On Actions of Debt.

were actually paid. Salk. 75. At the end of the case of Simon v. Glanville.

15. When both parties meet at a time and place, for something to be done by one to the other, he who pleads a tender must also plead a refusal, otherwise such plea is naught upon a demurrer, but good after a verdict; and if the defendant be absent, the plaintiff must shew it, and that he was at the time and place, and tendered what was to be done on his part. Salk. 623. Lancashire v. Killingworth.

16. This difference is taken between a tender in *assumpsit* and in debt; that as in debt the damages are but accessory, and therefore the defendant may plead in bar of the damages; but in *assumpsit* they are the principal, and therefore he ought to plead in bar *de ulterioribus dampnis*. Salk. 622. Giles v. Hart. 1 Ven. 322.

17. Where tender and refusal is pleaded, 'tis the refusal which is traversable, and not the tender; for 'tis that makes it a payment in law, and not the tender; and wherever the demand is certain, or a certain sum claimed in the declaration, there a tender and refusal is a good plea, and a tender is not well pleaded without a refusal.

18. If a man is obliged to pay at or before the first of May at such a place, a tender of the money at the place any day before is void, unless he meets the obligee at the place, and tenders it. 1 Co. 14.

19. If one comes with his money in a bag, and holds it in his arms, and says I am ready to pay you, 'tis no good tender. Noy 74.

20. But if more money be tendered than ought to be paid, or tendered in bags and laid down, *Quare* if not good. 5 Co. 115.

21. If one has during life to pay money at such a place to the obligee, a tender at the place is not good without notice that he intends at such a time to tender him the money, and declares that he would be there to receive it, and then it is good. Dyer 354.

22. If issue be taken on a tender, and found for the defendant, the money brought into court shall not be delivered to the plaintiff. Noy 110.

23. Debt on bond conditioned to pay money at a day and place, the defendant pleads he was there ready at the day, and the plaintiff or any for him was not there; the plaintiff may traverse the defendant's plea, or say he was there without a traverse. Keil 75.

24. If the condition of a bond is, that if A. do not pay money at such a day and place, he will, upon delivering up to him

Readings and Observations

him A's bond, pleading *paratus fuit* at the place, is not good without an *obtulit*. 3 Lev. 104.

25. Tender of Rent on the land how pleaded. 2 Cro. 423.

(P* 313) *Other Cases concerning pleading a Tender.

2 Keb. 353. <i>Ludleham v. Stacey.</i>	3 Lev. 104, 322.
3 Keb. 577. <i>Ramsay v. Rutter.</i>	Keil. 75.
800. <i>Beversham v. Osborne.</i>	1 Leon. 69, 70, 71.
Cro. Eliz. 14. <i>Hawley v. Simpson.</i>	2 Leon. 213.
73. <i>Allen v. Andrews.</i>	Ley 70.
126. <i>Harrold v. Clotworthy.</i>	Noy 74.
	110.
2 Cro. 423.	2 Ven. 109.
Cro. Car. 426.	Dyer 354.
Lut. 227.	5 Co. 76, 115.
1 Ven. 21.	1 Cro. 14.
	2 Roll's Rep. 432.

Of pleading Payment.

1. If one is obliged to pay the moiety of such monies, as from time to time the obligor shall receive; the defendant pleaded payment of the moiety without shewing the particular sums he received, and held good. 1 Sid. 234.

2. To an action of debt upon a bond the defendant pleads payment at Dublin in Ireland; and it was held naught: So in covenant by an apprentice in Middlesex, the defendant pleads a departure at London, and it was held naught. 2 Sid. 119.

3. Where the defendant pleaded payment of five pounds before the day, and acceptance in satisfaction, to an action brought for payment of eight pounds at such a day; the court held that a good plea, because acceptance before the day of a less sum, or at another place is good; but payment of part at the day and place cannot be alledged or supposed to be in satisfaction of all of the same kind. Moore 677. Penny v. Core.

4. Where payment of a lesser sum before the day is said to be ill. 2 Keb. 628. Chapman v. Winer.

5. That a place of payment is necessary to be alledged. 2 Keb. 58. Anflow v. Anflow. 768. Cantnor v. Huntnell. And that it is not cured after a verdict. 2 Leon. 216. Co. v. Beveridge.

On Actions of Debt.

6. If a bond be of twenty years standing, the law will presume it paid, upon *solvit ad diem* pleaded; but *Quære if in that case the defendant pleads payment after the day in the condition, whether he must not prove payment.* 6 Mod. 202.

7. If one be bound to pay rent at a day certain, payment before the day will not discharge it. 4 Leon. 4. Fuller's case.

8. Where payment pleaded was ill without shewing an acquittal or release. Cro. Eliz. 884. Colbrook v. Foster.

See more hereafter in title Pleading to Records.

Cases concerning pleading Outlawries.

1. To an action of debt upon a bond the defendant pleads an outlawry in the plaintiff, and concludes in abatement; the plaintiff replies *nul tiel record*, and the defendant had a day to bring in the record, and failed; and it being pleaded to a bond where an outlawry operates as a bar, on failing to bring in the record, the plaintiff had judgment; but otherwise would it have been in an outlawry upon a simple contract, for there the King shall not have it. Cro. Eliz. 203. Smith v. Bernard.

2. Outlawry in the testator is no bar to an action brought by the executor. Hutt. 53. 1 Brownl. 55. Lut. 1604. contra.

3. Nor is outlawry in the plaintiff a bar to an action brought (P 314) by an executor. 1 Brownl. 55. Hardr. 60.

4. If a general pardon by act of parliament destroys a plea of an outlawry. See 1 Brownl. 56.

5. Exceptions to a plea of an outlawry. 3 Keb. 297. Patman v. Stanard.

6. T. was outlawed in debt, and a supersedeas was delivered on record to the sheriff, before the award of the exigent: it was held that the party might avoid it by plea; and where a matter of fact is pleaded to avoid an outlawry, it must be pleaded in person; but matter of record must be pleaded by attorney. 4 Leon. 22. Taylor's case.

7. How an outlawry is to be pleaded. Comb. 379, 471.

A Plea of a Recovery in another Action.

1. A recovery in trespass or trover, or in any other action where the damages are uncertain, is a good bar to an action against another for the same trespass; but a recovery in an action of debt against one, where two are jointly and severally bound, is no bar to an action of debt against the other without satisfaction. Yelv. 68.

2. Where

Readings and Observations

2. Where a recovery in *assumpsit* is a good bar to debt upon a bond for the same matter. Cro. Eliz. 240.
3. But where two were jointly and severally bound, and the defendant pleaded that the plaintiff at another time recovered against the other, and had execution; it was held a good plea. Moor 29.
4. A recovery in an action of debt upon a bond, is a good bar to an action brought upon a statute-merchant or staple. 2 Cro. 8, 9, 34. Phillips v. Echard.
5. Where an action of debt was brought upon a bond, and the case was, that two men were bound in a bond to J. S. and the defendant pleads that his co-obligor was sued to judgment, and thereupon a *feri facias* issued, and that the money was levied by the sheriff; this was held no plea. 2 Show. 394. Dyke v. Mercer.
6. To an action of debt upon a judgment, the defendant pleads that the plaintiff had prosecuted him, and recovered, and that he paid the money to the sheriff, and the plaintiff demurs; the plea was held naught, and judgment for the plaintiff. 2 Show. 139. ——— v. Morton.
7. Where the defendant pleaded a plea, that upon *non est factum* in another action, it was found that it was not the defendant's deed; and the plea was ill pleaded, for that the judgment was not well set forth. 1 Brownl. 81, 82. Level v. Hall.
8. Where a verdict was held no bar by an insufficiency, in entering up the judgment thereupon. 2 Cro. 284. Level v. Hall.

Of pleading a Release.

1. Where a release was held no bar to an action for an annuity. Moor. 134, Digg's case. So of a relief by a release of all demands. 1 Co. 111. b.
2. Where a release was upon the whole matter pleaded, adjudged no bar to an action upon a bond. Parsons v. Cotterel, Ray. 399.
3. An action of debt was brought upon a bond, with a condition for the due service of an apprentice; and the obligee made a release to the apprentice, and not to the obligor, and to an action brought against the obligor, he pleaded this release; and it was held by the whole court, that by a release to the servant the obligation was saved, if the release was made before the bond forfeited; but if it were made after the covenant broken, then such release made to the stranger did not dispense with the bond. 3 Leon. 45.
4. Where

On Actions of Debt.

*4. Where a release pleaded *puis dare in continuance* was adjudged to be ill pleaded, there being no place mentioned where it was made. 3 Keb. 175. Child v. Gardiner. (P* 315)

5. To an action of debt upon a bond, dated and delivered the first day of May, and upon the first day of June following, the obligee makes a release to the obligor, dated the first day of March, and delivers it the first day of June, by which he releaseth all actions to the date of the release; the whole court held that the bond was not released. Cro. Eliz. 14. Drury's case.

6. To an action of debt upon a bond dated 1 May, 27 Eliz. the defendant pleaded that he was bound together with one R. in that bond, to whom the plaintiff released all actions and demands to the said first day of May; the plaintiff by his replication shewed that after the bond sealed by R. the obligee released to him, and traverses that the now defendant was bound together with R. and it was held that this release did not discharge the defendant. Cro. Eliz. 161. Mannings v. Townsend.

7. To an action of debt upon a bond brought by executors, the defendant pleads a release from one of them; and the plaintiff replied, that he who released was an infant, and that the release was made without consideration; and upon a demurrer it was adjudged for the plaintiff, it being a void release. Cro. Eliz. 671. Knot & al' v. Barlow.

8. If the defendant pleads a release, and the plaintiff craves oyer, and it appears that the bond is excepted, he may reply *non est factum*; and the obligation being excepted, all actions and suits upon it are excepted by intendment of law. Cro. Eliz. 726. Brook v. Wheeler.

9. A release after a verdict, and before judgment, cannot be pleaded; but the party is put to his *audita querela*. Hob. 162.

10. By a release of all demands, rent reserved upon a lease is not released; but *Twisden* said it was otherwise of a sum in gross. 1 Sid. 141. 1 Ven. 314. Salk. 578. 2 Cro. 171. Poph. 176. Jent. Cent. Cases 202.

11. But if the rent be payable, a release of all demands releases the rent; yet if part of the rent be due, and part not due, and the defendant pleads the release to the whole, the plaintiff shall have judgment. Salk. 573.

12. Whether a release from A. and B. to C. though these words be in the release, that they release all obligations and writings obligatory, actions, &c. which they or either of them might have against C. will be a bar to an action brought upon an agreement made between A and C. — It seems not, for it cannot be construed to be the intent of the parties to release

an

Readings and Observations

an agreement made to one of them, when he joins another in the same release, who was not a party to the agreement. Raym. 393.

13. The defendant to an action of debt upon a bond pleads a release of all errors and actions, suits and writs of error whatsoever; it was adjudged that this release extends only to writs of error. Raym. 399.

14. So that it must be observed therefore, that the general words of a release may be restrained by the particular occasion, for which the release was made: as where executors sued out a *scire facias* to have execution upon a judgment for six thousand pounds, and the defendant pleaded in bar a release by one of them, whereby he acknowledged to have received of the defendant five pounds given him for a legacy, and released to him thus, *all actions, suits and demands whatsoever, which I against him as executor, &c. have or may, or can have, for any matter whatsoever*; it was adjudged no release, for that the particular purpose for which the release was made, shall restrain the general words. 3 Lev. 274. Knight & al' v. Cole & Ux' Exec', &c. 3 Mod. 277, 278, 279.

(P* 316) *15. To a recognizance, or to a *scire facias* upon a recognizance, a release to the bail of all actions and demands is no plea; because at the time of the release there was not any recognizance in any sum, nor was there any duty due. 5 Co. 70, 71.

16. See Hooe's case cited in the case of Hancock and Feild in 2 Cro. 171. But this must be understood where the recognizance is in the King's bench; but if the recognizance be in the common pleas, where the sum is certain in which the bail are bound, a release to the bail would be good; and with this agrees the opinion of my lord Coke in 1 Roll's Rep. 387. at the end of the case of Hakesley v. Hurrifon.

17. Other cases concerning pleading a release, see

Cro. Eliz. 54. *Alford v. Lee.*

68. *Firth's case.*

2 Cro. 82. *The King v. Wendman.*

300. *Tynan v. Bridges.*

310. ———

3 Cro. 426. *Digby v. Price.*

490. *Knevertton v. Layton.*

1 Keb. 499. *Hen v. Hanson.*

2 Cro. 486. ———

1 Brownl. 51. *Speak v. Richards.*

54. ———

61. *Potter v. Thompson.*

62. *Lawrence v. Altham.*

80. *Whitten v. Bye.*

115. *Bridges v. Ennis.*

2 Brownl. 300. ———

Jenk. Cent. Cases 202.

2 Ven. 131. *Shipley v. Grafter.*

Exceptions

On Actions of Debt.

Exceptions to Pleas relating to Lands.

1. To an action of debt upon a bond to procure a stranger to make a release of his right and title to lands; the defendant cannot plead that the stranger hath not any right to those lands. 1 Saund. 215, 216. Doughty v. Neale.

2. If one is obliged to make a sufficient title to lands before such a day, and the defendant pleads a feoffment with livery, and that he was an hour before sun-set upon the premises, ready to have made a conveyance: this is not good without shewing what sort of conveyance he intended it to be; but there needs no notice of the time and place. Ven. 147.

3. In debt upon a bond with a condition to confirm such a demise; and the defendant pleaded that he *confirmavit & relaxavit*, and held no plea for want of alledging a confirmation by deed. Dyer 229 b.

4. If one is obliged to make to another a legal estate, 'tis sufficient for the obligor to plead that he made a feoffment; but if it had been to build a sufficient house, he ought to plead that he built such a house, and that it was sufficient. Kelway 95.

5. In pleading the performance of a condition, which is, not to disturb the possession of the obligee in his possession, by any indirect means but by course of law; and he pleads that he did not disturb by any indirect means, but by course of law; it was held good, for what follows the word *but* is surplussage. 2 Leon. 197.

6. If one is obliged to make a deed, it is not sufficient in pleading to say he made it without shewing the deed that he made; but if a man is obliged to deliver a deed already made, it is sufficient. Salk. 498.

7. Where the defendant was obliged to surrender to the use of the plaintiff; and he pleads a surrender to the plaintiff, that is good. 3 Cro. 6. But if he pleads a delivery without saying to whom; *Quare* if good.

8. To an action of debt upon a bond, with a condition to suffer B. quietly to enjoy lands; it has been held a good plea to say, that after making the bond he enjoyed the lands; for the word *always* shall be intended. 3 Cro. 195.

*9. What plea was held good, pleaded to a bond with a condition to warrant and defend lands. Moor 175. Grococke v. White.

10. What

Readings and Observations

10. What was held a good plea to a bond with a condition for the quiet enjoyment of lands. Moor 58. Broughton v. Carney.

11. Where an action of debt was brought against one Mansier upon a bond, where the condition was, *That the obligor and one J. Maunxel should do all reasonable acts for further assurance, to be devised by the obligee's counsel*; the defendant pleaded that the plaintiff offered him a release in writing, which he executed; but further, that the plaintiff shewed it to his son the said J. Maunxel, and required him to execute it; that the son was illiterate, and prayed that the plaintiff would deliver it to him, to the intent that he might shew it to a skilful man, who might advise him of the contents of it; and if the contents were according to the lands sold by his father, that then he would execute it, and the plaintiff refused; upon this there was a demurrer, and the plea was adjudged insufficient. Moor 182. This case is likewise reported in 2 Cooke 3. but the chief objection was, that the defendant had pleaded that he had sealed and delivered a release in writing, whereby he had taken upon him to know the nature and quality of it, and therefore ought to have shewn the contents of it; but if he had pleaded that he had sealed a writing, without shewing that he knew the contents of it, it had been sufficient: but the judges doubted of the other point as to the son; for although the obligor may excuse himself by illiterature, yet it was a great doubt whether the obligor should plead that in a stranger; and there was likewise a great doubt whether the stranger should be allowed to refuse executing by reason of illiterature, because the father had obliged himself that the son should do it; but if a certain time had been limited for the obligor to do it, there illiterature would not excuse, because the obligor might have provided himself with a skilful man to assist him, at the last instant, when he was to perform it. Vide Moor 143. Androse v. Eden. And as to the release, the following cases are in point, 1 Cro. 253. Kiel. 80. Dyer 43. 1 Leon. 71. 3 Mod. Rep. 252. Al. 72. 2 Cro. 165, 340, 363. 2 Leon. 214. Co. Lit. 303. Winch. 9 Hard. 133.

12. Where in an action of debt upon a bond, with a condition to assure lands, the breach was not well assigned. Raym. 190. Lafcelles v. Chatterton.

13. If the condition of a bond be to discharge a messuage from all incumbrances, the defendant may plead generally that he did discharge it from all incumbrances; but if it be to discharge it from such a lease, he must show specially how he did it. 1 Brownl. 63. Lut. 609.

14. Upon a bond with a condition, that if such lands be proved to be parcel of the manor of D. H. then the plaintiff shall

On Actions of Debt.

shall enjoy without interruption of the defendant. 2 Cro. 232.
Elve v. Sabe.

15. Plea to debt upon a bond for quiet enjoyment of lands.
 3 Cro. 195. *Arlow v. Wright.* Cro. Eliz. 212. *Minge v. Earle.*
 1 Leon. 187. *Seaman v. Browning.*

16. Plea to a bond with a condition to enjoy lands, and
 make an assurance. Cro. Eliz. 870. *Waller v. Crook.*

17. Plea to debt upon a bond with a condition to convey
 lands. Cro. Eliz. 825. *Stutfield v. Somerset.*

18. Plea to debt upon a bond to make an estate, and ill.
 Stiles 61. *Brooke v. Brooke.*

19. Where a plea to a bond to levy a fine was ill. 1
 Brownl. 94. *Hollingworth v. Huntley.* 1 Brownl. 76. *Man-*
chester v. Draper.

20. Where a plea to a bond to pay money and levy a fine,
 was not well pleaded. 1 Brownl. 76. *Manchester v. Draper.*

21. Plea to an action of debt upon a bond not to disturb
 the obligee in the possession of lands, where naught. Godb. 60.
 pl. 74. *Deighton v. Clark.*

22. Where a plea to a bond with a condition to grant an
 estate was adjudged ill. 1 Brownl. 75. *Chapman v. Pescod.*

23. Where a plea to a bond to surrender copyhold lands
 was ill pleaded. 1 Brownl. 72. *Horne v. May.* Winch 11.
Llewelling's case.

24. A plea to a bond with a condition upon the assignment
 of the old lease to grant a new one. 1 Bulstr. 22. *Bartholomew*
Administrator, &c. v. Savage.

25. Exceptions to a plea in an action of debt upon articles
 to make a further assurance to lands. 2 Keb. 685. *Lascell v.*
Caterton.

What Pleas have been adjudged good, and what
 not, in Action of Debt upon a bond with the
 Condition to perform an Award.

1. To an action of debt for the performance of an award,
 the defendant pleaded that it was a void award, and not ac-
 cording to the condition; and it was held an ill plea. 1
 Brownl. 124.

2. Where arbitrators award releases to be made from one to
 the other at such a place, in pleading performance 'tis enough
 to say he was ready at the place. 2 Brownl. 48.

3. In an action of debt to perform an award *nul award fait*
 pleaded, the plaintiff sets forth the award without saying that
 it

Readings and Observations

it was ready to be delivered to the parties; and held good without such averment. Hardr. 399.

4. To an action of debt upon an award to pay money to two, the defendant pleaded performance; and the plaintiff replied that the money was not paid to one; and it was ill. 2 Sid. 41.

5. The plaintiff brought an action of debt upon a bond of five hundred pounds; the defendant demands *oyer* of the bond and condition, which was to observe an award of A. B. arbitrator, indifferently chosen to determine all manner of controversies, quarrels, and demands concerning the title of certain lands, so as the said award were made and put into writing, under the hand and seal of the arbitrator, &c. and then he pleads that the arbitrator made no award: the plaintiff replies an award, by which such things were to be done, and sets forth *in hæc verba*, under the seal of the arbitrator: the defendant rejoins, that the arbitrator made no award under his hand and seal, according to the condition of the bond: the plaintiff demurs, for that the defendant ought to plead the award under the hand, as well as the seal of the arbitrator; for when he produces it in court, as he doth by a *profert hic in curia*, he must plead it formally as well as to produce it, and judgment was given for the plaintiff. 2 Mod. Rep. 77, 78. Columbel v. Columbel.

6. Where a plea was adjudged not good to an action of debt upon a bond with a condition to perform an award. Moore 545. Marsh v. Edmonds.

7. To an action of debt, with a condition to perform an award, the defendant pleaded no award, and the plaintiff assigns a breach; the defendant cannot rejoin any matter, which shews the award void, or to excuse himself from the performance, for that is a departure from his plea. 1 Lev. 133. Garret v. Weeden.

(P* 318) *What Pleas to an Award have been adjudged good
and what not.

Gro. Eliz. 10. <i>Kingsmill v. Knatman.</i> 448. ——— 459. <i>Edmunds v. Marks.</i> 838. <i>Risden v. Englate.</i>	1 Leon. 320. <i>Fraud v. Bates.</i> 71. <i>Brett v. Auder.</i> 3 Bulstr. 62. <i>Berry v. Perry.</i> 2 Bulstr. 117. <i>Bilford v. Fum.</i> W. Jones 66. <i>Bishop of Norwich v. Cornwallis.</i> 3 Keb. 296. <i>Hall v. Morna.</i>
---	--

Fle

On Actions of Debt.

10. 1 Leon. 72. — Where there is a difference taken between the condition of a bond to discharge the plaintiff, and a condition to save him harmless.
11. See 1 Roll's Abr. 432. pl. 2. Danv. Abr. 2d Vol. 54. Letters Y. Z.
12. Stiles 16. Wroth v. Elsey. Where it was held that he ought to have pleaded *non dampnificatus*, and not that he saved the obligee harmless.
13. Lut. 669. Briggs v. Mond. Where the condition of a bond was for the payment of money for the maintenance of a bastard child, and a proviso that the obligee should save the obligor harmless, &c. and a plea that there was a prosecution against the obligor about the child, and that the obligee had not saved the defendant harmless, and concludes *Si actio, &c.* It was held that the obligee was not obliged to save the obligor harmless from a legal prosecution, but only that the obligor should not be put to any charges for the maintenance, &c.
14. Where a plea of *non dampnificatus* generally hath been adjudged a good plea, and where not. 3 Mod. 305. 3 Mod. 351. 1 Keb. 379. Morgan v. Thomas. 1 Sid. 444. 1 Mod. 43. 619. 4 Leon. 62.

What Pleas have been adjudged good, and what not, to Actions of Debt for an Escape.

1. To an action of debt for an escape at A. and the defendant confesses an escape at B. and that he made fresh pursuit; it is not good without traversing the escape at A. for it is an escape in every county. Jones 145.
2. To an action of debt for an escape the defendant pleaded a commitment without *prout patet per record*; and it was held to be defective in form. 5 Mod. 9.
3. What hath been adjudged a good plea to an action of debt brought against the sheriff for an escape. Grills v. Edgway. Moor 660.
4. What hath been held no plea to an action brought by the defendant against the sheriff for an escape. Belchamber v. Marge. Moor 404.
5. To plead that the defendant escaped with the consent of the plaintiff, is no bar to the plaintiff's action of debt upon judgment. 1 Show. 249. Buxton v. Horne.
6. To an action of debt upon an escape at London of one in execution, the defendant pleaded that such a day the defendant

Readings and Observations

broke prison, and escaped against the defendant's will, and that the defendant made fresh pursuit, and in such pursuit retook him; the plaintiff replied, that the defendant remained a whole night and a day out of the view of the defendant; this plea was adjudged ill, because the defendant did not therein alledge where he made fresh pursuit, so that it might appear he answered to what the plaintiff alledged, which was the prisoner's escape at London. Poph. 41. *Geiles v. Rigeway*. But these points seem to be resolved, that the being out of the sheriff's view is not material; so that it appears that the whole act of escape is against the will, and thro' no default of the defendant; as the prisoner's turning a lane out of view, or being so through the darkness of the night; or if he makes to a house, and is kept there a long time, and the sheriff sets a guard upon the house, or retakes him the next day or any other day, without departing the house; and the sheriff, as to the prisoner, tho' he did not make fresh pursuit, may yet retake the prisoner, and the plaintiff may accept the prisoner to be in execution; but if the plaintiff recovers against the sheriff, he cannot retake him, but is put to his action. *Ibid.*

Other Pleas to Actions of Debt upon an Escape.

<i>Cro. Eliz.</i> 6. <i>Vast v. Gawdy</i> .	<i>Lut.</i> 631. <i>Beol & Ux' v. Simp-</i>
185. <i>Devered v. Rat-</i>	<i>son.</i>
<i>cliffe.</i>	2 <i>Leon.</i> 89. ———
164. <i>Ognell v. Passton.</i>	4 <i>Leon.</i> 69. ———
188. <i>Bushe's case.</i>	
1 <i>Brownl.</i> 51. <i>Maddock v.</i>	
<i>Young.</i>	

Pleas to Actions of Debt upon Statutes.

1. An action of debt was brought upon the statute of 2 Ed. 6. for Tithes; to which the defendant pleaded an agreement between the plaintiff and him for three years, and doth not alledge it to be by deed, and an issue is joined upon it, and found for the defendant; tho' this be not such an agreement as to pass the right, yet it was resolved to be a good agreement within the statute to bar the plaintiff in his action of debt. *Raymond* 14. *Barnard v. Evans*.

2. To an action of debt for *not coming to church*, it hath been held that the plaintiff may plead conformity even after a verdict for the plaintiff. 2 *Show.* 331.

3. Objections to a plea of the statute of 5 Eliz. cap. 4 to a bond. 3 *Bulstr.* 179. *Bennet v. Belfield*.

4. A plea of the statute of 32 H. 8. c. 16. whereby lease of shops made to any stranger or alien artificer shall be void. 3 *Mod.* 94. *Bridgham v. Fronlee*.

5. When

On Actions of Debt.

5. Where the statute of 23 Hen. 8. cap. 16. pleaded to a bond given to the sheriff was held no plea. Moor 542. Cartwright v. Doleworth.

6. Exceptions to a plea in an action of debt for not setting out tithes. 2 Bulstr. 93. Moyle v. Emot.

7. To an action of debt upon the statute for selling wine without license, declaring *quod cum* the defendant sold wine at his house in such a place at such a day, until such a time; the defendant pleaded *nil debet* and a verdict for the plaintiff. 1 Show. 337. Mallack, *qui tam*, &c. v. Sparing.

8. Objections to a plea of the statute of 13 Eliz. cap. 20. that bonds given for benefices should be void. Cro. Eliz. 88. Gosnell v. Kinglemarsh.

9. Plea of the statute of 5 Ed. 6. cap. 16. for selling offices. Cro. Eliz. 529. Lee v. Colethill.

10. Of the statute for not setting out tithes. Cro. Eliz. 621. Johnes v. Carne.

11. Exceptions to a plea of the statute of 16 Car. 2. cap. 7. concerning gaming. 3 Keb. 671. Hudson v. Malin. 3 Keb. 259. Edgbury v. Rosindal.

12. Exceptions to a plea of the statute for selling offices. 4 Mod. 222. Blankard v. Galdry.

Where the Statute of Limitations hath been held a Bar, and where not.

1. In debt the plaintiff declared that his testator recovered a judgment in this court, upon which he sued out a *fieri facias*, which he delivered to the defendant, being sheriff of Lincoln, and thereupon the said sheriff returned a *fieri facias*, but that he hath not paid the money to the plaintiff, *per quod actio accrevit*, &c. the defendant pleaded the statute of limitations, to which the plaintiff demurred; and the question was, whether this action was barely grounded on the contract, or whether it had a foundation upon matter of record; if on the contract only, then the statute of 21 Jac. cap. 16. is a good plea to bar the plaintiff of his action which enacts, *That all actions of debt grounded upon any lending or contract, &c.* and the cause of action doth accrue upon a contract; and in this case nine years had passed; but if it be grounded upon matter of record that is a specialty, and then the statute is no bar: And afterwards in Michaelmas term following, by the opinion of the Chief Justice Wyndham, and Atkins Justice, it was held that this case was not within the statute, because the action was brought against the defendant as an officer, who acted by virtue of an execution; in which case the law did create no contract, and that here was a wrong done, for which the plaintiff had taken a proper remedy, and therefore should not be barred by this statute. 2 Mod. Rep. 212. Cockram v. Welby.

Readings and Observations

2. Where the statute of limitations was held no bar to an action of debt for an escape. *Jones v. Pope.* 1 Lev. 191. 2 Keb. 93. S. C.

3. Where it was adjudged that an action of debt upon an award was not within the statute of limitations. 2 Saund. 67. *Hodlesden v. Harridge.* 1 Lev. 273. 2 Keb. 462.

4. That the statute of limitations does not extend to the statute of 2 Ed. 6. for carrying away of tithes. 3 Cro. 513. *Tallory v. Jackson.*

Pleas of the Statute of 23 Hen. 6. concerning Bonds taken by Sheriffs, and other Officers.

Cro. Eliz. 66. *Bracebridge v. Vaughan.*

108. *Trussel v. Askton.*

672. *Crynen v. Tythen.*

Lut. 680. *Blewett v. Applebee.*

3 *Cro.* 309. *Johns v. Strafford.*

2 *Cro.* 286. *Villers & Ux' v. Hastings.*

2 *Leon.* 118. *Phillips v. Stone.*

3 *Keb.* 71. *Monday v. Frogat.*

111. *Mildmay's Case.*

160. *Foorth v. Ward.*

3 *Keb.* 191. *Twisleton v. Dun-kin.*

262. *Red v. Huans.*

Cro. Eliz. 644. *Stepney v. Lloyd.*

745. *Brown v. Adams.*

776. *Bowles v. Hewett.*

800. *Guybon v. White-rost.*

808. *Clifton v. Webb.*

852. *Blackburne v. chasl.*

862. *Cotton v. Wall.*

2 *Keb.* 656. ———

(P* 320) *Of pleading the Statute of Usury, and what are usurious Contracts.

1. To avoid a security, by reason of the statute of usury, the contract itself must be usurious; for if the party afterwards takes more money than is allowed, that will not make the contract usurious. 2 *Mod.* 307. *Ballard v. Oddey.* 1 *Mod.* 69. 1 *Saund.* 295.

2. So that if a contract or bond be made *bona fide* for a just debt, and afterwards it is corruptly agreed to give a bond for interest more than the rate by the statute, for the forbearance tho' this corrupt agreement is punishable by the statute for the treble value, yet it is said that such usurious contract shall not avoid the bond; that was made *bona fide.* 1 *Saund. ibid.* *Cro.* 20 But if at the time of the contract it was agreed to have above six per cent. the bond is void. 3 *Leon.* 205. *Bod v. Tafall.*

3. So it is held by Holt, where a man makes an usurious contract, and gives him unlawful interest, and agrees to give him a bond for the principal, and after by a subsequent agree-

On Actions of Debt.

ment gives a bond for the sum lent to J. S. to whom the lender owes so much, in satisfaction of his debt; this bond is not avoidable by the statute: If a man lends money for the legal interest, and after a subsequent agreement is made for more interest, which is usury, that will not avoid the first contract. Far. 119. 1 Saund. 294, 295. 2 Mod. 307. 3 Mod. 35. 2 Salk. 680, &c. Cumberba. 92, 125, 133. 1 Show. 8. 2 Show. 319. 1 Lev. 54. 2 Lev. 7.

4. And in pleading the statute, you must set forth what was the corrupt agreement, and what sum was taken more than six per cent. 3 Mod. 35. Hinton v. Roffey. 2 Show. 329.

5. And it hath been held no plea to say that in such a year, upon an usurious contract, the plaintiff lent the defendant such a sum; and that afterwards a new bond was given for part of that sum. 1 Brownl. 73. Vaughan v. Chambers.

6. If upon lending seven pounds to be paid at the end of a year, there is a corrupt agreement to pay three pounds for every month, it is in arrear, after the end of the year; and upon this a bond or bill is made, this is usurious and void. Jones 410. 5 Co. 69. 2 Car. 509.

7. If upon lending one hundred pounds, there is an agreement to pay twenty pounds a year, during the life of such person, and a bond is given accordingly; this is not usury, for there is no provision for the principal money; but if the principal is to be repaid, tho' not expressed within the bond, it is usury. 2 Cro. 253. Fountain v. Grymes.

8. And these distinctions are taken by Judge Dodderidge in 2 Cro. 508. at the end of the case of Roberts and Terrayne, That if I lend one hundred pounds to have one hundred and twenty pounds at the end of the year, upon a casualty; if the casualty goes only to the interest, and not to the principal, it is usury; but if the interest and principal are both at hazard, it is not then usury; which is the case of deeds made upon bottomree, which are not usurious, agreeable to which last mentioned case of usury is 1 Sid. 28. 1 Lev. 54.

9. And if I secure both interest and principal, if it be at the will of the party who is to pay it, it is not usury; as if I lend to one a hundred pounds for two years, to pay for the loan thereof thirty pounds; but that if he pays the principal at the year's end, he shall pay nothing for interest: This is said by Dodderidge not to be usury, for the party hath it in his election to pay it at the first year's end, and so discharge himself.

10. And this agrees with the case of the King and Drury, in 2 Lev. 7, 8. where it was adjudged not usury to take a lease for three hundred years, at the rent of thirty-five pounds per annum, conditioned to be void, if the grantor pays three hundred pounds at the end of four years; for that is no more than

Readings and Observations

than an annuity determinable by the grantor when he pleased, and the grantor had no remedy for his money.

11. Where A. lends to B. three hundred pounds upon an adventure, during the natural life of C. for such a time; if therefore C. pays A. twenty-two pounds ten shillings and ten pence, at the end of three months; and afterwards, at the end of six months pays the principal sum with a further premium, at the rate of six-pence each pound *per month*; or if before the times mentioned the said C. dies, that then the bond to be void; this was construed an usurious contract. Carthew 67, 68. Comb. 125, 126. 3 Salk. 391.

12. But in 1 Sid. 182. if one lends a hundred pounds to pay forty pounds *per annum*, till one hundred and twenty pounds be paid, that is not usury, but the purchase of an annuity.

13. But where the case was, that A. lends B. one hundred and fifty pounds for two years, upon the second day of August, and it was found that for the loan it was at the same time agreed that B. should grant to A. an annuity of twenty-two pounds, during the two years, if A. so long lived, and that upon the fourth day of August the grantor should convey the lands to A. for years, for the security of the principal, with a proviso that upon payment the term should cease; this was held an usurious contract; and a difference was taken, where the principal as well as the interest is at hazard; that is not usury, as in the case of a bottomree contract; but where the principal is secured, and the interest only at hazard, that will not avoid the statute of usury. 2 Roll's Rep. 47, 48. Roberts v. Tremoile.

14. Debt upon a bond dated the twenty-fourth of May, conditioned to pay three hundred pounds on the twenty-fifth of February, &c. the defendant pleaded in bar, that after making the said bond, viz. such a day the plaintiff *corrupte recepit* of the defendant thirty pounds, for the use of the said three hundred pounds for one year, viz. from such a day to such a day, which is more than six pounds *per cent. per annum*; *contra formam statuti*; and upon a demurrer to this plea it was adjudged ill, because the statute makes all bonds void where money is lent upon or for usury, and where more is taken than after the rate of six *per cent.* But this bond doth not appear to be for money lent, or for usury, but for payment of a just debt; and if there is an usurious contract after the bond, that shall not affect the bond to make it void, because it was good at the time it was made; but by the latter clause of the statute, such an usurious contract is punishable by forfeiture of treble the value. Ibid. 3 Salk. 390.

On Actions of Debt.

15. If money is borrowed upon a corrupt agreement, and the borrower and a stranger give a bond for the money, the stranger not being party or privy to the corrupt agreement, and then the borrower gives the stranger a bond to save him harmless from the bond; the bond to the stranger is not void by the statute. 2 And. 121.

16. A. is indebted to B. in one hundred pounds upon an usurious contract; B. is indebted to C. for a just debt, and A. and B. enter into a bond for the payment of money due to C. in an action of debt upon this bond against A. he pleads the usurious contract; the plaintiff replies, that before the bond B. was justly indebted to him, and for this debt the bond was entered into, and that he was not privy to the corrupt agreement betwixt A. and B. upon a demurrer the bond was adjudged good. 2 Cro. 333.

17. If A. owes B. one hundred pounds, who demands his (P 321) money, and A. acquaints him that he hath not the money ready, but is desirous to pay it, if B. can procure it to be lent by any other person; and thereupon B. having a present occasion for his money, contracts with C. that if he will lend A. one hundred pounds, he will give him ten pounds; and thereupon C. lends the money, and the debt is paid to B. this is a good and lawful contract between B. and C. for B. hath benefit by it, per Holt chief justice reported in Carthew 252.

18. To a *scire facias* upon a judgment the statute of usury cannot be pleaded. 1 Sid. 182.

19. To a bond or articles, though they appear usurious, the defendant cannot take advantage of it, upon an ill plea or a demurrer: but must plead the statute. 1 Sid. 285. 3 Salk. 391.

20. To an action of debt upon a bond, the defendant pleaded that there was a corrupt agreement, and avers that the bond was entered into by covin to evade the statute; and *per cur.* this averment is traversable. Hardr. 418. Joy v. Rent.

21. Though a corrupt or usurious bargain shall make a deed void, yet a corrupt assurance will not make an agreement corrupt. 2 Roll's Rep. 414, 415.

22. If one gives an usurious bond, and tenders the whole money; yet if the party will take only legal interest, he shall not forfeit the treble value. 4 Leon. 43.

23. If there be an agreement to pay at the rate of six pounds *per cent.* and by the scriveners mistake, the money agreed to be paid, which was six pounds *per cent.* is made 8 *per cent.* that is not usury. 2 Cro. 678.

24. If the defendant pleads that it was agreed so and so setting forth a corrupt agreement; and the plaintiff replies *non corrupte agreeat fuit*, by this replication of the plaintiff, the defendant's plea is made good. Moor 464.

25. And

Readings and Observations

25. And if the jury find a contract, which is in its nature usurious, though they do not find that it was corruptly agreed, yet it will be a good verdict; but otherwise if an information wants the word *corrupte*. 2 Roll's Rep. 48.

Other Cases concerning pleading the Statute of Usury, and what have been deemed usurious Contracts.

<i>Cro. Eliz.</i> 20. <i>Pollard v. Coley</i> .	<i>W. Jones</i> 396. <i>Newison v. Whitby</i> .
245. <i>Lowe v. Wotten</i> .	410. <i>Swales v. Bateman</i> .
588. <i>Robinson v. May</i> .	1 <i>Brownl.</i> 52. <i>Sharpley v. Hurrall</i> .
642. <i>Button v. Downham</i> .	3 <i>Mod.</i> 35. <i>Hinton v. Roffey</i> .
1 <i>Brownl.</i> 85. <i>Ellis v. Warnes</i> .	2 <i>Cro.</i> 32. <i>Ellis v. Warnes</i> .
2 <i>Ven.</i> 83. <i>Busb v. Buckingham</i> .	2 <i>Cro.</i> 208. <i>Sharpley v. Hurrall</i> .
107. <i>Buckler v. Mil-lard</i> .	3 <i>Cro.</i> 501. <i>Newison v. Whitby</i> .
1 <i>Bulstr</i> 17. ———	<i>Owen</i> 9. ———
2 <i>Show.</i> 39. <i>Hinton v. Roffee</i> .	2 <i>Keb.</i> 55. <i>Farrell v. Sham</i> .
4 <i>Leon.</i> 43. <i>Brown v. Fulshy</i> .	3 <i>Keb.</i> 62. <i>Cham. v. Taylor</i> .
2 <i>Leon.</i> 166. <i>Basset v. Sproule</i> .	14. <i>Radley v. Manning</i> .
3 <i>Leon.</i> 63. <i>Potkin's Case</i> .	468. <i>Palmer v. Taylor</i> .
	618. <i>Gilmor v. Iflos</i> .

Cases concerning pleading Attachments by the Custom of London.

<i>Cro. Eliz.</i> 101. <i>Pell v. Pell</i> .	<i>Cro. Eliz.</i> 691. <i>Humfry v. Barnes</i> .
157. <i>Babinton v. Babington</i> . 3 <i>Leon.</i> 282.	843. <i>Hodges v. Cox</i> .
<i>Cro. Eliz.</i> 342. <i>May v. Middleton</i> .	1 <i>Brownl.</i> Hope v. Holman.
593. <i>Lewknor v. Huntley</i> .	3 <i>Leon.</i> 210. ———
598. <i>Parramore v. Paine</i> .	<i>W. Jones</i> 406. <i>Pearse v. Calcot</i> .
	2 <i>Show.</i> 506. <i>Self v. Kennicott</i> .
	1 <i>Ven.</i> 111, 113.

Pleadings by an Infant.

1. An infant may plead his nonage to a bond, though given for necessaries, where there is a penalty. Noy 85. *Delavel v. Clare*. Latch 151. *Cowlin v. Cook*.

2. But

On Actions of Debt.

2. But in the case of a single bill it was held in 1 Lev. 86. 1 Keb. 382. *Russell v. Lee*, that where it was given for necessaries, the infant could not plead his nonage; but upon a bond with a penalty, he could, upon the authority of Co. Lit. 172. 1 Cro. 920. *Moor* 679.

3. Where an infant, in order to deceive A. borrowed one hundred pounds of him, affirming himself to be of full age, and an action was brought against him upon this false affirmation; and the question was, whether the infant was chargeable; *Keeling and Wyndham* were of opinion that the action would not lie; but *Twisden* doubted. 1 Lev. 169. *Johnson v. Pie.* 1 Keb. 905. But where a fact is committed by an infant as a Trespass, *Dyer* 105. or a Trover, 3 Keb. 59. *Owen v. Lewis*, an infant cannot plead his nonage.

4. Infancy may be given in evidence upon *non assumpsit*. 3 Keb. 798. *Tapper v. Davenant*. 2 Leon. 144. *Seaton v. Gilbert*.

5. But it is said in the case of *Cole and Delawne*, that to an action of debt upon a bond the defendant ought to plead his infancy; and that it cannot be given in evidence upon *non est factum*. 3 Keb. 228.

6. If an infant borrows money to buy necessaries, it has been said that he cannot plead his infancy; for where he did, and the plaintiff replied that they were for necessaries; upon a demurrer it seems to be the opinion of the court, that the action would lie. *Ellis v. Ellis*. *Comber*. 482. Note; It seems that the action was brought for money laid out, as well as for money lent; and because the plaintiff replied, and said nothing as to the money lent, judgment was given for the defendant. 5 Mod. 368. 1 Salk. 279, 386, 387.

7. But my lord chief justice Holt, in the case of *Derby and Boucher*, held that an infant might plead his infancy, and was not obliged to pay money lent to him, though for necessaries; because it is upon the lending the contract must arise. 1 Salk. 279. And so the same point is adjudged by the late lord Maclesfield in the case of *Earle v. Peale*. 1 Salk. 387. that though an infant may buy necessaries, he cannot borrow money to lay out for necessaries; for he may misapply it; and therefore the law will not trust him; and it is at the peril of the lender who might have laid it out for him, or have seen it laid out, and then it would have been construed his providing, and not the infant's.

8. A defendant may plead his infancy to an action upon a bill of Exchange. *Carthew* 160.

9. An infant must appear and plead by guardian, and not by attorney; for he is not supposed to be in a capacity to choose one. 3 Mod. 236.

10. If one under age be keeper of a gaol, and suffers a prisoner to escape out of execution, he cannot plead his infancy
to

Readings and Observations

to an action brought for the escape. 3 Mod. 222. 2 Inst. 382.

(P* 322)

*Pleas by Baron and Feme.

1. *Ne unquex accouple in legali matrimonio* was held an ill plea to an action of debt brought by husband and wife. Salk. 437.

2. To an action of debt brought by a man and his wife against C. for rent reserved upon a lease for years, made by the wife and a former husband; the defendant is not estopped to say that the husband was sole seised, for the wife hath not a reversion by estoppel against the lessee; but when two join in a fine, he who accepts of the fine is estopped to say that the parties had nothing in the premises. 1 Cro. 700. Roll's Rep. 294, 872.

3. Where the wife was waived, and the husband was discharged by a superseedeas. 1 Leon. 138. Burford v. Fox.

4. To an action of debt upon a bond made to the wife, when sole, to perform an award; the defendant pleaded that before the award made he married her; *Quære* whether a good plea. 3 Keb. 9. Samon v. Norton.

Pleas by Executors and Administrators.

1. An executor cannot plead that he is not the person named in the will of the testator. Stiles 63. Seaman v. Edwards.

2. It has been said that an administrator must plead that he is so, and not executor, with a traverse, that he ever administered as executor. 1 Brownl. 97. Lowthby v. Humphry. 2 Brownl. 183, 184, 185, 186. Lawry v. Aldred & al'.

3. But in Salk. 297. in the case of Fowler v. Cooke, the lord chief justice Holt held the traverse needless; but (says the book) 'tis true, if he intermeddled before administration, he may be charged as executor of his own wrong; but that shall not be intended till the contrary appears; and therefore the plaintiff must reply it; and he took this difference between pleading that he is administrator, and that he is executor; for that to plead he is executor, he ought to traverse the dying intestate; because unless there was a dying intestate, no action can be brought against one as administrator; and to say he was made executor, is by implication only an answer to the dying intestate. Powers v. Clarke, to the same point, Salk. 298. 5 Mod. 145.

4. And agreeable to this resolution is the case of Pyne v. Wooland in 2 Ven. 179, 180. where the plaintiff to such plea as above, replied, that after the death of the defendant's husband, and before letters of administration granted to her, the defendant

On Actions of Debt.

defendant administered divers goods and chattels of her husband at such a day: to which the defendant demurred; and judgment was given for the plaintiff; for by demurring, and not setting forth the day when administration was granted to her, it might be after the writ brought; and besides, if she disposed of the goods as executrix of her own wrong, the taking out administration afterwards, though before the action brought, will not hinder the plaintiff from charging her as executrix of her own wrong. Cro. Eliz. 102. to the same point; and see 1 Mod. 239.

5. So that the cases of Yelv. 115. 1 Brownl. 18. and others to this point, are law; that if an action be brought against one as administrator of J. S. and the defendant pleads that J. S. made him executor; it is not a good plea without a traverse that J. S. died intestate.

6. An executor may retain goods to pay himself, and may plead it, as where an action of debt was brought against an administrator; who pleads, that the intestate was indebted to him by bond, and that he retained the money in his hands to satisfy the debt; and the plaintiff replied, that the money was not due and payable to him at the time of the intestate's death, and that he took out administration after the day of payment; and if the administrator had pleased, he might have taken out administration before the day of payment; and the court held the defendant's plea good. 1 Brownl. 73. Grove v. Jordan; but that he should not have the penalty; and this administration, though taken out after the plaintiff's writ, purges the tortious intermeddling as executor of his own wrong, so as to make him capable of retaining to pay himself. Stiles 337. 1 Roll's Abr. 923. cited in the case of Pine and Wooland in 2 Ven. 180.

7. An action of debt was brought upon a bond against an executor, who pleaded that the testator was indebted to him by a bond, the condition whereof was to pay rent; and that at the time of the decease of the intestate there was three hundred pounds due for rent, and that he had not more than sixty pounds of assets to pay it.

8. The plaintiff replied that there was but thirty pounds due for rent at the time of the testator's death, which the court held to be a good replication, although the penalty of the bond was forfeited at the time of the testator's death; for if a bond due to a stranger be forfeited, and if it be thus pleaded by an executor, and that he hath not assets *ultra*; it is a good replication to say that the obligee would have taken part of his money in full; and it shall be a bar for no more; and so in this case the defendant ought to take but his just debt.

9. And the court said, that if men would plead their true case specially, it would save many a suit in chancery. 1 Ven.

54. Page v. Denton,

10. And

Readings and Observations

10. And though a defendant may plead a retainer for a debt due, it is said in 1 Brownl. 75. in the case of Bond and Green, that he may also give it in evidence. Gouldsb. 216. Case 310. 1 Roll's Abr. 922.

11. But it is said that he ought to make his election to retain for his debt, before an action brought against him; and where F. was bound in a bond of thirty-four pounds to B. and also in another bond to W. P. in eighty pounds; and F. died intestate, and J. P. was his administrator; and W. P. one of the obligees, made J. P. his executor; and J. P. pleaded to an action brought against him upon a single bill, that he had goods of F. sufficient to satisfy the debt due to him as executor of W. P. which he retained to satisfy the same, and that he had no assets *ultra*; this plea was adjudged ill, because he did not say that he made his election before the action brought; but *Quære* if this be law. 2 Brownl. 51. Burdet v. Pix. See the case of Woodward v. Darcy in Plow. Com. 184. a. 4 Co. 30. Coulter's Case.

12. And it is said in the case of Wainford administrator, &c. v. Warner, that he ought in this case of a retainer to plead generally, that he fully administered; but the chief objection to the plea in this case was, for not shewing that the bond was for payment of money. 1 Brownl. 80, 81. See likewise 1 Brownl. 52.

13. Debt on a bond against the defendant as administrator *durante minore etate, &c.* who pleads that the testator sealed a bond to A. B. of six thousand pounds, to pay three thousand pounds to his wife, if she survived him within six months after his decease; and that she was administratrix, and had assets to one thousand pounds, and no more, which she retained in satisfaction of the said debt; and the court inclined all for the defendant but Hollaway justice; but it was adjourned. 2 Show. 403. Rockelley v. Godolphin.

14. Where the executor pleads, to avoid being charged with rent, that he waved the term; he must shew that the rent was greater than the value of the land. Cro. Jac. 559. Mawle v. Cacyffer.

(P* 323) *15. And in pleading this plea, it is necessary that he relies upon that matter, and must take care that he does not waive it, or plead double; as where an executor to an action of debt brought against him in the *debet* and *detinet* for rent in arrear, in the time of the executor, upon a lease made to the testator, pleaded that the rent was more than the value of the land, and that he tendered the surrender before the time, for which the rent is demanded; and that the plaintiff refused to accept the surrender, and that the defendant had fully administered, and so demands judgment if the action, &c. and it was held that the plea was double and ill, and as the plaintiff

On Actions of Debt.

had waived the material part of his plea, (viz.) *That the rent exceeded the value of the land*, and relied upon the tender of his surrender, which was nothing to the purpose; judgment was given for the plaintiff. 1 Ven. 271, 272, Bolton v. Cannon.

16. It is said in Salk. 297. Billinhurst v. Speerman, that upon such plea he ought to demand judgment, if he ought not to be charged in the *detinet tantum*; and that was the opinion of Holt and Hale; for it was but reasonable, because an executor could not wave the term only, for he must renounce the executorship *in toto*, or not at all.

17. To an action of debt brought by an executor, he pleaded that at another time the plaintiff brought an action of debt as administrator, and was barred; this was adjudged no plea, because the former was only a mistaken action. 2 Cro. 15. Robinson v. Robinson,

18. Yet in the following case, where an action of debt was brought against two as executors, and they pleaded a judgment against one of them as an administrator; it was held a good plea. 1 Lev. 261. Parker v. Amit. 1 Sid. 404.

19. And where an action of debt was brought against two as executors, and one pleads that he was administrator, and that administration was committed to him by the bishop, and pleads a recovery against him as administrator, and *plene administravit*, and no assets to satisfy that judgment; and the other executor acknowledged the action, and the plea was held good; for if an executor of his own wrong be sued with a rightful executor in one writ, the executor of his own wrong shall not by his plea prejudice the rightful executor. 1 Brownl. 78.

20. Where a plea by an administrator of a recovery in an inferior court was ill pleaded. 1 Brownl. 66.

21. Where the administrator pleaded a recovery, and did not say that the intestate *devenit obligatus*. 1 Keb. 808. Brown v. Purchase.

22. Where the administrator pleaded that the intestate was indebted and did not say how; but that the creditor recovered, and *no assets ultra*, and held ill. 2 Keb. 835. Shenter v. Cozens. 2 Keb. 2. Norton v. Harvey.

23. Where an executor pleads a judgment, he ought to shew what value the goods are which he hath, and then say that they are not sufficient to satisfy the judgment; and not to say that he has no goods, except what will satisfy the judgment. 1 Lev. 132. Davies v. Davies.

24. Where an executor to an action of debt pleaded a recovery in such a term, without saying in what year or reign; and held ill in substance. 1 Sid. 449.

25. But if an action be brought against an executor, and he pleads in bar several judgments, and some of them are ill pleaded; yet if it appears that he hath not assets to satisfy those that

Readings and Observations

that are well pleaded, the plea shall be adjudged good. *Vau.* 103.

26. Where an executor pleaded several judgments, and *no assets ultra*; and the plaintiff replies, that they were kept on foot by fraud; and the defendant rejoins, that they were not kept on foot by fraud; this rejoinder is ill, because the defendant ought to say that they, or either of them, are not kept on foot by fraud. *Car.* 221.

27. Where a plea was held ill by pleading *no assets ultra*, omitting the words *nec habuit die impetrationis billa*. 3 *Keb.* 712. 3 *Lev.* 29. *Butcher v. Reeve*.

28. So where he pleaded that he had not assets at the time of the writ purchased; but did not say, nor at any time after. 1 *Brownl.* 52.

29. Other exceptions to judgments pleaded by an executor or administrator. 1 *Keb.* 750. *Nichol v. Hackett*. 1 *Keb.* 734. 1 *Brownl.* 66, 101.

30. Where *plene administravit* was adjudged no plea. 2 *Keb.* 218. *Anstin v. Millet*.

31. An administrator *durante minore etate* cannot plead, after an imparlance, that the infant came of age. 1 *Keb.* 157. *Lawson v. Croft*.

32. Where a plea of a recognizance in the nature of a statute-staple was ill pleaded by an executor, which would otherwise have been a good bar, though not forfeited; but otherwise of a statute for the performance of covenants. 3 *Cro.* 362. *Goldsmith v. Sydnor administrator, &c.*

33. An executor cannot plead *nil debet* to an action of debt upon a judgment. 3 *Keb.* 35. *Snelling v. Smith*.

34. An executor cannot plead *non detinet*, but where the testator could have pleaded *nil debet*. 2 *Mod.* 266.

35. Executors cannot plead *plene administravit* to an action brought against them in the debt and detinet. 1 *Sid.* 334.

36. Where *non devastavit modo & forma* was held good, without saying *bona & Catalla seu aliquam inde parcellam*. 3 *Keb.* 615. *Davis v. King*.

37. Where a plea was adjudged ill for want of shewing that the bond therein mentioned was given for a true debt. *Brownl.* 50. *Greene v. Wilcox*.

38. The defendant pleaded several judgments in debt in the court of Rochester, and one judgment in B. R. *prout patet per recorda prædicta*, and that he had not assets to satisfy those judgments: three exceptions were taken to the plea. 1. That he did not say *prout patet per separalia recorda*, and conclude *prout patet per recorda* in the proper court. 2. He does not say what he has in his hands to satisfy. 3. He does not say that they were true and just and true debts. *Dodderidge* held the plea ill for all the reasons; but *Houghton* for the second only; and the chief justice for the first only. 2 *Cro.* 626, 629. *Samms v. Mercer*.

39. Where the defendant pleads six judgments, and one of two are found to be kept on foot by fraud, and the other

On Actions of Debt.

not, the plaintiff shall have judgment. 1 Brownl. 49. Garret v. Harrison.

40. Where a plea by an administrator of two recognizances, and *no assets ultra*, was ill pleaded. 2 Brownl. 153. Charnock v. Corey.

41. Where a divorce was pleaded by a husband and wife executors. Cro. Eliz. 352. Underell v. Brooks & Ux'.

42. Where an administrator pleaded that the intestate died in prison at the suit of the plaintiff, upon an outlawry after judgment, and the resolution thereon. Cro. Eliz. 850. Shaw v. Cutters.

43. An action of debt was brought against one as executor, and he pleads *plene administravit*; and it was found by the verdict, that the wife of the defendant was made executrix; and she to defraud the creditors, made a gift of the testator's goods before her marriage, and yet she retained them in her possession; and after marrying the defendant she died; and the defendant had in his hands so much of the goods, as were sufficient to satisfy the creditors; and it was adjudged for the plaintiff; for the defendant hath confessed himself executor by pleading *plene administravit*, and the grant by the wife by fraud created no property in the defendant. Moor 396. Watson's case.

44. S. D. and D. D. executors of G. D. to an action of debt upon a bond entered into by the testator, pleaded that G. D. the testator had acknowledged a recognizance in the nature of a statute-staple of twelve hundred pounds, and that they had not *assets ultra*; the plaintiff *replied, that D. D. one of the defendants, was bound together with the testator in that statute; to which the defendants demurred; and it was adjudged a good plea; and the cases in the margin of the book are as follow. 1 Lev. 132, 201, 261. 1 Sid. 404. Raym. 153. 2 Lev. 40. 3 Lev. 311. 2 Mod. 36. Vaughan 104. 4 Mod. 63, 64, 296. Carter 221. 1 Lut. 241. (P* 324)

45. To an action of debt against an executor, he pleads that J. S. is an executor not named with him in the writ; and prays judgment of the writ; but doth not aver that the other administered; and the plea was adjudged ill; for although a defendant may plead that there is another executor not named, without shewing that the other administered, because he cannot know whether he did or no; yet when an executor is sued, if he pleads that there is another executor not named, he ought to shew that he himself administered as executor; because it is within his knowledge. 1 Lev. 161. Swallow v. Emberfon.

46. If falshood in the defendant's plea is neither hurtful to the plaintiff, nor beneficial to the defendant, there it shall not hurt the defendant; as suppose the defendant pleaded, a judgment obtained against the intestate, or himself, and that the intestate, or himself, were married at the time of the judgment obtained; which in truth was false, for that the one or the

Readings and Observations

the other was unmarried at that time, his plea being otherwise good; this falseness shall not make the plaintiff recover: Vaughan 104.

47. Where the defendant pleads a false plea, which falsehood is so detrimental to the plaintiff, and beneficial to the defendant, as by pleading several judgments, and concluding that he hath not assets *ultra*; there the plaintiff may reply that one of the judgments are satisfied, which replication shall be fatal to the defendant. Vaughan 104.

48. But to plead that he hath not *bona & catalla præterquam bona & catalla quæ non sufficiunt* to satisfy the judgment, is void for the uncertainty; for no sum being mentioned, no good issue can be taken upon it; so likewise to say that he hath not assets *ultra* what will satisfy, is void for uncertainty. Ibid. 104.

49. But it is good pleading to say that he hath not assets *præterquam bona & Catalla ad valenc' separal' denar' ter ipsum in satisfactione separal' Judic' solut'*, —and also besides assets to the value of ten shillings, which are liable to satisfy the statutes: It is also a good plea for an executor to plead several judgments, &c. and to conclude *quod non habet nec ad aliquod tempus, &c. h'uit* any assets of the testator *præterquam bona & catalla* sufficient to satisfy those judgments. Ibid. 103.

50. To this the plaintiff must reply assets *ultra*, or that any judgments are satisfied. Ibid. 103.

51. A. brought an action against B. as executor in debt upon a bond against B. and B. pleads a recovery had against him by J. S. beyond which he had not assets; the plaintiff replies, confessing the judgment; but said further, that B. the defendant compounded for that debt for twenty pounds, which was paid in satisfaction of the judgment; and that the defendant notwithstanding, kept the judgment on foot by fraud to deceive the creditors; the defendant traverses the composition, and upon a demurrer, shewing for cause that the defendant ought to have traversed the fraud, and not the composition; it was adjudged for the plaintiff; and these five points were resolved in this case.

52. *First*, That if a judgment be recovered against an executor without a cause, and by covin, to defraud the creditors in that case the creditor, if the judgment be pleaded, may reply generally that the judgment was obtained by fraud without a good cause, to defraud the creditors.

53. *Secondly*, If the recovery was without a cause, (i. e. without a just debt, tho' there be no covin between the plaintiff in the judgment and the executor, but by feint pleading & negligence, the creditor may reply that matter.

54. *Thirdly*, If the judgment be obtained for a just debt there the creditor cannot avoid the judgment, though it was by confession

On Actions of Debt.

Pleas to Actions of Debt upon Bonds to save harmless.

1. Where the condition is to save the obligee harmless, the obligor may plead *non dampnificatus* generally; but if he will take upon him to plead that he did save him harmless, it is not enough to say so, but he must shew how. Stiles 16, 219. 3 Mod. 252. But *Quære* if not good upon a general demurrer. 2 Keb. 629. Henshaw v. Warren. 1 Lev. 191.

2. But where the plaintiff is damnified by his own act, the defendant ought to shew it in his plea in bar; and not plead generally *non dampnificatus*. 2 Saund. 84.

3. If the condition be to save harmless from a bond forfeited, payment is no plea; but the defendant ought to plead *non dampnificatus*. Gouldsb. 158. pl. 90.

4. Where a condition is to warrant lands and save harmless, tis no good plea for the defendant to say that the plaintiff *habuit & gavisus fuit pacifice*. Dyer 43. 2 Mod. 305.

5. Where the condition of a bond was to free and keep harmless the plaintiff, off and from all costs and damages which may arise by reason of a law suit, &c. it was agreed that if the condition had been to keep harmless only, *non dampnificatus* had been a good plea; but it being to free and keep harmless, the question was if it was a good plea; and the opinion of the court was, that it was good, because the condition was to save the plaintiff harmless from something that was uncertain at the time of making the bond, viz. from the costs and charges of the suit; but if it had been to save harmless from a particular thing, there such a negative would not have been good, because the defendant ought to shew how he had indemnified the other. Mod. 243, 244. Harris v. Pett.

6. Where the condition of a bond was to secure the obligee harmless against J. S. in an action for fifty-three pounds, for which he had been bail for him; the defendant pleads that he paid to J. S. the twenty pounds, in satisfaction of the fifty-three pounds, and so kept him harmless; but for that the plaintiff might be damnified before the payment, to which the defendant gives no answer; the plea was held ill. Cro. Eliz. 56.

Other

Readings and Observations

Other Cases where Exceptions have been taken to
Pleas to Bonds with Conditions to save harmless,
relating to the following Particulars.

1. Cro. Eliz. 253. *Acton v. Hill*. To a plea that the obligor had discharged the plaintiff, but does not shew how.
2. 369. *Botwright v. Harvey*. To a plea because it did not appear.
3. Owen 71. But that the plaintiff was damnified, being still liable to pay the money.
4. Cro. Eliz. 393. *Hutchinson v. Lewson*. To a plea because the defendant did not shew how the plaintiff was molested, or that he was not molested, but only that he paid such a sum for the plaintiff's charges.
5. Cro. Eliz. 672. *Morris v. Lutterell*. To a plea by the defendant in excuse that the plaintiff caused him to be imprisoned such a day, so that he could not save the plaintiff harmless from another bond, which was the tenor of the condition.
6. 916. *Bray v. Bacon*. To a plea that he had discharged the obligee from all bonds, &c. but does not shew how; but the exception disallowed that he had not set forth what the bonds were.
7. Cro. Jac. 165. *Alington v. Yearkner*. To a plea that the defendant had saved the plaintiff harmless, pleaded to a condition to save harmless, &c. from all bargains, incumbrances, upon the sale of an advowson.
8. 339. — Cited in the case of *Freeman and Sheen*, that where one is obliged to acquit another of such a debt or such a suit, it is not sufficient to save him harmless; but he must procure an actual discharge.
9. 2 Bulstr. 270. *Codner v. Dalber*. To a plea that the defendant had freely and absolutely discharged the plaintiff from being his bail.

On Actions of Debt.

confession to prevent him of his debt, because it cannot in that case be covinous.

55. Fourthly, If the judgment be had, and there is a composition, and the plaintiff in the judgment agrees to take less than his debt, and the judgment is kept on foot for the whole; the creditor may reply that matter, for the judgment shall be a bar for no more than is to be paid upon it.

56. Fifthly, The creditor may plead it without a traverse, that it was just twenty pounds, that was compounded to be paid, and conclude with a general averment, that the judgment is kept on foot by fraud; and the fraud is the thing material to be put in issue. *W. Jones 91. Veale v. Gatesdon.*

What other Pleas by Executors that have been held good, and what not.

1 <i>Brownl.</i> 51. ———	2 <i>Cro.</i> 131. <i>Gowen v. Roll & Ux' Exec', &c.</i>
81. ———	182. <i>Wodell v. Hungate.</i>
<i>Co. Eliz.</i> 728. <i>Hampton v. Bartholomew.</i>	270. <i>Hawes v. Leader.</i> 1
<i>Litt.</i> 662. <i>Robinson v. Corbet.</i>	<i>Bulst.</i> 101. <i>S. C.</i>
<i>Co. Eliz.</i> 110. <i>Thirkettle v. Reeve & al'</i>	3 <i>Cro.</i> 25. <i>Knight v. Harvey administrator, &c.</i>
127. <i>Hooper v. Gamersfall & Ux'</i>	<i>Stiles</i> 61. <i>Kale v. Joceline.</i>
471. <i>Further v. Further.</i>	1 <i>Lev.</i> 69. <i>Blanchflower v. Fry.</i>
472. ———	275. <i>Powley v. Sier.</i>
565. <i>Bradbury v. Bradbury.</i>	312. <i>Corbet's Case,</i> 2 <i>Lev.</i> 60.
608. ———	2 <i>Leon.</i> 20. <i>Thurkettle v. Tye.</i>
646. <i>Smalpeace v. Smalpeace.</i>	3 <i>Leon.</i> 100. <i>Denton v. Goddard.</i>
858. <i>Godfrey v. Woodward.</i>	1 <i>Lev.</i> 67. <i>Bracebridge v. Baskerville.</i>
1 <i>Cro.</i> 8. <i>Phillips v. Echard.</i>	<i>W. Jones</i> 12. <i>Aubrey v. Bridgewater.</i>
102. <i>Mills v. Shirfeild.</i>	142. <i>Baylie v. Hughes.</i>
128. <i>Read v. Potter.</i>	1 <i>Brownl.</i> 51. <i>Brooksby & al' v. Tresham.</i>
	53. <i>Gage v. Gilbert.</i>
	64. <i>Mantel v. Gibbons.</i>

Of pleading Records.

1. If a matter of record be the ground and foundation of the plaintiff's suit, or the substance of the plea, it ought to be certainly and truly alledged; but otherwise where it is but a conveyance to the substance of the plea; but the proceedings and sentence in an ecclesiastical court may be alledged summarily, as that a divorce was obtained between such parties, Vol. II.

E e

for

Readings and Observations

for such a cause, and before such a judge, *& concurrentibus qua in jure requiruntur*; for the judge ought to be shewn, to the intent that the court may write to him, if the matter be denied. Co. Lit. 303.

2. If one pleads a record, to have any advantage from it, he ought to have the record to shew, unless it be in the same court where the record is pleaded. 19 E. 4. 7.

(P* 325) *3. If one pleads a record removed out of the common pleas by a writ of error into the King's bench, he ought to say that it remains there unreversed and disannulled. 6 Co. 44. b. Higgen's case.

4. The copy of a record may be given in evidence to the jury, and no rasure or interlineation shall be intended therein; and therefore a copy of a record being certified to be true, it is permitted to be good evidence; (but it is said) the sure way is to have it exemplified under the seal of the court. 11 Co. 92. a.

5. A record may be given in evidence where it is only inducement to the substance of the plea, and is not the direct matter in issue; as a conviction of recusancy, where the record was burnt; so if an appropriation be in issue, the King's licence, if it cannot be found of record, ('tis said) may be proved in evidence without shewing the record, though it be the foundation of the appropriation. Hardr. 323. Knight v. Dauler.

6. So whether a plaint be levied of record, according to the custom, is to be tried by the country. Hutton 20. Hob. 244.

7. How records in the King's bench are pleadable in inferior courts, and how transmitted, and how the issue is to be joined. Vide 1 Sid. 330. Knight v. Pitt.

8. A deed brought into court, and there received to be recorded, is from thence a record. Hutton 1.

9. So much of a record, as is necessary for the plaintiff to plead, he ought to shew; but he need not shew more. 2 And. 99, 100.

10. Where the King is entitled to lands by double matter of record, it hath been said that the party must avoid it by double matter of record; for *nihil tam naturale quam quidlibet dissolvi eo modo quo ligatur*. Jenk. Cases 120. Case 42.

11. But it is said that at this day, it is ordained by the act of 2 Ed. 6. cap. 8. where the King is entitled by a double matter of record, a *monstrans de droit*, or a traverse lies, as the case requires; but that it was the common law that required in such case a petition to the King, and a commission and an office to be found; and if it was found for the subject, he should interplead with the King. Jenk. Cent. Cases 178.

12. There can be no averment against a record; as where D. appeared as an attorney for A. in an action brought by A. against B. it cannot be assigned for error that D. was not an attorney or that there is no such person *in rerum natura*, for that would

On Actions of Debt.

be against the record; and the admittance of him by the court for an attorney in that particular, makes him an attorney, if he was not so before. Jenk. Cent. Cases 332. Het. 107.

13. Where an issue upon *nul tiel record* was taken upon a record at the sessions, and the judgment was *quod deficit de recordo*; that judgment was reversed, for there should go a *certiorari* to the justices, to certify whether there be such a record or no; but otherwise in a superior court, where the jurisdictions are equal. Jenk. Cent. Cases 114. Case 23.

14. Where a record certified or produced, varying from the record pleaded in some small matter, but not in substance, shall not vitiate the plea. Hob. 179. 3 Lev. 243.

15. The old way of pleading a record was to begin at the original, and not to omit so much as any *continuance*, *summons* or *severance*; but if there be divers matters in a record, it is sufficient to plead to any of them (*inter alia*). Comb. 253.

16. Where a record is pleaded, the party must produce the record at the day. 2 Roll's Rep. 133.

17. The right way to plead the record of a judgment is, that such a term such a judgment was obtained against the party, and not to set forth the whole record of obtaining it; because (says my lord Vaughan) it were a vast expence of time and money so to do. Vaughan 92.

18. A recital of part of a record is sufficient where it is but a conveyance to the action. Cro. Eliz. 877.

19. Upon *nul tiel record* pleaded in the common pleas to an action of debt upon a judgment recovered in the King's bench, notwithstanding the objection, that because the records there are *coram ipso rege*, therefore not to be removed; yet it was held that it might be sent by *mittimus* into the court of common pleas. Cro. Car. 297. Lutterel v. Lea. See 4 Inst. 73. Dyer 32.

20. Where payment was adjudged no plea to a matter of record. 1 Leon. 213. Ordway v. Parrot, where the contrary was held by Berkley. Cro. Car. 329.

See more of pleading records in titles Replevin and Trespass in the third volume.

Of pleading a Fine.

1. In pleading a fine with proclamations, the party ought to conclude, *if against the fine, with proclamations*; and not *if against the fine generally*; for a fine at common law works a discontinuance, but does not bar the right; and if it be concluded without saying with proclamations, it shall be intended only

Readings and Observations

a fine at common law, because, as has been said, every plea shall be construed more strongly against the party pleading. Palmer 243.

2. Where a fine is levied, the other party cannot plead to it, that the conuzor *non dedit nec concessit per finem*; but the plea in that case is *nul tiel record*; for otherwise a matter of record would be tried by the country. 2 Roll's Rep. 179.

3. One cannot plead that a fine was levied of the lands (*inter alia*). 1 Roll's Rep. 73.

4. If a fine with proclamations be pleaded in bar, it need not be averred that the parties were of full age; for the fine is made void only by exception, and it comes properly on the other side to shew a disability; but where an act of parliament makes a fine or feoffment of one of full age good, there in pleading this fine or feoffment, he must aver the party to be of full age. Plow 326.

5. In pleading a fine levied, it was alledged that a final concord was made, and not said a fine was levied; yet it was held good. Plow. 431.

6. In pleading a fine *sur grant and render* without an entry, it was objected that pleading, by force whereof he was seised, did not supply the entry; but that upon a fine *sur cognizance de droit* it is otherwise, because by that it is executed. Cro. Eliz. 903. But in Cro. Eliz. 918. it was resolved, that by pleading *virtute cujus* he was seised in fee; it shall be intended that he entered, for otherwise he could not be seised; so in Plow. 503. in Grendon's case.

7. The way of pleading a fine, is to plead that such a term a fine was levied, &c. but it hath been pleaded that *quadam concordia facta fuit & postea concessum & concordatum fuit, &c.* and it hath been held good. 2 Lev. 31.

8. A right to an estate by extent is barred by a fine and non-claim. 2 Ven. 329. So also of a right to a term for years. Ibid. But otherwise where a statute is assigned in trust to attend the inheritance. 2 Ven. 330. A fine bars no interest which was devested at the time of the fine. 1 Ven. 80. It is no bar to a mortgage. 1 Ven. 82. 1 Sid. 460. Whether a fine bars a lease for years in trust, see 1 Ven. 81. Cro. Eliz. 781. Where a fine is a bar, and where not, see hereafter in the third volume, title Replevin and Trespass.

(P* 326) *9. None can be received to say that the conuzor was an idiot. 2 And. 193.

10. All the conuzors in a fine are estopped, although at the time of the fine they had nothing in the land. 2 And. 79.

11. A stranger cannot avoid a fine by an averment, but may confess and avoid it by pleading *quod partes nihil habuerunt*. 2 And. 80, 81.

On Actions of Debt.

12. If a fine be found by verdict in the common pleas, but not with proclamations, ('tis said) the court will *ex officio* inspect the record, to see if there be any or not. 2 And. 45.

13. Where a fine must be pleaded, and conclude *fi actio, &c.* and where by *estoppel*. 2 Leon. 160.

14. How a fine is to be pleaded upon the statute of 4 H. 7. 1 H. 3. and 32 H. 8. 1 Leon. 75, 76, 77, 78. 2 Leon. 36, 37.

15. How and in what cases it may be pleaded *quod partes ad finem nihil habuerunt, &c.* 1 Leon. 78, 83, 189. 2 Leon. 36,

37. 3 Leon. 37, 139. Jenk. Cent. Cases 12.

16. That in pleading a fine, it is not necessary to shew that the conuzor was seized. 1 Leon. 255.

17. That it is dangerous to plead a fine of such lands (*inter alia*). 1 Leon. 255.

See more likewise as to pleading fines in titles Replevin and Trespass in the third volume.

Of pleading Feoffments and other Deeds.

1. If one pleads a feoffment, he ought to conclude, that by virtue thereof he was seized; and so it is, not only in lands and tenements which lie in livery, but also of rents, advowsons, commons, and other things that lie in grant, of which a man hath an estate for life or inheritance; but in pleading an estate, which is but a chattel, as a lease for years, there you may say by virtue whereof he entered and was possessed; so when one pleads an estate for life, or any greater estate which passed by livery, he need not plead an entry, because he is in actual seisin by the livery; but in case of a lease for years it is otherwise, because there is no actual possession till an actual entry. Co. Lit. 201. a.

2. If a feoffment be made to A. by three, and one dies, A. cannot plead it as the feoffment of the three; but it is said to be otherwise of a gift in tail or lease, because the right to the reversion survives; but if a feoffment be made to A. and two others, and the two others are dead, A. may plead it as a feoffment to himself. 14 Ed. 4. 1. b. 35 Hen. 6. 38. Vide 7 Eliz. Dyer 234.

3. If a feoffment be alledged by two, and it is traversed to be made *modo & forma*, and it is found the feoffment of one, *modo & forma*; there the words *modo & forma* are material. 32 Hen. 6. 1, 2.

4. The pleading a feoffment in fee, upon a condition without a deed and re-entry, is good, if the other party confesses the condition. 5 Rep. 40. b. Dormer's Case.

5. If

Readings and Observations

5. If a feoffment by one joint-tenant be pleaded to be made to his companion, the plaintiff may say that he did not enfeoff him, because such feoffment is merely void; but otherwise of a feoffment that is only voidable. 18 E. 4. 29.

6. If a man pleads that another was seised, and enfeoffed him, he need not say that the feoffment was to his use, for that shall be intended till the contrary appears. 5 Hen. 7. 33.

7. A grant was pleaded in this manner, *concessit tenementa prædicta per nomen manerii de C. cum pertinentiis*; it was adjudged that it was a good plea, without an averment that the lands demised were parcel of the manor. Dyer 207. b.

8. If a termor brings a *quo minus*, and in his declaration makes a title in the King, that his lessor granted the reversion to N. (but does not shew it to be by deed) and that N. granted it to the King by deed enrolled, (which he must say, for nothing passes to or from the King but by matter of record); yet though he does not shew that the reversion granted to N. was by deed, it was held well enough, because he that pleaded was a stranger to the deed, and claim no title to himself by the deed. Dyer 174. a.

9. If a man pleads a joint-tenancy at common law, he ought to shew by whose feoffment he was so. Dyer 32.

10. Where one was obliged always to ratify and confirm the estate of the obligee, it is said to be the better opinion that it is no plea, to say that he had ratified and confirmed; but the confirmation ought to be pleaded by deed. Dyer 229.

11. If a man pleads the grant of an annuity generally without a deed, yet (it is said) it shall be intended a lawful grant of an annuity (to wit) by deed. 37 H. 6. 18.

12. *Conditions* to defeat chattels may be pleaded without a deed; but otherwise of *conditions* to defeat freeholds; but if such condition be by devise, it may be pleaded without a deed. 11 H. 7. 22. Dyer 127.

13. It is said that payment of an annuity, granted with a clause of distress, is a good plea without shewing an acquittance; but that it is otherwise of an annuity granted without a clause of distress. 37 H. 6. 18.

See likewise more cases as to pleading deeds, &c. hereafter in the titles Replevin and Trespass in the third volume.

Of pleading Recoveries.

1. It hath been said, that if one pleads a recovery of an acre of land, where two acres were recovered, it is well enough; so a recovery pleaded as against one, where it was suffered against

On Actions of Debt.

against two; so the same law is said to be, in pleading a feoffment, though it be upon a condition, it may be pleaded as a feoffment made generally, without saying it was upon condition. 36 H. 6. 3, 4.

2. But it is reported to have been said by Holt chief justice, that where there is a recovery of forty acres, to plead the recovery of twenty acres, is ill; but it must be pleaded of forty acres, of which these twenty are parcel. Comb. 253.

3. A recovery ought to be pleaded in such manner as the law makes a construction upon the conveyance, as (*ex. gra.*) if a subsequent deed directs the uses of a recovery; though by the act of parliament that is now made a good deed to lead the uses; yet the way of pleading, is to say, that in such a term such recovery was suffered to such uses. Comb. 403. Trygarn v. Fletcher.

4. It is said that always in pleading a recovery, it ought to be averred to be to such and such uses. 9 Co. 11. b. 21 E. 4. 52.

5. A recovery of a rent was pleaded, without alledging a title. 39 H. 6. 23.

6. See several exceptions to a plea of common recovery, in the case of Aubrey v. the Lord Bridgewater, W. Jones 10.

7. A recovery is good, though a stranger that hath nothing in the land be made a tenant to the *præcipe*; for the recompence in value is *supposed to go to him that lost the estate. 1 Vent. (P* 327) 358. and 'tis good by way of estoppel.

8. And if the tenant to the *præcipe* gains the freehold, at any time before judgment, 'tis good. Salk. 568. 1 Mod. 218. 2 Mod. 70. Comb. 425. and if made by a fine, and the fine reversed, yet the recovery will be good. Ibid. Loyd v. Evelin.

9. A condition that runs with the land cannot be barred by a recovery; but otherwise of a condition collateral, as a grant of a rent with a condition to pay a sum in gross; but a condition to re enter for non-payment of rent is barred, for that runs with the land. Salk. 570.

10. Where the King makes a gift in tail, saving the reversion to himself, and afterwards gives leave to the tenant in tail to suffer a common recovery; and to that intent passes the reversion out of himself, and lodges it in others, to have it reconveyed to him afterwards, which is done accordingly; it was held by the court of exchequer, upon conference with all the judges, that afterwards the tenant in tail, or his issue, may bar this reversion by a common recovery; and that 'tis not within the statute of 34 Hen. 8. which restrains, &c. because the reversion was once severed from the crown, and the privity of estate gone; and the statute is to be intended to restrain where the reversion continues in the same plight that it was in at first, without any alteration. Hardr. 409.

11. That

Readings and Observations

11. That a common recovery bars all remainders and contingencies of those who cannot falsify the recovery. 1 Sid. 202.
12. What shall be barred by a recovery, and what not. 1 Mod. 108, 109.
13. And for other cases on this head, see hereafter the third volume in titles Replevin and Trespass.

Of pleading Estates.

1. If one pleads that another was seized in fee *per copiam rotulorum*, without saying *ad voluntatem domini*; this must be taken as a freehold, and not a copyhold. Cro. Car. 229.
2. Where a lessee pleads a second lease, he ought to shew that the first was surrendered. Plow. 195. a.
3. Where a grant of a reversion is pleaded, it need not be averred that he was seized at the time of the grant. Plow. 193.
4. Where a man pleads the seisin of a reversion expectant on a lease for six years, he may say that he was seized as of a fee and right, as well as in his demesne as of fee. Plow. 291. a.
5. Where a man is seized by a grant, and then by an act of parliament, he must not say that he is seized by grant, and by act of parliament; but must say that he was seized by grant, until the act of parliament commenced, and then say *virtute cujusdam actus*, &c. he was seized. Plow. 194.
6. If a demise be by indenture under the great seal, 'tis not good to plead it, *prout patet irrotulament*, without a *constat* or exemplification. Lut. 1132.
7. In pleading an estate given to husband and wife, and to the heirs of the wife; it must be pleaded that the husband and wife were seized to them, and the heirs of the body of the wife. Lut. 976.
8. In pleading the seisin of an inheritance, in which there is no meynalty, no absolute ownership, only a right, as to a reversion, or to an advowson; there the way of pleading (though he has an estate of inheritance therein) is not to say, that he is seized in his demesne as of a fee; but to say, that he is seized as of a fee and right. Co. Lit. 17.
9. In all cases where the fee is conditional or determinable, he shall plead that he was seized in his demesne as of a fee, without shewing the commencement of his estate; but if tenant in tail bargains and sells to the bargainee and his heirs, by a deed enrolled; although this be an estate descendible, during the life of tenant in tail, yet it is said the surer way is to plead the special matter, and not to say that he was seized in his demesne as of a fee. 10 Co. 98. a.

10. To

On Actions of Debt.

10. To plead that one is seised as of a freehold, will serve for an estate-tail, as well as for an estate for life. Dyer 100.

a. b.

11. In setting forth an estate or title to tithes, he may say, *that he was seised in his demesne as of a fee*, because they are visible and apparent, and are said to be not like a reversion, fealty, suit, and such like. Dyer 85.

12. But it is said that a man cannot say *that he was seised in his demesne as of a fee* of an annuity. Dyer 221.

13. Where it was said that the King was seised in his demesne as of a fee, and did not say, in right of his crown; yet it was held to be good. Dyer 87.

14. Where the plea was, that the master and fellows of a college were seised in their demesne as of a fee, without saying *in right of their College*; yet the plea was held good. Dyer 103. b.

15. In pleading estates, the pleas must be framed according to the operation of deeds, and not according to the words, as if the words of the deed be *dedit & concessit*; this is a grant at common law, and therefore must be pleaded with an *attornment*. 4 Mod. 151.

16. If a tenant for life grants his estate to him in reversion; this must be pleaded as a surrender. 4 Mod. 151.

17. If one joint-tenant makes a feoffment to another; this is not good at common law, because they being jointly seised, one cannot make livery and seisin; therefore it must be pleaded as a confirmation. 4 Mod. 150.

18. If one jointenant pleads that the other *concessit*, 'tis not good; because a release, and not a grant, is the proper conveyance. 4 Mod. 150.

19. General estates in fee-simple may be generally alledged; but the commencement of estates-tail, and other particular estates regularly ought to be shewn, (unless in some cases where they are alledged by way of inducement;) and the life, of tenant in tail or for life ought to be alledged. Co. Lit. 303. b.

20. It is said that, if a tenancy in common be alledged on the part of the plaintiff by the defendant, he need not shew how he was tenant in common; but otherwise of joint-tenants, or if the defendant pleads a tenancy *pro indiviso* on the part of himself. 22 H. 6. 12. And see 3 H. 6. 56. where it is said, that if one pleads that the plaintiff held in common, he ought to shew how; for it may be by alienation of the parceners or joint-tenants.

21. Tho' the plaintiff in an action of debt for rent may plead a *que estate* in the defendant generally, without shewing how; yet where a man claims under a *que estate*, there he ought to shew the several assignments. Skinner 303.

Readings and Observations

22. For other cases concerning pleading of a *que estate*, or rather a derivative estate, which is too mean for the party to set forth for some purposes; see hereafter in *Titles Replevin and Trespass in the third volume*.

(P* 328)

*Of pleading Customs, &c.

1. If a custom be alledged in any place, as a manor or a parish, it cannot be appropriated to part; but must extend to the whole. *Lut.* 28. *1 Leon.* 314.

2. If one pleads that such a thing was done *secundum consuetudinem manerii*, it is ill; for he ought to set forth that within such a manor there is, and hath been, such a custom. *2 Ven.* 144.

See more of pleading customs and prescriptions in the *titles Replevin and Trespass, in the third volume*.

What Pleas have been adjudged good, and what not, to Actions of Debt for Rent.

1. To an action of debt for rent by indenture, *nil habuit in tenementis*, is no plea. *3 Lev.* 146. but otherwise is it, if it be by deed-poll.

2. In an action of debt for rent due upon a parol lease, the defendant pleads *nil habuit in tenementis pradiſtis*; the plaintiff replied that he was seised in fee; there he ought to have concluded to the country. *1 Inst.* 126.

3. An action of debt was brought for rent reserved upon a lease for years, in which there was a proviso, *That if the rent be behind and unpaid by the space of a month next after any or either of the days of payment, then the lease to be void*: The plea was, that the rent was behind a month after the day, on which it was reserved to be paid; and so the lease is void; to which plea the plaintiff demurred, because the defendant did not say that the plaintiff demanded the rent; for though the rent be due without demand, yet the interest shall not be determined without it, which must be expressly laid in the pleading; and of that opinion was the court, except Justice Atkins, who doubted. *2 Mod. Rep.* 264. *Steward executor of Steward v. Allen*.

4. In an action of debt upon two demises, the defendant pleads *nil habuit in tenementis tempore dimissionum*; that was held naught, for there must be *duo tempora* for two demises. *2 Vent.* 253.

5. The defendant pleads to an action of debt for rent, entry and expulsion before Lady-day; and held good; for it is of

On Actions of Debt.

the part of the plaintiff to shew a re-entry. 1 Bulstr. 205. and the plaintiff, in his replication of a re-entry, must shew a continuance. Stiles 452.

6. To an action of debt upon a lease for years, the defendant may plead an entry into part; upon which follows suspension, and it doth not amount only to the general issue. 1 Ven. 2. Anonymus 119. Mathews v. Crofs.

7. To an action of debt for rent, the defendant pleads Eviction by an extent, without an inquisition; and held naught. Moor 891.

8. To an action of debt for rent reserved upon a lease for years, an accord with satisfaction is a good plea. 9 Co. 79.

9. To an action of debt for the arrears of an annuity devised by a will, the defendant may plead *nil detinet*; so to an action of debt upon a grant of rent, where it might be levied by distress, *nil debet* is a good plea; but to an action of debt upon a grant of an annuity *nil detinet* is no plea, because he has no remedy by distress; but it must be avoided by a matter of as high a nature as it was created, as an acquittance under hand and seal. Hardr. 333. Wilfon's case.

10. A plea to an action of debt for rent was held ill pleaded by an assignee for years, as to twenty pounds *nil debet*, and as to the rest on assignment; because he did not say in what year the twenty pounds became due. Sid. 338.

11. To an action of debt against the assignee of a term, by the assignee of the reversion, the defendant pleads an assignment; he ought to shew that he in reversion had notice of it. 1 Sid. 339. Knight v. Buckley, Raym. 162.

12. But to an action of covenant for rent brought by the lessor against the assignee of the executrix of the lessee, the defendant pleads that before any rent in arrear he assigned to another; adjudged for the plaintiff by three judges against one. Carthew 177.

13. Where the defendant pleaded to an action of debt for rent reserved on a lease for years, an entry for non-payment of rent, and *nothing in arrear* before the entry, it was held no plea. Keil. 153. b.

14. To an action of debt for rent, the defendant may plead to bar a covenant, by the lessor, in the same deed to allow the lessee to deduct so much for charges. 1 Lev. 152.

15. An action of debt was brought for rent upon a lease for years; the defendant pleaded, *That before the lease a judgment was given in debt against the plaintiff, at the suit of J. S. and afterwards he made this lease; and afterwards the land was made, and delivered in execution by elegit, before which extent there was nothing in arrear; and it was thereupon demurred,* and

Readings and Observations

and without argument adjudged to be a good plea. 1 Cro. 398. Day v. Austin.

16. To an action of debt for rent, where the plaintiff declared upon a lease of four acres; he pleads to part *nil debet*, and to the residue he pleads that the lease was made of four acres, and of another acre besides; and that before the rent became due, the plaintiff entered into the fifth acre; and upon a demurrer it was held, the plea was ill, for the defendant ought to have traversed a demise of the four acres only; for if the plaintiff had taken a traverse, it would have been a departure; and as the defendant pleads a lease different from that in the declaration, he ought to have traversed the lease, upon which the plaintiff declares. 1 Lev. 263. Salmon v. Smith; the same case in Raym. 175.

17. Where an eviction of the term was well pleaded to an action of debt for rent. Moor 127. Newton v. Barnardine.

18. Whether an assignment and acceptance be a good plea to an action of debt upon a lease for tithes. 2 Keb. 688. Dean and Chapter of Windsor v. Gover.

19. Exceptions to a plea in an action brought by an executor for rent. 3 Keb. 500. Hodgskins v. Thornbury. —

The like in an action brought by an administrator. 3 Keb. 488. Cartwright v. Pinkney.

What other Exceptions have been taken to Pleas in Debt for Rent, and what have been adjudged not, relating to the following Particulars.

Cro. Eliz. 123. — To a plea of the statute of 13 Eliz. by which all leases are void, made by the parson guilty of non-residence.

341. Cherbourne v. Rye. To a plea of entry and suspension of the rent.

700. Brereton v. Evans. To a plea that the feme, one of the plaintiffs, had nothing in the premises at the time of the demise; and the plea held good, because it could not enure by way of estoppel or confirmation.

1 Keb. 927. King v. Standish.

(P* 329) *2 Keb. 99. Man v. Rainsborough.

3 Keb. 255. Keble v. Pampillon.

331. City of Exeter v. Clure.

2 Leon. 10. Wingfield v. Seckford. Held that upon a plea of *nil debet*, the defendant cannot give eviction in evidence. Owen 55. March 80. S. P. Bu

1 Mod. 35, 118. *contra*.

3 Leon

On Actions of Debt.

- 3 Leon. 171. Barnes v. Smith. To a plea as to part *non detinet*, and as to the rest a proviso in the deed, for the defendant to deduct for so much as he could not quietly enjoy.
- 1 Brownl. 120. Ketley's case. To a plea of infancy to an action of debt for rent, it was held the lease was only voidable.
- Godb. 105. pl. 124. Upon a plea that the plaintiff had granted the reversion to him in fee, and found against the plaintiff; whether by that he forfeits his term.
- 2 Bulstr. 151. March v. Brace. To a plea of assignment and acceptance of rent from the assignee.
- W. Jones 10. To a plea of a proviso in a lease, that if the rent be in arrear the lease shall be void, no plea without shewing a demand of the rent by the lessor.
- Stiles 47. Paradine v. Jane. Whether a lessee for years, ousted by an army of aliens, can plead this in bar to an action brought for the rent.

Of pleading Performance of a Condition.

1. Where the condition of a bond was, that if the obligor delivered to the obligee, at such a day and place, twenty pounds or ten kine, at the *then* choice of the obligee; that then, &c. in pleading performance, the defendant ought to plead a tender, as well of the twenty pounds as of the ten kine. Fordley's case, 1 Leon. 168. And this case is reported in Moor 246. and it is there said it would have been otherwise if the word *then* had been out; but that word shews that the obligor was at the time of payment obliged to give the plaintiff his election.

2. But in the case of Bassett v. Kerne, where the condition of the bond was, that the defendant should pay to the plaintiff, within one month after the death of the lady K. thirty pounds or twenty kine; to which the defendant pleaded that the plaintiff did not make any choice or election; the court held clearly that this was a good bar, and that the obligor was not bound to make a tender of both; and this difference is there taken from the authority of 23 E. 4. 4. where the condition is in the disjunctive, before the day of the performance the election is in the defendant; but if at the day he makes default, the election is in the obligee. 9 E. 4. 36, 37. 1 Leon. 69, 70. Case 92. Moor 241.

3. A condition is not to be performed in any other manner by a parol agreement; nor is such agreement to be pleaded without

Readings and Observations

without pleading it a written agreement. Moor 573. Holford v. Andrews.

4. If the condition of a bond be to discharge an annuity, pleading that the defendant discharged the annuity, is not a good plea without shewing how. 9 Co. 25.

5. In an action of debt or covenant, not to deliver possession to any person but the lessor, and such person as shall lawfully recover the same, if the defendant pleads that he did not deliver the possession but to such person as lawfully recovered the same; this was held a good plea following the words of the condition. 1 Leon. 83.

6. To an action of debt upon a bond with a condition, the defendant cannot take hold of any thing mentioned by way of recital in the condition, but must answer the condition itself. Hob. 130.

7. Where it appearing upon the plea, that the obligor was hindered from performing one part of the condition; adjudged he was discharged from the other. Stiles 79. Borne v. Sheers.

8. Where the condition of a bond was, that the husband should permit his wife to make a will to the value of one hundred pounds, to be paid within one year after her decease; it was held no plea to say that he had permitted her to make a will, without pleading likewise payment of the money. 3 Cro. 597. Sherman v. Lilly.

Other Cases concerning pleading performance of a condition, relating to the following particulars.

1. To a condition that if the obligee were charged or molested in his body or goods, the obligor within a month should make satisfaction. Cro. Eliz. 393. Hutchinson v. Lewson.

2. To a condition that if J. S. executes a bond to the obligee before such a day. Cro. Eliz. 143. Bease v. Draiton.

3. To a condition to deliver to the plaintiff before such a feast such a ship and tackle, or pay such a sum as J. N. should value them to be worth. Cro. Eliz. 864. More & al' v. Morecomb.

4. To a condition that if the obligee enjoyed such lands till the full age of J. S. and if J. S. within a month after his full age, made an assurance to the plaintiff of the same land. Cro. Eliz. 870. Waller v. Croot.

5. To a condition to appear to the return of a writ. 3 Mod. 87. Pauley v. Ludlow.

6. What was held an appearance on *nul tiel record* pleaded. 1 Brownl. 74. Carter v. Freeman.

7. To a condition to perform one of two things therein mentioned. 3 Mod. 232. Shipley v. Chappel.

8. To

On Actions of Debt.

8. To a condition to make all such linen as the obligee should want during his living single. *Oats v. Thornhill.*
9. To a condition for the obligee to have all the debts, and the defendant not to release any. 1 *Keb.* 680. *Barcroft v. Douty.*
10. To a condition to levy a fine at the costs of the obligee, 1 *Keb.* 816. *Culpepper v. Austin.*
11. To deliver corn on the twenty-ninth day of February, then next following, February having but twenty-eight days in that year. 1 *Leon.* 101.
12. To a condition to pay to the obligee, within one month after notice, what monies shall be proved his apprentice to have embezzilled. 1 *Leon.* 256. *Tedcastle v. Hallywell.*
13. To a bond with a condition that the obligee should enjoy wood sold to him by the obligor, and that the wood was four miles from Rye. 2 *Leon.* 113. *Mingey v. Earl.*
14. To a bond with a condition that if M. W. the obligee did not depart from the defendant's service, nor marry without his consent; then if the defendant paid the plaintiff one hundred pounds, that then, &c. 2 *Leon.* 89. *Monings v. Worley.*
15. To a condition to deliver forty pair of shoes to a common carrier at Holbourn-bridge, to the use of the obligee. 2 *Mod.* 309. *Staples v. Alden.*
16. To a condition to pay a legacy. 1 *Bulstr.* 43. *Stone v. Blisse.*
17. To a condition for the payment of children's portions, when they came of age or were married. 2 *Bulstr.* 266. *Haulsey v. Carpenter.*
- *18. To a condition for the delivery of wheat. *Cro. Eliz.* (P* 330) 253. *Stone v. Radish.*
19. To a condition to serve a cure, not to depart without licence, to make a lease, and not to make it void by resignation, &c. *Cro. Eliz.* 490. *Earl of Lincoln v. Hoskins.*
20. To a condition to give evidence. *Cro. Eliz.* 705. *Dobson v. Crew.*
21. To a bond with a condition to procure a marriage. *Cro. Eliz.* 694. *Blandford v. Andrews.*
22. To a condition to give a release in the prerogative court, such as the judge there should think fit; and the defendant pleads that the judge did not devise or appoint any release, and the plea was held ill. *Cro. Eliz.* 716. *Lamb v. Brownwent.*
23. To a condition to acquit, discharge, and save the plaintiff harmless from a bond. *Owen* 19.

Of pleading Performance generally.

1. If the condition of a bond be *to save harmless in the enjoyment of lands*, and that they are free from all incumbrances,
and

Readings and Observations

and that the defendant would make a further assurance by fine; *Quære*, if *performance generally* is a good plea? Lut. 609.

2. But to an action of debt upon a bond with a condition that a stranger shall render a true account; *performance generally* is no good plea.

3. If the condition of a bond be for performance of several things, the defendant cannot plead *performance generally*, but must set forth a performance of the several things; but otherwise, as to performance of covenants of an indenture, consisting of several things. 1 Sid. 215. 1 Lev. 303. *Wimbleton v. Holdrip*.

4. To an action of debt upon a bond to deliver such goods such a day, the defendant pleads that he delivered them according to the form of the condition aforesaid; and the court inclined that this general way of pleading performance was not good. 1 Lev. 141. *Brookes v. Dean*.

5. Where the condition is in the disjunctive, the defendant may plead performance of either part; and if one part of the defendant's plea be falsified in pleading, the plaintiff must have judgment. *Modern Cases in Law and Equity* 349. *Griffith's case*.

Of Pleas to Actions brought for performance of Covenants.

1. When all the covenants are in the affirmative, and matters of fact are to be performed; there *Performance generally* is good; but otherwise where some are in the negative, or in the disjunctive; there the party ought in an especial manner to shew how they were performed, and when one of the covenants is to perform a matter of record; as in the case of levying a fine; there tho' the covenant be in the affirmative, he ought specially to shew how the covenant was performed, because the record is to be tried by its own credit, and is not to be examined by the country; and perhaps the plaintiff will (as he may) reply, that all the parties contained in the indenture, are not comprised in the fine, or some other plea, upon which the fine is to be examined. Palm. 70. 2 Hen. 7. 15. 10 Hen. 7. 12. 13 Hen. 7. 8. 2 R. 3. 17. 21 E. 4. 7. 5. Rep. 133. b. 2 Rep. 3. b.

2. And when some covenants are in the negative, and some in the affirmative: as to those covenants in the negative, he must shew wherein he hath not broken them; and as to those in the affirmative, there he must shew a performance; and those in the negative are against law, then the court must take notice of that, and it will not be sufficient for the defendant to plead performance generally. Hob. 13. *Stiles* 165. *Fines Dell*.

On Actions of Debt.

3. When one is bound to perform covenants in an indenture, to an action brought upon a bond for the performance; the defendant, in order to discharge himself, ought to shew the deed to the court, that they may see what the covenants were; for he cannot shew that he has performed all, without shewing what he was to perform; and therefore he ought to recite the indenture in his plea, whereof he is supposed to have a counterpart; but if he never had a counterpart, or had lost it, upon affidavit thereof, the court will compel the plaintiff to give him a counterpart, in order to set it out for his defence. 6 *Mod.* 237. *Cook v. Remington.* 2 *Show.* 86.

4. And if there be an indorsement, *oyer* of the deed is not compleat *oyer*, without *oyer* of the indorsement; but that must be understood where the indorsement is at the same time with the deed; for if it be at another time, it is then a new deed, and he must have *oyer* of that, and set it forth, and not rest upon the bare deed. *Ibid.*

5. It has been said there is a difference, where the act to be performed is to be done by the party himself and where by a stranger; for where it is to be done by one party to another, that there general performance is sufficient; but where it is to be done by a stranger, there though the covenant be in the affirmative, yet the party ought to shew the performance specially: and the case in 16 *H. 7.* 11. was cited to that point; and *Dodderidge* said that the reason why general performance was not good, was, because the obligee is a stranger to the person who is to do the act, and therefore the obligor ought to shew how the stranger hath performed it: and *Haughton* said that the reason was, because that where a stranger is to do the act, the obligor could not say that he had performed the covenants, and therefore the obligor ought to shew how the stranger had performed it; but *Mountague* said, he saw no difference, where the act is to be done by a stranger, and where by the party. *Palmer* 70. 2 *Roll's Rep.* 159. The same point, as to an act to be done by a stranger, that general performance is not good, is in the case of *Fitzpatrick v. Robinson*, 1 *Show.* 1.

6. To an action of debt upon a bond for the performance of covenants in an indenture, the defendant pleads the indenture cancelled; 'tis no plea without pleading performance till such a day, and that on such a day the deed was cancelled. 1 *Brownl.* 78.

7. In an action of debt upon a bond, with a condition to perform covenants in an indenture, the defendant did not make a *prospect in cur'* of one part of the indenture under the plaintiff's seal, as by law he ought, but instead thereof only craved *oyer* of the plaintiff; it was held to be but a defect in form. 1 *Saund.* 107. *Jeans v. Harridge & Ux'.*

Readings and Observations

8. If the defendant does not crave *oyer*, then the deed cannot be intended to be in court; therefore if he pleads performance generally, or any other plea grounded upon the deed, the omitting of *cur' prolat'* was matter of substance. 1 *Sid.* 50, 97, 425. 1 *Roll's Rep.* 20. 1 *Lut.* 483. 2 *Bulstr.* 259. *Dupont v. Wildgoose*; but now it is made matter of form only, by the act of 4 & 5 *Anne*.

9. Where an action of debt is brought upon a bond to perform covenants contained in certain indentures; and one of the parties to such indentures pleads that there are no such covenants on his part to be performed; and upon *oyer* of the indenture, the contrary appears, it is a good cause of demurrer. 1 *Saund.* 317.

10. Where pleading performance generally was held to be aided by the 27 *Eliz.* 1 *Leon.* 311. *Oglethorpe v. Hide*.

(P* 331) *What Pleas have been adjudged good, and what not, in Actions of Debt for the Performance of Covenants, relating to the following Particulars.

Cro. Eliz. 62. *Gallies v. Budbery*. Performance generally pleaded, where some covenants were in the affirmative, and some in the negative.

691. *Croxwell v. Peachey*. The same point.

232. *Oglethorpe v. Hide*. Where performance generally was held to be aided by the statute of 27 *Eliz.*

236. *Tedcastle v. Holliswell*. Not answering to the substance of a condition to pay what an apprentice should spend, or any other by his procurement.

255. *Emott v. Cole*. Eviction of the land, and performance till eviction pleaded.

479. *Mayne v. Scott*, { A plea to a condition to make
Popham 109. { a new lease, that the plaintiff
never surrendered his former
lease, not good, it appearing
the defendant had disabled himself.

Cro. Jac. 281. *Briscoe v. King*. Where performance generally was pleaded, and a breach assigned, in not paying money mentioned in the proviso; and adjudged that the condition did not extend to the proviso, but to the other covenants.

Cro. Car. 421. *Horn v. Barber*. General performance pleaded where the covenants were in the affirmative, but to perform in the disjunctive.

1 *Keb.*

On Actions of Debt.

- ¹ *Keb.* 127. *Parvie v. Hall.* The indenture was pleaded to be made between *J.* and *D.* whereas it was between *J. A.* and *D.*
158. *Lord Suffolk v. Battifon.* Performance generally pleaded to an action of debt upon a bond to pay money upon a purchase.
- ² *Keb.* 405.
667. *Wilson v. Armorer.* A plea to an action of debt upon a bond to perform covenants, part in the negative, and part in the affirmative; to the negative covenants the defendant pleaded negatively, and to the affirmative ones performance; but did not shew how.
- ¹ *Leon.* 37. *Parmount v. Griffin.* To a condition wherein was a proviso, that if any dispute did arise, &c. it should be referred to four indifferent persons; and the defendant in his plea does not shew upon what covenant the action was brought.
136. *Littleton v. Perne.* To a condition that the defendant should permit the plaintiff to enter, &c. into lands which laid fallow; and the plea ill for not shewing what the lands were that lay fallow.
- ² *Leon.* 113. *Mingay v. Earle.* A plea answering the intent of the condition, though not the words; as to say, that the lands were four thousand paces, instead of four miles, from *Rye*.
114. *Parker v. Harrold.* To a plea that the custom of the realm is, &c. Objection that such custom cannot be tried; and if it be through the kingdom, it is the common law.
189. *Wood v. Avery.* Where the plea is ill, for if it is impossible to perform the condition, the bond is single.
- ³ *Leon.* 69. ——— Where the condition of a bond was to perform covenants as to repair; and the defendant pleads acquittal and discharge of the repairs.
- ¹ *Godb.* 95. *pl.* 108. Where the defendant pleaded performance, (P* 332) whereas, he ought to have pleaded performance of all the covenants, except the payment of the rent; and as to that he was always ready to have paid it when demanded.
100. *pl.* 116. *Plympton's case.*
- ¹ *Brownl.* 77. A plea to a condition to perform covenants in an indenture, that such a day the indenture was cancelled; an ill plea; for he ought to have shewn when the indenture was cancelled, and pleaded performance to that day.

Readings and Observations

2 *Show.* 86. *Pawlet v. Savage.* Where general performances was held no plea.

Lut. 593. *Keating v. Irish.* Held that to a bond, with a condition to give the obligee notice of declarations in ejectment, general performance was not a good plea.

608. *Butterfield v. Marshall.* A plea of general performance not good to a bond with a condition for quiet enjoyment; and that the estate was free from incumbrances, and to make a further assurance; but *Quare* if it be not good in substance as to the quiet enjoyment, and the estates being free from incumbrances.

2 *Mod.* 33. *Duck v. Vincent.* To a condition to perform covenants, where there is any one to pay money, when an assurance made; a plea that he paid the money such a day, is not good, without shewing when the assurance was made, that it might appear the money was paid according to the condition.

What Pleas have been adjudged good, and what not, to Actions of Debt upon a Bond for the payment of money, or do somewhat to or for the Plaintiff.

1. Where the condition of a bond is to pay one hundred and twenty pounds out of personal estate, on a day certain, it is no good plea to say, that before the day the defendant received but fifty pounds out of the personal estate; for the sense of the words is to pay one hundred and twenty pounds, or so much as he shall receive before such a day. *Ogle v. Quintin*, *Trin.* 34 *Car.* 2 *B. R.* entered of *Easter* 34 *Car.* 2. *Roll* 39. *T. Jones* 218.

2. To an action of debt upon a bond, the defendant pleaded an acceptance of another bond in discharge; and it was held not a good plea: There is no name of the case in 3 *Cro.* 85, 86, from which I took this case; but the same point is adjudged in *Hob.* 68, 69. *Mod. Rep.* 221. 2 *Cro.* 650. 1 *Brownl.* 47.

3. But if the second bond had been given by an executor or an heir, for the greater security of the testator's or ancestor's debt, it is otherwise. *Mod. Rep.* 224.

4. In an action of debt upon a bond, the defendant pleads a delivery as an escrow, without saying to whom: and then concludes, *Et hoc parat*, &c. and held ill. 1 *Ven.* 9.

5. An

On Actions of Debt.

5. An action of debt was brought upon a bond; and the defendant pleaded, that at the time of making the bond, the defendant was not *de sane memory*; and upon a demurrer it was adjudged to be no plea; and the opinion of *Fitzherbert* was denied to be law. 1 *Cro.* 398. *Co. Lit.* 247. b. *Fitz. Nat. Brev.* 302 b. 1 *Cro.* 662.

6. An award by deed is pleadable to an action upon a bond; but *Quare* 1 *Lev.* 292. *Norris & al. v. Creach.*

7. Where the defendant pleaded that a stranger was imprisoned by another, and kept in prison until the defendant gave his bond for his enlargement; and it was held no plea. *Mantell v. Gibbs, Brownl.* 64.

8. To an action of debt upon a bond, with a condition to (P 333) pay so much money yearly, while such letters patents are in force; the defendant pleads, *That from such a time to such a time he did pay, and that then the letters patents became void; and of no force*; the plaintiff replied, *That they were in force, et hoc petit quod inquiratur per patriam*; the defendant demurs, and *per cur'* the plea is ill, because it doth not shew how the letters patents became void. 1 *Show.* 290. *Lewis v. Preston.*

9. An action of debt was brought upon a bond; the condition was, *That if the defendant paid the plaintiff, or his assigns, twenty pounds upon such a day and place, the obligation to be void*; the defendant pleads that the plaintiff appointed one *A.* to receive the money at the day and place; and he tendered it to *A.* who refused it; and the plea was held good, without alledging a payment in fact. *Moor* 37.

10. Where the plaintiff declared upon a bond against one, and upon *Oyer* it appeared to be made by three jointly; if the defendant demurs, the court will intend that the others are dead, or that they never sealed the bond. 1 *Keb.* 336. *Osborn v. Croftland.*

11. Whether the obligor, bound to pay so much money at such a day, can plead that the money was attached before the day. 2 *Keb.* 132.

12. To an action of debt upon a bond to pay so much money at such a day, as should appear to be due; and the defendant pleads, that nothing did appear to be due; whether such plea be good or not. 2 *Keb.* 239. *Tracy v. Cheshire.*

13. Where two bring an action upon a deed, the defendant cannot plead in bar that one only sealed the deed. 2 *Keb.* 632.

14. 'Tis a good plea to an action upon a bond that the officer took it *colore officii*, though the plaintiff in the action be made the obligee; for 'tis within the equity of the statute. 4 *Mod.* 187. *Bowder v. Share.*

15. Where

Readings and Observations

15. Where *D.* the testator had let lands to *H.* for seventy years, and *H.* gave a bond, with a condition, that he should pay a stranger ten pounds yearly, if *H.* or his assigns, shall or may so long occupy the lands, it is no plea to say he surrendered the lands to *D.* for as to a stranger his estate continues; and therefore, during the time he might have enjoyed, he shall pay the ten pounds; and *D.* who had the reversion, shall be construed assignee to *H.* during the term; but otherwise if the payment had been to the obligee. *Cro. Eliz.* 313. *Ford & Ux' v. Hollingbroke.*

16. Where a bond is given with a condition that the obligor shall, during his life, purchase lands for his wife and her heirs, it is a good plea to shew that she died such a day; because the obligor had all his life to do it in; but *Gawdy* held, that he ought to purchase lands to the heir of the wife; *Quare* therefore *Cro. Eliz.* 378. *Baton v. Laughter.*

17. Where the condition of a bond is, that the obligor's two daughters shall give the obligee releases when they come of age; it is no plea to say, that one of the daughters is under age; but it shall be taken distributively, and be so performed. *2 Keb.* 591. *Boswill* executor, *&c. v. Coats.*

18. If a bond be with a condition to pay to *B.* and his wife, during their lives, so much a year, it is a good plea to say, that one of them is dead; for *B.* and his wife being strangers to the bond, the payment ceaseth upon the death of either of them. *1 Mod.* 187. *5 Co.* 9. *1 Leon.* 74, 103. *1 And.* 151, 161. *11 Co.* 3 b. *Owen* 52. *1 Roll's Abr.* 832. *Raym.* 126. *Palm.* 74, 108. *1 Ven.* 163. *2 Ven.* 74, 108. *5 Co.* 9. *1 Leon.* 74. *1 Brownl.* 46. *2 Brownl.* 43.

19. To an action of debt upon a bond, the infant may plead his nonage, tho' the bond be given for necessities. *Moor* 679. *Ayliff v. Archdale.* *Co. Lit.* 172. *Cro. Eliz.* 920. *Cro. Jac.* 560.

20. What pleas have been adjudged not good to an action brought upon a single bill. *Moor* 642. *Cro. Eliz.* 884. *Williams v. Green.* *1 Brownl.* 70.

(P* 334) *21. To an action of debt upon a bond made to a feme covert with her husband's consent, the defendant pleads that the husband made him his executor; it was held no plea; and it was said that perhaps that was the very reason he made him executor. *2 Show.* 24. *Cheekley v. Cheekley.*

22. To an action of debt upon a bond for the payment of money to the administrator of the obligee, within two months after his decease, the defendant pleads that there was no administration granted; and upon a demurrer the plaintiff had judgment. *2 Show.* 143. *Lee v. Garret.*

On Actions of Debt.

23. To an action of *debt* upon a bond, the defendant pleaded, that at the time he sealed and delivered the bond, there was a space left, wherein afterwards the name of *J. S.* was inserted, who also sealed and delivered the bond; and the defendant's counsel would have it, that the adding another obligor, bound jointly and severally with him, was so material an alteration as to avoid the bond; and relied upon *Pigott's* case in 11 *Co.* but the court held that the bond remained the same as to him, and he could not take advantage of this matter; and 'tis the common practice of sheriffs to take their bonds in this manner. 1 *Ven.* 105. *Zouch v. Clay.*

24. It was agreed by all the judges, that if one be bound in a bond, and afterwards promises to pay the money, an action of *assumpsit* will lie on that promise; and if the plaintiff recovers all in damages, it will be a good bar in action of *debt* upon the bond. *Cro. Eliz.* 240. *Ashbrooke v. Snape* 415. *Cro. Jac.* 410. *Cro. Eliz.* 242, 283.

25. If *A.* is bound in a bond that *B.* shall enjoy a lease of *Blackacre* immediately after his decease, if the lands, at the decease of the obligor are sown with corn, and the executors take it; yet is not the bond forfeited, because by law the corn, as emblements, belongs to the executors. 4 *Leon.* 1.

26. An action of *debt* was brought upon a bond with a condition to pay money upon the plaintiff's delivering over to the defendant some receipts, &c. and the defendant pleads that the plaintiff did not deliver over the said receipts; this plea was adjudged ill. *Raym.* 430. *Berning v. Pollat.*

27. In pleading a debt upon a bond, it ought to be said directly that the obligor became bound by a bond, and not that the obligor was indebted to the obligee, as appears by a bond. 1 *Saund.* 275.

28. If it appears judicially to the court, by the defendant's own shewing, that he hath pleaded a false plea, it is a good cause of demurrer; and the plaintiff need not shew any matter of fact in his replication, to maintain his action. 1 *Saund.* 317.

29. Where the defendant in an action of debt upon a bond, with a condition that the defendant should permit the plaintiff to recover and receive a debt, owing to the defendant by *C.* pleaded that he did agree that the defendant should receive the money, whether good or no. Vide 2. *Keb.* 9.

30. To an action for an annuity *pro consilio impenso & impendens* the defendant pleaded, that he required the plaintiff to give counsel; which he refused; and held an ill plea. 1 *Leon.* 209.

31. Where

23. To

Readings and Observations

31. Where a plea of sickness was held an excuse for the non-payment of money precisely at the day. *Raym.* 373. *Topham v. Pannel.*

32. To a plea in an action of debt upon a bond, with a condition to deliver up goods contained in a schedule. 2 *Keb.* 4. *Waterman v. Adams.*

33. An action of debt was brought upon a deed for twenty pounds, on delivering all the goods taken as a distress for rent of one *Locke*; the plaintiff avers, that he did deliver them all; the defendant pleads that he did not deliver them all, was held ill, without shewing what he did deliver, and what not. 3 *Keb.* 762.

(P* 335) * What other pleas have been adjudged good, and what not, to actions upon bonds for the payment of money.

<i>Cro. Eliz.</i> 119.	<i>Shepherd v. Kearne.</i>	2 <i>Keb.</i> 525.	
142.	<i>Bond v. Richardson.</i>	2 <i>Cro.</i> 85.	<i>Blunden v. Wood.</i>
355.		242.	<i>Dockrey v. Tanning.</i>
420.	<i>Sharpless v. Hankinson.</i>	254.	<i>Neale v. Shelf.</i>
697.	<i>Hayford v. Andrews.</i>	187.	<i>Huscombe v. Standing.</i>
830.	<i>Crook v. Brainforth.</i>	3 <i>Cro.</i> 193.	
4 <i>Mod.</i> 230.	<i>Pitman v. Bidlecombe.</i>	376.	<i>Telley v. Peirce.</i>

Other Cases concerning Pleas in general.

1. A foreign plea must be verified by affidavit; but if it is apparent in the condition of a bond, that the money is to be paid out of an inferior jurisdiction, to a plea to the jurisdiction it need not be verified by affidavit. 5 *Mod.* 335. *Cholmondely v. Brown.*

2. If part of the debt be released, and an acquittance is given before the action brought, it is a bar only to so much; but it seems the action must be brought for the whole. 2 *Ven.* 135. *Colley v. Hellier.*

3. Where the word *scilicet* shall be adjudged repugnant and void, and the word *postea* stand consistent and good. *Stiles* 45.

4. That a plea of being *Solus & innuptus* amounts to the general plea of *Ne unquex accouple*; and is therefore ill. *Stiles* 17. *Paine v. Skelton.*

5. Where

On Actions of Debt.

5. Where a letter of licence and composition hath been adjudged ill pleaded. 4 *Leon.* 4. *Fuller's case.* *Lut.* 683. *Reyston* executor, &c. v. *Beeston*.

6. Where it was held no bar to an action of debt upon a bond. 1 *Show.* 46. *Ayliff v. Scrimshire.*

7. To an action of debt the defendant pleads an *attainder* in himself after the debt became due; and it was adjudged no plea. *Hall v. Trussel.* *Cro. Eliz.* 516.

8. Matters that go in defeazance of a deed, need not be alledged in the declaration but come more properly on the defendant's part to be pleaded. *Raym.* 65.

9. Exceptions to a plea of entry and expulsion, to an action of debt upon a bond, made for the payment of money for the occupation of lands. 3 *Keb.* 453.

10. To a plea to an action of debt upon a recognizance. 3 *Leon.* 53. *Treesbam v. Roberts.*

11. To an action of debt upon a judgment in an inferior court of record. 2 *Keb.* 107. *Dring v. Respass.*

12. To a plea that the defendant was in execution, and was permitted to escape; pleaded to an action of debt upon a judgment. 1 *Show.* 174. *Buxton v. Horn.*

13. Where a writ of error was held no plea. 4 *Mod.* 247. *Dighton v. Granvil*; and how to plead such plea when it is pleaded. 5 *Mod.* 68.

14. The defendant pleads *Ne unquez accouple en loyal matrimony*; the plaintiff demurs; held an ill plea, because that puts it upon trial by certificate, which admits a marriage; but not *secundum leges ecclesie*; he should have pleaded no marriage in fact, and that would have been tried *per pais*; judgment for the plaintiff. 1 *Show.* 50. *Allen & Ux' v. Grey.* *Salk.* 437.

15. How to plead a misnomer, 2 *Brownl.* 48.

16. Exceptions to a plea to an action of debt for the arrears of an annuity. 1 *Leon.* 209. *Bagshaw v. Shrewsbury.*

17. To an action of debt for the arrears of an account. (P 336) 1 *Leon.* 13.

18. To the pleading a release to an action of debt for rent. *Cro. Eliz.* 624. *Collins v. Harding.*

19. To a plea to a bond to make a further assurance. 2 *Mod.* 299. *Goffe v. Elkin.*

20. To a plea to a bond given for the appearance of the obligor. 3 *Mod.* 87. *Pawley v. Ludlow.*

21. To a plea to an action of debt upon the statute of Hen. 8. for practising physick *contra formam Statuti.* 4 *Mod.* 17. *College of Physicians v. Bush.*

22. Where a plea to an action of debt upon a bond, with a condition that if J. S. enters into another bond, was held ill; and what was judged no performance of the condition. *Cro. Eliz.*

23. Where

Readings and Observations

23. Where the defendant pleaded to an action of debt upon a bond to sail a ship to a place in *Greece*, and stay there forty days, and then to freight her, and bring her back to *London*. *Godb.* 74. *pl. Taylor v. Rebera.*

24. A recovery in a court-baron was pleaded; but it was not said before whom the court was held, or in what county; and therefore ill. *Lut.* 1526.

25. In pleading the act of poor prisoners, the defendant had not shewn for what he was imprisoned; and for this cause it was held ill. 3 *Lev.* 190.

26. If in pleading it appears the name of the corporation is changed, it must be shewn, or the plea is naught. 3 *Lev.* 243.

27. In pleading an expulsion by an *Habere facias possessionem*: it is not good without shewing that judgment was obtained. 1 *Lev.* 83.

28. In pleading an outlawry with *Et hoc parat' est verificare*, without *prout patet per recordum*, is ill. 3 *Lev.* 2.

29. If an *inquisition* be pleaded to be taken *colore officii* before the escheator or theriff, or any one impowered by common or statute law to take; 'tis not necessary to shew what power the escheator, &c. had to take it; but where an *inquisition* is taken by virtue of a commission, what power the commissioners have ought to be shewn. *Plow.* 485. b.

30. If one pleads a *pardon with exceptions* to clear him from any crime, he ought to shew that he is a person not excepted; but where one claims an estate prior to an act of Parliament, which is saved to him; tho' the saving is by the exception in the act, yet he need not aver himself not excepted. *Plow.* 488.

31. Where a lessor for years rendering a rent acknowledges a statute, and the reversion is extended; and the consue brought an action of debt for rent arrear, and the defendant confessed it; but said, that the plaintiff was outlawed, and issue was joined upon *Nul tiel record*; and the record was certified, much varying from the record of the outlawry; and it was pleaded in disability; and adjudged that the party had failed of the record; and 7 *Hen.* 4. was denied for law by the court. *Noy* 74. That case in the year-book was, that the defendant pleaded that the plaintiff was outlawed at the suit of J. and the plaintiff replied *nul tiel record*; and upon a view of the record, it appeared that the plaintiff was outlawed at the suit of W. and the plaintiff being outlawed, could have no action; and the judgment was for the defendant.

On Actions of Debt.

Of Replications, Rejoinders, Traverses and (F 337) Estoppels in Actions of Debt.

In treating of which, these few things are worthy of observation.

1. *The law will not force a man to plead that which is in defiance of his own right, unless the matter is precedent to his right; as if a man grants an annuity pro consilio impendendo, he need not shew that he gave counsel; but it must be shewn by the other party that he did not.* Plow. Com. 32.

2. Every replication, as well as a plea, ought to be a direct answer to the bar, and certain, and not argumentative only.

3. If the bar of the defendant be insufficient, and by the plaintiff's replication it appears he hath no cause of action, there the plaintiff shall never have judgment; but where the bar is quasi a confession of the point of the action, there if the plaintiff replies, and shews the truth of the matter to enforce his case, notwithstanding it be insufficient in law; yet the plaintiff shall have judgment. 8 Co. 120. Dr. Bonham's case, 9 Co. 110. b. Meriel v. Treffiam.

If the bar be insufficient in matter, and the writ and count good, and the replication superfluous only, not shewing any matter which may impugn or destroy the action; the plaintiff shall have judgment.

4. If A. grants an annuity thus, that when B. shall be promoted to a benefice, he shall have the annuity, B. must shew that he is promoted to a benefice; but if A. grants an annuity to cease when B. shall be promoted to a benefice; there he need not shew that he is promoted, because it is in defeazance of the annuity, which must be shewn by the other party. Plow. Com. 25. 15 Hen. 7.

5. So in the case of an *assize* brought by the heir, the tenant says, that the father of the plaintiff was tenant by the curtesy, and demised to his ancestor, who is dead, and he as son and heir entered; it shall be intended that he was the first that entered; for the law, in this case, casts the estate upon the first occupant; and if he was not so, it must be shewn on the part of the plaintiff. Plow. Com. 28.

6. Where the defendant by protestation alledges that there was no award, for plea avers that it was not delivered in writing to him; the plaintiff replies, that *per arbitramentum in scriptis factum & partibus ante diem deliberatum*; it was awarded, and so assigns a breach; this replication is not good, because it is not direct, but only argumentative, that the arbitrators delivered their award. Dyer 243. b.

7. If

Readings and Observations

7. If the defendant pleads *dureſs of imprisonment* to an action of debt upon a bond, it is not a good replication for the plaintiff to ſay, that he threatened to bring a ſuit againſt him for the arrearages of rent, according to the couſe of common law, and to imprifon him by proceſs of law, if he might; if the defendant would not ſeal the bond upon which the action was brought; this is no plea, for it is no anſwer to the bar. 16 *Ed. 4. 7. pl. 1.*

8. To an action of debt upon a bond, the defendant pleads that the bond was upon a condition to infeoff the obligor of certain lands, at ſuch a day and place, and that the defendant was preſent there all the day to have infeoffed the plaintiff, and that the plaintiff came not there to accept it; the plaintiff replied and alledged, that he was there preſent all the day to accept the feoffment, *abſque hoc*, that the defendant was there; this hath been held a good replication. 22 *Ed. 4. 43.*

(P* 338) 9. In an action of debt upon a bond, the defendant demands Oyer of the condition, and pleads that certain letters patents granted to the plaintiff, became void before the day of payment of the money; the *plaintiff replies, that the letters patents were in force at the time of making & *adhunc exiſtunt*; upon a demurrer the plea was adjudged ill, becauſe the defendant ought to have ſhewn how the letters patent became void. *Lewis v. Preſton, Mich. 3 W. & M. Skinner 303.*

10. To an action of debt upon a bond, with condition to pay the clear profits; the defendant pleaded performance in the manner and form as the plaintiff had alledged; this judgment given in *Durham*, was reverſed in *B. R.* becauſe the plaintiff had not alledged that there were clear profits, but only that they amounted to twenty pounds; and ſo they might have been all expended in the getting it. 2 *Lev. 135. Howard v. Wickliſſ, Hill. 27 Car. 2. Roll. 373.*

11. In debt upon bond, with condition to perform an award; the defendant pleads no award; the plaintiff replies an award, whereby the defendant was to pay fifteen pounds at or before the firſt of *December*, and ſo aſſigns a breach that the defendant had not paid the fifteen pounds upon the firſt of *December*; to which the defendant demurred, and had judgment; for altho' he did not pay it upon the firſt of *December*, he might have paid it before; and altho' payment before the day be a good payment at the day, yet in pleading, the parties muſt purſue the words of a condition, and the defendant muſt plead, that at or before ſuch a day he paid the money; ſo muſt the plaintiff in aſſigning a breach alledge, that the defendant, at or before ſuch a day, did not pay the money mentioned in the condition or award, or whatever it be: And if the payment be to be made on the firſt day of *May*, or within ten days after, and the

On Actions of Debt.

the defendant pleads payment on the first of *May*, and the plaintiff takes issue thereupon, without going any further; and if it be found for him, yet he can never have judgment; for he should have said, that the defendant did not pay on the first of *May*, or within ten days after. *Allen* 60. *Hodson v. Ingram*, *Pasch.* 24 *Car.* entered of *Hill.* 23 *Car.* Roll 965,

Of the Words *Modo & forma* in Replications.

1. Where these words *Modo & forma* are the substance of the issue, and when they are only words of form, this diversity is to be taken. Where the issue goes to the point of the writ or action, there the words *Modo & forma* are but form; but 'tis otherwise where a collateral point in pleading is traversed; there if the feoffment be alledged by two, and it is traversed, *Modo & forma* are material words; so if a feoffment be pleaded by deed, and it is traversed, *absque hoc, quod feoffavit modo & forma*; upon this collateral issue *Modo & forma* are so essential, as that the jury cannot find a feoffment without a deed. *Co. Lit.* 281.

2. But it is said there is another diversity to be observed, that altho' the issue be upon a collateral point, yet if the finding part of the issue appears to the court, that no such action lies for the plaintiff, no more than if the entire issue be found; there *Modo & forma* are but words of form. *Co. Lit.* 281. *b.*

3. An action of debt was brought upon a bond to perform covenants; the defendant demands *Oyer* of the condition, and pleads performance; one of the covenants was, that the defendant was seised of an indefeazible estate in fee-simple; and the plaintiff replies, that the defendant was seised of an indefeazible estate in fee-simple: and it was held that the breach was well assigned, according to the covenant, without setting forth at estate the defendant had. *Raym.* 14. *Glinister v. Audley.*

*4. In debt upon a bond, with a condition to perform covenants, of which one was to deliver two hundred faggots annually; the defendant pleads *performance*; the plaintiff replied, and shewed, that he had not received of the defendant's intestate, nor of the defendant, the said faggots; but that so many were due, *without shewing how many were due* in the intestate's time, and how many since; and therefore held not good. 1 *Lut.* 338. (F* 339)

5. But if the defendant pleads *nil habuit in tenementis* to an action of debt for rent, and the plaintiff replies, that *A.* demised to him for twenty years, *A.* having full power to make such demise; that is a good replication, without shewing what estate *A.* had therein. 2 *Vent.* 253.

6. Where the plaintiff to *nil habuit in tenementis* pleaded replied, that the estate of such a one, by several mesne conveyances,

Readings and Observations

ances, came to the plaintiff; and held well enough after a verdict. *Raym.* 389.

7. In the case of ——— v. *Glaspe*, the plaintiff declared upon a lease for years made to the defendant of lands in *E.* rendering rent; the defendant pleaded, that the plaintiff *tempore dimissionis nihil habuit in tenementis prædictis, &c.* the plaintiff replied, that he had a good and sufficient estate; it was agreed by the court, that the plaintiff ought to have shewn what estate he had, so that it might appear to the court that he had a sufficient estate in the lands whereby he could make a lease. *Yelv.* 228. but it was held to be aided by the statute of Jeofails.

8. Where an action of debt is brought upon a bond, with a condition that the obligee shall enjoy such lands without eviction; it is not sufficient for the plaintiff to aver, that he who hath recovered the lands against the plaintiff had a good title, without shewing what title he had. 2 *Saund.* 178, 179.

9. Where the condition of a bond was, that the defendant should for six months pay all such monies as he received, while he continued post-master; so a plea of performance, it is not a good replication to say, that he continued post-master longer, and did not pay, &c. 3 *Keb.* 45. *Lord Arlington v. Merrick.*

10. Where the condition of a bond is, that if the obligor pays to the obligee one hundred pounds, within one month after notice of his return from *C.* and an issue be taken upon the notice, though the plaintiff ought to have shewn that the defendant had not paid the money, yet if the issue be found for the plaintiff upon the notice, he shall have judgment. *Cro. Eliz.* 320. *Griffin v. Spencer.*

11. Where the condition of a bond was, that whereas the defendant had sold the plaintiff a close, and had mortgaged diverse lands to *J. S.* whereby the close was mortgaged, or supposed to be mortgaged to *J. S.* if therefore the close, &c. be redeemed, set free and discharged from all titles which may grow, by reason of the mortgage, that then, &c. and the defendant pleads that the close was not mortgaged to *J. S.* and further, that the close was redeemed, freed and discharged, &c. upon a motion in arrest of judgment this replication was held good, and not like to the case of an award; for there the plea of the defendant that an award was made is so general, that it tenders no issue; for which reason the plaintiff, in his replication, ought not only to shew an award, but a breach of that award; for otherwise it doth not appear that he hath any action; but in this case, the defendant by his plea tenders an issue, and the plaintiff affirming by his replication that it was mortgaged, the issue is complete, and he need not shew any redemption; for it shall be

On Actions of Debt.

be intended it was redeemed, because the defendant says it was not mortgaged. *Yelv. 24, 25. Bayly v. Taylor.*

12. And it is like to the case of an award, *that if J. S. pays to J. D. ten pounds, then J. D. shall assure to J. S. the manor of D.* and they are obliged to perform this award in an action of debt upon this bond against *J. D.* if he pleads that *J. S.* did not pay to him ten pounds; *it is a good replication for *J. S.* to say, that he did pay him the ten pounds, without saying further that *J. D.* had not assured the manor of *D.* because the plaintiff hath given an answer to the direct matter alledged in the plea. *Ibid.* (P* 340)

13. So if *J. S.* be bound to marry the daughter of *D.* upon *Easter day* next; to an action of debt upon that bond, it is a good plea in bar for *J. S.* to plead that the daughter of *J. D.* died before *Easter day*; and it is a good replication for *J. D.* to say, that his daughter was alive at *Easter*, without saying that *J. S.* had not married her. *Ibid.*

14. So where *A. B.* and *C.* his wife were tenants in tail of a messuage, and had issue *D.* *A.* dies, *B.* his wife marries *E.* and *E.* and *B.* made a lease to *F.* for twenty years, rendering rent, with a covenant that *F.* should permit the said *E.* and *B.* to come upon the premises, from time to time, to see that the premises were repaired: to an action of debt brought upon the bond to perform the covenants, the defendant pleads the tail above, and the death of *B.* tenant in tail; and that *D.* the issue in tail, on such a day entered, before whose entry no covenant was broken; *E.* the surviving lessor, who had brought the action, replied, that *D.* the issue in tail, came with him upon the premises to see if the premises were repaired, and reversed the entry of *D. modo & forma*, and it being found for the plaintiff; this replication was adjudged good upon a writ of error, for the special plea of the defendant had disabled the plaintiff from assigning any breach of covenant, because he was obliged to answer to this special matter; so where the defendant to an action of debt for the non-performance of an award, if the defendant pleads a release of all demands under the award; by this he tenders to the plaintiff a special plea in issue; and it is sufficient for the plaintiff to answer to the release, without assigning a breach. *Yelv. 78. Grey v. Guy.*

15. Where the condition of a bond was *to pay money to the plaintiff and others, the parishioners of D.* and the defendant pleads, that the day he paid the money to the obligee, and to *J. S. R. K.* the parishioners of *D.* the plaintiff replied, that the *J. S.* and *R. K.* were not all the parishioners of that parish; it was held an ill replication. *Moor 68.*

Readings and Observations

16. An exception to a *replication* to a plea of another action depending. *Cro. Eliz.* 462. *Green v. Wilcocks.*

17. Exceptions to a *replication* to *non dampnificatus.* 3 *Keb* 336. *Young v. White.* 1 *Keb.* 392. *Taverner v. Quaterman.*

18. To a *replication* in an action upon a bond to perform covenants. 3 *Keb.* 524. *Perry v. Whitley.*

19. To an action of debt upon a bond with a condition not to chase the obligee's warren; the defendant pleaded *non chafavit*; the plaintiff replied, that the defendant *chafavit* without shewing where the warren lies; and for this cause the replication was held naught. *Jones, Car.* 2. 21.

20. Where the defendant was obliged by the condition of a bond to render an account, and to the defendant's plea of performance the plaintiff replies a request; but does not shew how it was made, or with whom to account, and that he then and there refused; it was therefore held naught. 1 *Lut.* 389.

21. Where the condition of a bond was to satisfy the plaintiff for all goods that his apprentice should waste; and in the replication the plaintiff assigns a *breach* that he had wasted divers goods to the value of one hundred pounds; upon which the plaintiff demurs; and now it was excepted to the *replication*, that it was too general not shewing what the goods were; but the court adjudged it well enough in this action upon the bond, where damages are not to be recovered. 1 *Lev.* 94. *French v. Peirce.*

(P* 341) *22. Where the plaintiff took issue upon his marriage, and did not say, that he was married *tempore impetrationis brevis originalis prædict*; yet it shall be intended after a verdict. 1 *Lev.* 41. *Bassett v. Morgan.*

23. Where the plaintiff need not assign a breach of covenant. *Relv.* 78. *Jeffery v. Gay.* The like point, the defendant's plea, containing special matter. 1 *Brownl.* 89.

24. Whether the breach well assigned in a replication in an action upon a bond given to render an account of all monies. Vide 1 *Keb.* 760. *Woodcot v. Cole.*

25. Where the breach was well enough assigned, upon condition to pay money according to a proviso in a lease, without setting forth the indenture. 2 *Keb.* 667. *Hagh v. Chadwick.*

26. What was held an improper replication to a plea of payment. 3 *Keb.* 629.

27. Where a *replication* was held to make the issue good upon a plea of the statute of usury; though the words *corrupte agreeat* were not in the plea. *Moor* 464. *Rogers v. Jackson.*

28. Where a *replication* in an action upon an award was held ill. 1 *Brownl.* 66. *Gates v. Smith.* 2 *Ven.* 72. *Leigh v. Ward.* 1 *Brownl.* 105. *Barrett v. Fletcher.* 1 *Brownl.* 62. *Wild v. Vinor.*

29. Where

On Actions of Debt.

29. Where a *replication* to a plea pleaded to an action of debt upon an award, was held not to be double. *Stiles* 41. *Tyler's case*.

30. Exceptions taken to a replication to *nil habuit in tenementis* pleaded. 4 *Mod.* 76. *Parker v. Harris*.

31. To a plea of *non dampnificatus*. *Abbots v. Johnson*. 3. *Bulstr.* 233. 1 *Brownl.* 117. *Doughty v. Fawc.*

32. To a plea of *riens per descent*. 2 *Mod.* 50. *Osbaston v. Stanhope*. 5 *Mod.* 102. *Redshaw v. Hester*.

33. An action of debt was brought against an administrator, and he pleads a *Judgment* against the testator; the plaintiff replies, that there was an action against the intestate, but that he died before judgment, and that the judgment was obtained by fraud; this was held a good *replication*, and that the judgment being ill, and the now plaintiff being a stranger, might avoid it by plea; and this rule was put, that where a judgment may be reversed by a writ of error, there the party shall not be admitted to do it by plea; but a stranger to the judgment must avoid it by plea; as if a *scire facias* be brought against the bail, 'tis a good plea for them to say, that the principal was dead before judgment given; (*i. e.*) 'tis a good plea to the *scire facias*, by way of excuse for not bringing in the body, but not to avoid the judgment, because against the record. 2 *Mod.* 308. *Randall's case*.

Cases where exceptions have been taken to replications in actions of debt, relating to the following particulars.

1. To judgments pleaded by an administrator, and no assets *atra*. 2 *Brownl.* 118. (*Charnock v. Currey*).

2. To a plea pleaded by an executor of a retainer in satisfaction. 1 *Brownl.* 103. *Alexander v. Lamb*.

3. To a plea of *non dampnificatus*. *Stiles* 142. *Nelson v. Tompkn.*

4. To a plea in an action upon a bond given for the due service of an apprentice. *Cro. Eliz.* 723. *Cardinal v. Hescott*.

5. To a plea pleaded by an executor. 2 *Cro.* 140.

6. What was held not a departure in a replication to a plea in an action of debt upon the statute of 14 *Hen.* 8. against physicians unlicensed. 2 *Cro.* 121. *Laroughton v. Garter*.

7. Where the date of a submission, varying from that set forth in the replication, was adjudged not to vitiate the award. 1 *P.* 184. *Tile v. Dawson*.

8. Where the defendant's rejoinder had made the replication good, which was not so before. 2 *Cro.* 312. *Gyll v. Glasf.*

9. To a plea pleaded by a wife that she was married, &c. *Cro. Eliz.* 857. *Riddleston v. Wogan*.

Readings and Observations

10. To a plea in an action of debt upon a bond to free lands from incumbrances. *Cro. Eliz.* 899. *Bayley v. Taylor.*

11. To a plea of *nil habuit in tenementis*. 2 *Cro.* 312.

12. To an action of debt upon a bond with a condition for the payment of money. *Cro. Eliz.* 727. *Lane v. Goldman.*

13. In a replication to a plea in an action upon a bond, with a condition for the quiet enjoyment of lands. 3 *Cro.* 5. *Hammond v. Dod.*

14. To pleas in action of debt upon award bonds. *Cro. Eliz.* 797. *Black v. Palgrave* 758. *Bretton v. Pratt* 66. *Fuller v. Spackman*, 1 *Show.* 242. *Rousby v. Manning*, 1 *Leon.* 304. 1 *Leon.* 140. *Oldfield v. Wilmer*, *Yelv.* 152. *Barrett v. Fletcher*, *Stiles* 111.

15. To a plea of a statute entered into by the testator. *Gwyn v. Roll & Ux' Exec'*, &c. 2 *Cro.* 131.

16. Where the plea and rejoinder were held bad, and the replication good, to an action upon an award bond. 2 *Bulstr.* 38. *Lindsey v. Astley.*

17. To a plea of the statute of 23 *Hen.* 6. 2 *Leon.* 107. *Bowse v. Vernon.*

18. To an action of debt upon an award, the defendant pleads no award; the plaintiff replies an award made at another day; and held good. *Stiles* 41.

19. To an action of debt upon a bond with a condition to performance of an award, the defendant pleaded that the arbitrators made an award whereby they awarded the defendant to pay to the plaintiff three thousand one hundred pounds, and to give a general release to the plaintiff; but shews nothing to be done by the plaintiff (although in truth they had awarded him to give a general release to the defendant); and the defendant pleaded further, that he had paid the money, and given a release according to the award; the plaintiff took issue upon payment of the money, but took no notice of the other part of the award, whereby the plaintiff was to execute a release to the defendant; so that it appeared it was a void award, and the plaintiff could not have judgment. 1 *Saund.* 326, 327. *Keb.* 568. 3 *Lev.* 165. 1 *Salk.* 69, 70. and the cases in the margin of the last edition of *Saunders*.

20. An action was brought upon a bond to perform an award so that the award be signed, sealed and delivered; and in replying, the plaintiff omitted that the award was signed; and it was held ill after a verdict. 1 *Brownl.* 67. *Jackson v. Coming.*

21. A replication to a plea that there was no award; that an award was made, but does not say, *de & super pramissis*. *Keb.* 865. *Ratcliff v. Bishop.*

22. Other replications in an action upon bonds to perform awards. 3 *Keb.* 675. *Hinton v. Crans.* 2 *Keb.* 54. *Hornick v. Sunderfon.*

On Actions of Debt.

23. A replication to no award pleaded, does not set forth where the arbitrators made their award; but it being complied with the former sentence, that at such a day and place the arbitrators undertook, &c. was held well enough. 1 *Keb.* 183. *Taylor v. Smith.*

24. Exceptions to a replication to a plea of an outlawry. 1 *Leon.* 87.

25. The like to a replication to a plea of nonage. 1 *Keb.* 416. *Russell v. Lea.*

26. Exceptions to a replication to a plea of the statute of limitations, that the defendant was beyond sea, and that the plaintiff sued him within six years after his return. 1 *Keb.* 794. *Beyne v. Clapham.*

A replication, as well as a plea, ought to have a (P 341) proper conclusion.

1. To a condition that the defendant shall pay all sums which should be expended about, &c. the defendant pleads that he paid all; the plaintiff replies he had not paid all, *et hoc paratus est verificare*; upon a demurrer it was adjudged the plaintiff ought to have concluded to the country, because there is an affirmative and a negative; and if he might be admitted to aver his replication thus, there would be no end in pleading. *Raym.* 98. *Charleton v. Finney.*

2. Exceptions to a replication for not concluding to the country in an action upon a sheriff's bond. 3 *Keb.* 448. *Lewin v. Alcock.*

3. Where the plaintiff in his surrejoinder to the defendant's rejoinder, ought to have concluded to the country, and not with an averment. *Raym.* 94. *Morgan v. Man.*

4. Where the plaintiff concludes his replication in debt with a prayer only of his debt, that shall not vitiate the replication; but the court are to give judgment for the damages, as incident to the debt. 1 *Lev.* 222. See this case reported in 1 *Sid.* 339. where it is said, that the judgment was reversed *Nisi.* 1 *Saund.* 97. 2 *Keb.* 205.

5. Where the plaintiff in his replication to the defendant's plea (as an executor) ought to have concluded to the country. *Ido.* 137. *Alexander v. Lane.*

6. In an action of debt upon a bond to pay *tantas denariorum summas*, as he should receive by such a day; the plaintiff replies, that he did not pay fifty pounds which he received on such a day; whether the plaintiff ought to conclude to the country. 2 *Keb.* 230. *Hansfall v. Nurse.*

7. To a plea pleaded by the defendant that he did not procure any person to obtain letters patents, &c. the plaintiff replies,

Readings and Observations

plies, that the defendant did procure letters patents for another person to use that mystery, and concludes to the country; it was held good, and that to conclude *prout patet per recordum* would be improper. 3 *Mod.* 79. *Clerke v. Hoskins.*

8. To an action of debt upon a bond, with a condition to render an accounts of such goods as came to his hands; the defendant *pleads* that no goods came to his hands; the plaintiff *replied*, that a silver bowl came to his hands, and concludes *et hoc paratus est verificare*, and held good. 1 *Saund.* 103. *Hayman v. Gerrard.* See *Griffin v. Spencer, Bro. Eliz.* 320. *Bayly v. Taylor. Cro. Eliz.* 899. *Yelv.* 24, 73. *Jeffery v. Guy.*

9. But in *Yelverton* 137. in the case of *Alexander and Lane*, where the defendant, as an administrator, pleaded that goods of the intestate to the value of ten pounds came to his hands, which he retained towards satisfaction of a debt, and that he had no more goods besides these, to the value of ten pounds; and the plaintiff replied that he had more goods, and concludes *et hoc paratus est verificare*; that replication was held ill, for concluding it with *et hoc paratus est verificare*.

10. To an action of debt upon a bond, the defendant *pleads* that his ancestor was seised of such lands in fee, and made a settlement to trustees, with a power to make leases for ninety-nine years; and that the trustees made such lease, and no assents *præter* the reversion: a *replication*, that the settlement was fraudulent, for plea that he had assents sufficient by descent, &c. was held good. 2 *Mod.* 50. *Osbaston v. Starhope.*

11. Where the defendant *pleads* *nil habuit in tenementis*; and the plaintiff replies, that he was seised in fee; he ought to conclude to the country. 1 *Inst.* 126. a. cited in 1 *Saund.* 102. in the above case of *Hayman v. Gerrard.*

12. Where a man, by the nature of his defence, ought not to plead *non est factum* generally, but ought to plead the special matter, and conclude *et sic non est factum.* 1 *aym.* 125. *Errington v. Hurst.*

13. Where-ever new matter is offered in a replication, the plaintiff ought not to conclude to the country, but to aver his plea; as where the defendant *pleads* that the plaintiff was an alien; and the plaintiff replies that he is *indigena in regno Angliæ sub ligeantia*, &c. and born at *London*, &c. and not an alien, and concluded to the country; it was held ill, for there being new matter set forth in the replication, he should have given the defendant an opportunity to rejoin. 4 *Mod.* 285. *Nichols v. Pawlet.* So it is of a plea of coverture, if the defendant *pleads* coverture, *tempore impetrationis brevis originalis ipsius* the plaintiff; and the plaintiff sets forth an original sued out such a day; the plaintiff must aver his replication, and not conclude to the country: So it is where the defendant *pleads* a tender

On Actions of Debt.

a tender, *ante diem impetrationis brevis originalis ipsius* the plaintiff; and the plaintiff replies *non obtulit*; if the plaintiff sets forth his original sued out such a day, this being new matter, the plaintiff must aver his replication.

What other Replications in Actions of Debt have been adjudged good, and what not.

3 Keb. 337. <i>Hern v. Hudson.</i>	2 Keb. 535. <i>Hancock v. Proud.</i>
1 Cro. 160. <i>Mannings v. Townsend.</i>	591. <i>Besvil &c. executors of Gibbs v. Coats Pickford.</i>
398. <i>Eaton and Monex v. Laughier.</i>	3 Keb. 162. <i>Leuns v. Cox, administrator of Cole.</i>
828. <i>Stutfield v. Somerset.</i>	1 Leon. ———
2 Cro. 381. <i>Gold v. Death.</i>	<i>Mod. Caf. 156. Smith v. Bartlett.</i>
503. <i>Bourn v. Carrington.</i>	217. <i>Busbell v. Pasmore.</i>
3 Cro. 5. <i>Hammond v. Dodd.</i>	5 <i>Mod. Caf. 122. Redshaw v. Hester.</i>
1 Keb. 11. <i>Thackston v. Hunlocke.</i>	
2 Keb. 278. <i>Knight v. Pitt.</i>	

Where the Breach hath been well assigned, and where not, relating to the following particulars.

1. To an action upon a bond, with a condition that the husband should permit his wife to possess such and such goods, and she and her children to have them without interruption. *Crowles v. Dawson, 3 Cro. 204.*
2. To a bond with a condition for the payment of money upon proving the same to be due. *Lut. 665. Ladd v. Garron.*
3. To a bond with a condition to serve as an apprentice. *Cro. Eliz. 830. Culler v. Breuster.*
4. In an action upon a bond with a condition to execute writings. *1 Brownl. 93. Stanford v. Cooke.*
5. With a condition to make a further assurance. *1 Brownl. 84. Pudsey v. Newsham. 1 Brownl. 70. Preston v. Dawson.*
6. Where a breach of a condition was not well assigned, it not appearing when the condition was broken. *Stiles 17. Sanderfon v. Martin.*
7. Upon a bond given by a bailiff to the under-sheriff, it not appearing that the place where the bailiff was to levy the issues, was within the jurisdiction of the bailiff. *Stiles 18. Stoughton v. Day.*

*Of

Readings and Observations

(P* 342) *Of the Breach in Actions of Debt upon Bonds, for the Performance of Covenants,

- | | |
|---|--|
| <p><i>Cro. Eliz.</i> 297. <i>More v. Roswell.</i>
 332. <i>Andrews v. Wood.</i>
 517. <i>Hallings v. Con-</i>
 <i>nard.</i>
 544. <i>Chorus v. —</i>
 657. <i>Russel v. Gull-</i>
 <i>well.</i>
 674. <i>Nokes v James.</i>
 681. <i>Washington v.</i>
 <i>Murden.</i>
 683. <i>Smith v. Warren.</i>
 833. <i>Lane v. Hodges.</i>
 761. <i>Woodiard v.</i>
 <i>Dannock.</i>
 809. <i>Procter v. Johnson.</i>
 1 <i>Brownl.</i> 61. <i>Younge v. Melton.</i>
 65. <i>Reason v. Wheeler.</i>
 76. <i>Baker v. Payne.</i>
 81. <i>Witchcot & al' v.</i>
 <i>Nine.</i>
 112. <i>Sallows v. Gold-</i>
 <i>ing.</i>
 113. <i>Bristow v. King.</i></p> | <p><i>Stiles</i> 30. <i>Leve v. Cholwitel.</i>
 1 <i>Ven.</i> 184. <i>Procter v. Newton.</i>
 3 <i>Cro.</i> <i>Chapman v. Chap-</i>
 <i>man.</i>
 <i>Lut.</i> 693. <i>Studholme v. Mundell.</i>
 1 <i>Brownl.</i> 80. <i>—</i>
 1 <i>Leon.</i> 17. <i>Smith v. Pease.</i>
 2 <i>Leon.</i> 130. <i>Wye v. Throgm-</i>
 <i>ton.</i>
 2 <i>Show.</i> 425. <i>Crosse v. Young.</i>
 6 <i>Mod.</i> 234. <i>Godolphin v. Tudor.</i>
 3 <i>Keb.</i> 246. <i>Norman v. Foster.</i>
 3 <i>Cro.</i> 204. <i>Crowle v. Dawson.</i>
 380. <i>Nicholas v. Pullen.</i>
 1 <i>Keb.</i> 467. <i>French v. Pierce.</i>
 760. <i>Woodcott v. Cole.</i>
 2 <i>Keb.</i> 47. <i>Harsh v. Blackham.</i>
 275. <i>Hayman v. Gerrard.</i>
 1 <i>Leon.</i> 157. <i>Seaman v. Brown-</i>
 4 <i>Leon.</i> 123. <i>ing.</i>
 1 <i>Mod.</i> 227. <i>Gayle v. Betts.</i>
 3 <i>Keb.</i> 616. <i>Odingfeild v. Eng-</i>
 <i>land.</i></p> |
|---|--|

The like upon a Bond to perform an Award.

- | | |
|--|---|
| <p><i>W. Jones</i> 431. <i>Bardy v. Glyston.</i>
 <i>Cro. Eliz.</i> 177. <i>Vanviree v. Van</i>
 <i>viree.</i>
 676. <i>Withers v. Drew.</i>
 1 <i>Leon.</i> 28. <i>Allenton v. Bale.</i>
 2 <i>Bulstr.</i> 93. <i>Freeman v. Sheene.</i>
 3 <i>Cro.</i> 383. <i>Beale v. Beale.</i>
 4 <i>Mod.</i> 330. <i>Rowlby v. Man-</i>
 <i>ning.</i></p> | <p>2 <i>Keb.</i> 546. <i>Becket v. Taylor.</i>
 601. <i>Leech v. Morris.</i>
 670. <i>Collet v. Podwell.</i>
 69. 874. <i>Elborough v.</i>
 <i>Rates.</i>
 3 <i>Keb.</i> 253. <i>Vosque v. Daniel.</i>
 508. <i>Messenger v. Freeman.</i></p> |
|--|---|

On Actions of Debt.

Of Rejoinders.

Ninthly, The Pleadings upon a view of the whole are to be coherent and concomitant one with another; and therefore if the plaintiff replies matter not pursuant to his declaration, and does not corroborate and fortify it, or the rejoinder does not fortify the plea, or the surrejoinder the replication; they are in law called departures.

1. If one pleads a feoffment of *J. S.* in bar, and the plaintiff replies that *J. S.* disseised him, and enfeoffed the defendant, upon whom the plaintiff entered; the defendant may *rejoin* that the plaintiff, after the disseisin, confirmed the estate of *J. S.* and that after *J. S.* enfeoffed the defendant: this is not a *departure*, because the confirmation precedes the feoffment, and fortifies the bar; otherwise had he pleaded a confirmation to himself, being subsequent to the feoffment pleaded in bar. *Plow. Com. 105. l. 18 Ed. 4. 24.*

2. A lease pleaded at common law in the bar, and upon the statute in the rejoinder, is a *departure*. *Dyer 10. 21 Hen. 7. 17.*

3. A gift in tail, pleaded in bar with a *traverse*, the party shall not maintain the issue with a recovery in value; but it is said to be otherwise by way of declaration; and if a general gift be pleaded in bar, the party shall not afterwards maintain it by special matter, because the special matter ought to be shewn at first. *3 Hen. 7. 5.*

4. Where the defendant taking a *protestation* alledges, that the plaintiff's counsel did not devise a release, *for* *lea* affirms, that he was not requested to seal and execute, &c. and the plaintiff replies that *J. S.* his counsel devised a release, and that he requested the defendant to seal and execute, &c. and he refused; if the defendant rejoins that he did not refuse, &c. that is a *departure*, and the issue joined is a *jeofail* *ex curiam*; and they held that the plaintiff need not answer to the refusal, but only that he requested the defendant to seal, &c. because the defendant hath pleaded in the negative that he was not requested, and that shall be the issue. *Dyer 31.*

5. If the defendant pleads in bar a lease for fifty years made by a corporation, and afterwards, in the rejoinder, pleads the proviso of the statute of 21 H. 8. which makes such leases good for twenty-one years; the pleading of the proviso is a *departure*, because

Readings and Observations

because it does not agree with and enforce the bar. *Dyer* 102 *b.* 103. *a.*

6. Where an executor brings an action of debt upon a bond made and dated 12 *Jan.* the defendant pleads a release in bar after the date aforesaid; the plaintiff cannot aver the delivery of the bond to be subsequent to the release, for that is a departure; but *Quare*, if not otherwise, where the plaintiff says nothing of the day of the delivery in his declaration. 1 *Bliz. Dyer* 167.

7. Where a lessee, without impeachment of waste, covenanted that when he had felled wood, he would make a fence; and in an action of debt upon a bond to perform the covenant, the defendant pleads that he had not felled wood; the plaintiff replied, that he had felled two acres, and had not made the fence; the defendant rejoined that he had made the fence, and concludes to the country; this was adjudged a departure and a jeofail. *Dyer* 253. *b.*

8. If it be pleaded *Quod partes ad finem nihil habuerunt*, and that is denied; the party cannot verify his plea by saying that he had but a use in the land, for that is a departure. *Dyer* 291. *a.*

9. Where the defendant in his bar pleads performance of covenants, and in his rejoinder says only that he was ready to have performed the covenants; that is a departure. *Dyer* 371.

10. If the defendant in his bar makes a title by a gift in tail, and in his rejoinder by a dying seised, that is a departure; and where the defendant makes out a title by a lineal descent from his grandfather to his father, and from his father to himself; and the plaintiff replies, that the defendant's father was a bastard, and the defendant by protestation says that he does not know that his father was a bastard, for plea says, that his father was seised, and died seised; that is a departure. 21 *H.* 6. 33.

11. Where the defendant in his bar makes a title to an entirety, and by a rejoinder only to a moiety; that is a departure. 22 *H.* 6. 51. *a.*

12. If the plaintiff makes a title at large, and doth not traverse the bar, he shall not traverse it afterwards, for that is a departure; as if the plaintiff claims by a feoffment of *J. N.* and that he was seised, untill disseised by the defendant; and the defendant pleads that *J. S.* was seised, 'til disseised by *J. N.* who enfeoffed the plaintiff; and that afterwards *J. S.* entered and enfeoff'd the tenant; as in the bar, in that case, the plaintiff cannot traverse the feoffment of *J. S.* because that would be a departure. 5 *H.* 7. 33.

13. In many cases, if new matter be alledged in the replication, if the defendant makes a new answer in the rejoinder yet that is not a departure. 5 *Hen.* 7. 19.

On Actions of Debt.

14. So in many cases upon new matter being alledged by the plaintiff in his replication, the defendant may alledge new matter in the rejoinder; *and that shall not be construed a departure. 5 Hen. 7. 19. 21 H. 6. 57. 39 H. 6. 16. (P* 343)

15. Where the condition of a bond was, that the defendant should stand to the award of J. S. between the defendant and J. D's tenants, and the defendant pleads no award; the plaintiff replies that the award was made between the defendant and such tenants of J. S. naming them; the defendant rejoins that they were not his tenants; that is said to be no departure, because the plaintiff alledges a matter which gave occasion to this rejoinder. 39 Hen. 6. 16. 21 Hen. 6. 57. 5 Hen. 7. 19.

16. In an action of debt upon a lease for years, or in an avowry for a rent-charge by A. if after a plea pleaded the plaintiff will reply and enforce his action, or his avowry by *costui que use*; that is a departure, because at first by the declaration it is intended a lease, and rent at common law; and now by the replication it appears that the title is only by an authority given by the statute of 1 R. 3. Yelv. 14.

17. So if a man entitles himself by a feoffment of A. and the other party shews that A. was an infant at the time of the feoffment; if he will, in his replication, induce a custom to make the feoffment good, that is a departure: for the use in the foregoing case, and the custom in this case, are matters of title that were *in esse* at the time of the plea. *Ibid.*

18. But where a man entitles himself by the feoffment of J. S. and the defendant pleads that before the feoffment J. S. was attainted; now if the plaintiff will shew an act of Parliament, whereby the attainder of J. S. is reversed; that it is not a departure, because the matter of the title is not changed, but remains as it was at first, that is by the feoffment. *Ibid.*

19. To an action of debt upon an award-bond, the defendant pleaded that the arbitrators made no award; the plaintiff sets forth an award; the defendant rejoined, that before the making of the award the parties discharged the arbitrators; this was not held a good rejoinder, for it confesses the bond forfeited; therefore *Quare* whether he should not have rejoined that the arbitrators had not made such an award, and have given the discharge in evidence. *Winch 75. Westlie v. King.*

20. To an action of debt upon a bond to provide for a bastard-child, the defendant pleaded *non dampnificatus*; the plaintiff assigned a breach in paying so much a week for the child; the defendant cannot rejoin that he offered to provide for the child, and that this money was paid in his own wrong. *Saund. 84.*

Readings and Observations

21. To an action of debt, with a condition to perform an award, the defendant pleads performance; the plaintiff assigns a breach in the non-payment of ten pounds; the defendant rejoined a tender and refusal; this was held a *departure* 4 *Leon.* 79.

22. To an action of debt for the non-performance of an award, the defendant pleaded no award; the plaintiff replied an award; the defendant rejoins that there were several other things submitted, and so no award; this was held a *departure*. i *Sid.* 180. i *Lev.* 85.

23. To an action of debt for the performance of covenants, and for the payment of money; the defendant pleaded performance; the plaintiff replied the non-payment of half a year's rent: the defendant rejoined the payment of part in money, and the rest by payment of the land-tax; it was held a *departure*. *Salk.* 221. The Countess of Arran v. *Crise*.

24. If a man makes a lease, and covenants that A. shall pay him so much during the term, and gives a bond for performance of covenants, to which he pleads performance of all that was to be performed on the part of A. 'Tis implied that he paid the money, and therefore a good plea. *Dyer* 373.

25. In an action of debt upon a bond, with a penalty, conditioned for performance of certain covenants, articles and agreements, contained in an indenture of lease for a year; the defendant pleaded performance of covenants; the plaintiff replied that the defendant did not pay the rent reserved upon the lease at such a day, according to the form and effect of the condition of the obligation; the defendant rejoins, and alleges an entry by the plaintiff into the land leased before the rent, and that he kept the possession till the rent-day was past; upon which, issue being taken, it was found for the plaintiff: And now the defendant moved in arrest of judgment upon a fault in the replication, *viz.* that the plaintiff says that the defendant paid not his rent according to the form, &c. of the condition of the obligation, whereas there is no mention of any payment of rent in the condition of the bond, but in the lease only; *sed non allocatur*, because the defendant, by his rejoinder, has confessed that such a rent was in arrear, and has waived taking issue upon it, and taking issue upon another matter; and therefore this shall be well enough after a verdict. And *per Hale* Chief Baron, it is all one substance to plead, as the plaintiff has done, and to have pleaded *secundum formam & effectum indenturæ*, for the condition of the bond comprehends all that is comprised in the lease; but tho' it might have been made a question upon a demurrer, there can be no doubt of it after a verdict. *Hard.* 319. *Anonymus*.

On Actions of Debt.

26. An action of debt was brought upon a bond of fifty pounds to perform covenants in an indenture, and one was, That the defendant should pay twelve pounds a year for a messuage demised to him quarterly at four feasts; the defendant pleads performance of all covenants; the plaintiff assigns a breach that the defendant had not paid three pounds for one quarter's rent; the defendant rejoins, that before the three pounds were due the plaintiff entered upon him, and expelled him; this rejoinder was held a departure, for where the defendant pleads a general plea, he shall not make it good afterwards by a particular thing in the rejoinder. *Raym. 22. Graugh v. Hemborough.*

27. If the defendant pleads to an action of debt upon a bond, with a condition to save the plaintiff harmless, that he did save him harmless; the plaintiff in his replication ought to shew his damnification; and if the defendant rejoins that he had no notice of the plaintiff being thus damnified, and that if he had, he would have saved the plaintiff harmless, such rejoinder is a departure from the plea. *1 Saund. 116, 117. Cutler & al. v. Southern & al.*

28. It is not sufficient to plead matter which would be a performance of a condition by implication; as in an action of debt upon a bond upon bottomree, the defendant pleads that the ship went from *London to Barbadoes sine deviationem*, and that after her return from *Barbadoes to London*, she was lost; the plaintiff replies that she touched at *Jamaica*, and was lost in her return from *Jamaica to London*, and so shews a deviation; and the defendant rejoins, and shews that that deviation was by her being prest in the King's service; this is a departure from his plea, and ought to have been pleaded at first; and so he says she was lost *in voyage prædicto* in his plea, which could not be, if she was lost in her voyage from *Jamaica*; yet that implication that she was lost *in voyage prædicto* from *Barbadoes*, shall not make the plea good. *Williams v. Steadman, Pasch. 5 W. & M. Skinner 345.*

29. To an action of debt upon a bond, with a condition to give an account of all monies that came to his hands, the defendant pleads performance; the plaintiff replies that such monies came to his hands, *of which he gave no account; the defendant rejoins that the money was stolen from him; and it is held no departure. *Ven. 122. (P* 344)*

30. What hath been construed a departure in an action of debt, with a condition to perform an award. *1 Lev. 85. House Lander.*

31. Where a deed set forth in the replication was not a departure, is but evidence of the contract. *1 Keb. 421. Blunt v. Myfyn.*

32. What

Readings and Observations

32. What held a departure in a replication in an action for not performing an award. 2 *Keb.* 156. *Meriell v. Ecclesfield.*

33. After no award pleaded, and a breach assigned, in not paying money, the defendant rejoins payment; that is a departure. 3 *Keb.* 513.

34. A departure in a rejoinder in an action upon a bond for the performance of covenants. 2 *Keb.* 761. *Vere v. Smith.*

35. A departure in a rejoinder to a replication of *nul tial* award. 1 *Keb.* 414. *Howse v. Launder, Dean v. Bafon.*

36. A departure in a rejoinder to a replication of *non comp* ruit to *non dam nificatus* pleaded to a bond given for an appearance. 1 *Keb.* 59. *Cook v. Morgan.*

37. A departure in a rejoinder in an action upon a bond to deliver a horse, &c. the defendant had pleaded covenants performed; and the plaintiff had replied that the defendant had not delivered the horse, &c. 1 *Keb.* 678. *Brooks v. Lake.*

38. In a rejoinder in an action upon a bond for the performance of an award. 3 *Keb.* 512. *Hinton v. Cray.*

39. Where the defendant granted a rent-charge out of his land to the plaintiff, and was obliged in ten pounds, with condition that if he performed the covenants, &c. so that the obligee might have and enjoy the annuity, according to the intent of the deed; if the defendant pleads performance, that implies payment of the annuity, and upon a breach assigned of its being in arrear, and so contradicts his plea. *Cro. Eliz.* 828, 829. *Specot v. Sheres.*

40. If one covenants to make such an assurance of lands, counsel shall advise after pleading performance, he cannot say *quod consilium non dedit advisament*: for that is a departure. *Cro. Eliz.* 829.

41. Where the defendant is called executor in the declaration, tho' afterwards the plaintiff replies that the executor died before the probate of the will; yet it was held no departure. *Cro. Jac.* 614. *Hayton v. Wolfe.*

42. Whether a rejoinder to a replication in an action of debt upon a recognizance, was a departure. 6 *Mod.* 13. *Parkins v. Woolaston.*

Of Traverses.

TENTHLY—that when a material matter is alledged in Declaration, Plea, Replication, &c. the denying of which determines the Point in Question, it is necessary to take Traverse to bring the whole Controversy (complicated with several Circumstances) to one single Point.

1. If the defendant pleads an award of three things, plaintiff cannot reply an award of three things and another

On Actions of Debt.

but must reply an award of four things, and *traverse* the award of three only. *Plow. Com.* 95. *Lut.* 524.

2. So to an action of debt for rent upon a demise of three chambers, there if the defendant pleads a demise of three chambers and a dining-room, and that the plaintiff entered into the dining-room; he ought to *traverse* the lease of three chambers only mentioned in the declaration. 1 *Saund.* 208. 2 *Keb.* 467.

3. To an action of debt upon a bond, with a condition to make an inventory of such goods; the defendant pleads that he made an inventory, and that the goods therein were all the goods of *A.* the plaintiff replies that there were other goods of *A.* of which the defendant had made no inventory; he ought to *traverse* that those mentioned in the inventory were all as the defendant had pleaded. *Dal.* 52.

4. Where an action of debt was brought upon a bond with a condition to perform an award, so that it be made before the twenty-fifth day of *March*; the defendant pleaded no award; the plaintiff replied that before the suing out of the bill, *viz.* on the twenty-fourth day of *March*; the arbitrators made an award, and assigns a breach; whereupon the defendant demurs, for that he ought to have pleaded that before the twenty-fifth day of *March*, *viz.* on the twenty-fourth day of *March* they made their award; for the award might be made after the twenty-fifth day of *March*, and before the suing out of the bill, and the day is not *traversable*; for if the award was made at any time after the submission, and before the twenty-fifth day of *March*, it is good, and nothing is here *traversable*; but the twenty-fourth day of *March*, and that comes here under the *Scilicet*, which is never *traversable*; and of this opinion was *Keeling* Chief Justice; but the rest *e contra.* 1 *Saund.* 169, 170. Judgment it seems was given for the plaintiff by the whole court; and the best authority cited to maintain this replication, seems to be the case in *Cro. Jac.* 619, 620, where the plaintiff declared that in consideration he, at the defendant's request, would travel with him from *Devonshire* to *London*, the defendant promised to pay him four pounds, and the plaintiff avers that afterwards (to wit) on the fifteenth day of *April*, in the eighteenth year, &c. he performed the journey; whereupon he brought the action for the four pounds; the defendant pleaded that before the journey, (*viz.*) on the sixteenth day of *April* he discharged the plaintiff from his journey; and it was adjudged that the plea was ill, because that the journey was adjudged to be on the fifteenth day of *April*, and so before the sixteenth, which was the day the defendant alledged he discharged the plaintiff from the journey. See 1 *Saund.* 118. 286, 287. 1 *Lew.* 245.

5. To

Readings and Observations

5. To an action of debt upon a sheriff's bond, dated the thirteenth day of *June*, the defendant pleaded the writ returnable *die Veneris, scilicet*, the fourteenth day of *June*, and that he was thereon imprisoned till the nineteenth day of *June*; and (P* 345) that this bond was first delivered, *as his deed, before the nineteenth day of *June*; and *traverses* that it was delivered before the nineteenth day of *June*; and this was held an ill traverse, for it should have been a traverse that it was delivered before the day of the return. 1 *Sid.* 300.

6. In an action of debt upon a contract, the defendant shall not say the contract was made for a less sum, and *traverse* that it was made for such a sum. *Moor* 49.

7. Upon a writ of error of a judgment in the common pleas, the defendant pleads a *release of errors*; the plaintiff replies, that there was another judgment between the parties for the same sum, and of the same term; and that the release was of that judgment, of which the writ of error was not brought, *absque hoc*, that it was of this in question: It became a doubt in this case, whether there ought to be a *traverse* in this replication; for thereby the party is cut out from pleading *nul tiel record*; but the court said the way had been to have shewn one judgment specially, and then to have averred the *release* was made of that judgment, and to have rested there. 6 *Mod.* 235.

8. Where the condition of a bond was, *That if the defendant compounded with E. for his lands, then he should pay the plaintiff thirty pounds*: To an action of debt upon this bond, the defendant pleaded that he had not made any composition with *E.* the plaintiff replied that *E.* granted a rent-charge in fee to the defendant, in satisfaction of his title, and so he made a composition; the defendant protesting that *E. non concessit*, for rejoinder said he did not accept it in satisfaction; and it was adjudged a good rejoinder without a traverse. 5 *Mod.* 8. *Hob.* 1-8.

9. Where the defendant in pleading a deed delivered another day, ought to take a *traverse*. *Yelv.* 139. *Green Eden.*

9. Where it was held that an executor must traverse that the testator died intestate. *Lothbury v. Ridges. Yelv.* 115.

11. To an action of debt against executors upon a bond of two hundred pounds, the defendant pleaded a *recovery*, by a stranger, of two hundred pounds upon another bond; and averred that the debt was a just and true debt, and that they were not assets besides the two hundred pounds; the plaintiff replied that the recovery was by covin; and the judgment for the plaintiff, in this case upon a demurrer, was reversed, because it could not be covin, if it was for a just and true debt; and therefor

On Actions of Debt.

the plaintiff ought to have *traversed* that it was *for a just and true debt*. *Moor* 705. *Wilcocks v. Green*.

12. Where, the inquisition to be traversed. *Crc. Eliz.* 860. *Gybson v. Brook*.

13. An action of debt was brought for rent upon a lease for years; and the defendant pleaded, that before the plaintiff had any thing in the premises, that *J. S.* was seised, and died so seised; and his son entered, and the plaintiff entered upon him, and disseised the son, and made the lease; and the son re-entered before any rent in arrear; the plaintiff alledging by protestation that *J. S.* was not seised, for plea alledged that the father did not disseise the son; and upon a *demurrer* it was held that the *disseisin*, and not the *dissent*, was traversable. *Moor* 539. *Bannister v. Lilley*.

14. Where it was held not necessary for the plaintiff to take a *traverse* in his replication to a plea, in an action upon a bond, with a condition to appear. 3 *Keb.* 191. *Sturges v. —*

15. Where a *traverse* of the disseisin was held to be well taken to an entry into the lands by the disseisee, pleaded to an action of debt for rent. 3 *Keb.* 627. *Gee v. Mansfeild*.

Lastly, of Estoppels.

1. An estoppel is an impediment, or bar to an action, arising from the party's own act, who otherwise hath or might have had this action, and it comes of the *French* word *estoupe*; and there are three kinds of estoppels, viz. 1. By matter of record. 2. By matter in writing. 3. By matter in pais. 1. By matter of record, as by letters patents, by fine, by recovery, by pleading, by taking of continuance, by confession, imparlance, warrant of attorney, attaintance. 2. By matter in writing, not of record, as by deed indented, by making an acquittance by deed indented or deed-poll. 3. By matter in pais, as by livery, by entry, by acceptance of rent, by partition, and by acceptance of estate. *Co. Lit.* 352. b.

2. Where estoppels relate to pleadings, it may be observed from *Co. Lit.* 352. that every estoppel ought to be reciprocal, (i. e.) binding upon both parties, certain to every intent, a precise affirmation of the matter making the estoppel, and a matter material or traversable; and a man shall not be concluded by acceptance before his title accrues, an estoppel against an estoppel puts the matter at large. *Ibid.*

3. Matters alledged by way of supposal in counts, shall not conclude after *nonsuit*, otherwise after judgment given; and after *nonsuit*, although the supposal in the count shall not conclude, the bar, title, replication, or other pleading precisely alledged, shall conclude after a nonsuit. *Ibid.*

4. Where

Readings and Observations

4. Where the truth is apparent in the same record, there the adverse party shall not be estopped to take advantage of the truth, for he cannot be estopped to alledge the truth, when it appears upon record: If a fine be levied without any original, it is voidable but not void; but if an original be brought, and a *retraxit* entered, and after that a concord is made, or a fine levied, that is void in regard the truth appears of record: an impropriation is made after the death of the incumbent to a bishop, and his successors; the bishop, by indenture, demiseth the parsonage for forty years, to begin after the death of the incumbent; the dean and chapter confirm the incumbent; this demise shall not conclude, for that it appeareth that he had nothing in the impropriation, till after the death of the incumbent. *Ibid.* and 1 Co. 155. a.

5. Where the record of the estoppel doth tend to the disability or legitimization of the person, there all strangers shall take benefit of that record, as *outlawry*, *excommunication*, *profession*, *attainder* of *præmunire*, of *felony*, &c. *bastardy*, *mulierly*, and shall conclude the party, although they be strangers to the record: but of a record concerning the name of the person, quality or condition, no stranger shall take advantage, because he shall be bound by it: but note, that in case of *mulierly*, *prima facie*, an estranger shall take benefit by it; but yet, because he may be a *mulier* by the ecclesiastical law, and a bastard by the common law; therefore against such certificate pleaded, the adverse party may alledge the special matter, and confels the certificate of the bishop, and alledge further the special matter, according to the common law. *Cook's Inst. Part 1. 352. b.*

6. If a man makes a lease for life, and the lessee for life makes a lease for years, and purchases the reversion, and dies within the term, the heir may avoid that lease; but if a man having nothing in the land makes such lease, and afterwards purchases the land; if it be by deed indented, the heir shall be estopped to avoid it. *Dal. 26. pl. 4.*

(P* 346) *7. A man seised of lands in fee, took a lease by indenture of the herbage and pawnage of the same land, the same is an estoppel. 2 Leon. 159.

8. If one takes a lease of an infant or feme covert of his own land, by indenture, this is no estoppel. 1 Cro. 37.

9. On a special verdict in the second deliverance, the jury find that J. S. seised in fee, enfeofed George James in fee, who died seised, and the same descended to the plaintiff in the second deliverance; and afterwards the defendant let the land to the plaintiff for twenty-one years, and that the term expired; it was held that the jury are not to find the estoppel, and that it shall continue no longer than the lease. 1 Cro. 36.

10. When

On Actions of Debt.

10. Where the conuzee having sued out execution upon a statute, as a statute-merchant, he is now estopped to say it was another statute. 1 Cro. 233, 319.

11. An action of debt by *B. & Ux'* against *C.* for rent, upon a lease for years made by the woman and a former husband; the defendant is not estopped to say, that the baron was sole seised, for the feme hath not a reversion by estoppel against the lessee; but when two join in a fine, he who accepts of the fine is estopped. 1 Cro. 700, 701. Roll's Abr. 294. 872.

12. A lease by estoppel is a good lease to ground an action for an eviction; and 'tis no plea to induce and traverse that he was possessed by lease. 2 Cro. 73. 1 Roll 874. Hob. 12. Show. 79. 4 Co. 80. 1 Cro. 437. 5 Co. 17. 4 Co. 80. 1 Sid. 430. 1 Roll 50, 871. 2 Cro. 234.

13. Where a tenant *pur auter vie* makes a lease for years by indenture, and afterwards purchaseth the reversion; the lease ends by the death of *Auter vie*. Salk. 374.

14. A bond dated July 30, Anno 24 Eliz. and Anno 23 Eliz. a plea that the intestate died before the date of the bond, and so concludes that the bond was not his deed, and issue thereupon and a special verdict; and held, that although the plaintiff in pleading cannot alledge the delivery before the date, because against the deed to alledge against the deed; yet the jury are not estopped *ad veritatem dicendam*; otherwise if the estoppel or admittance be within the record, they cannot find any thing contrary. 4 Co. 2 Co. 4. b. 3 Leon. 100. Cro. Car. 130. 1 Jones 192. 2 Cro. 640. 3 Keb. 332. 3 Lev. 348. 3 Cro. 120. 2 Roll 690. 1 Cro. 140, 36. Owen 96. 1 Leon. 206. Sav. 98. Dyer 147. Car. 155. Palmer 2. Hardr. 483. Raym. 47.

15. A *scire facias* against tertendants, reciting the judgment of a wrong term; and upon *nul tiel record*, a judgment *pro quer*; and after an *elegit*, an ejectment is brought; the defendant is estopped to take advantage of a variance between the judgment and that given in evidence.——So if a *scire facias* be brought against the issue in tail upon a judgment in debt against the ancestor, and he being warned makes default, he shall not come after to say that he is tenant in tail; so if he pleads any other matter, and it be found against him, the court held that not only parties, but all claiming under them, are bound by this estoppel; and where an estoppel works on the interest of the land, it runs with it, and is a title, and the jury are bound by this estoppel, unless the fact be left at large by pleading. Salk. 276, 7. 1 Sid. 54. Raym. 19. 1 Lev. 41. 1 Keb. 112, 141.

16. If the condition of a bond, or a defeazance is, that the obligor shall pay all sums due to the plaintiff by writings obligatory; the defendant is estopped to plead that there are

Readings and Observations

no writings obligatory, by which he is obliged to pay any sum to the defendant; so if the condition be to pay money according to the form and effect of an indenture. 1 *Brownl.* 57.

17. A lessor shall be estopped to say there is no such person as *Duffham* the lessee, to an action brought by a second lessee, by a recital of the first lease, wherein *Duffham* is named. 4 *Leon.* 48. 2 *Leon.* 11.

18. An action of debt upon a bond, a release pleaded, the plaintiff is estopped to reply that the release was delivered before the bond. *Comb.* 83.

19. The acknowledgment and enrolment of a deed makes an estoppel; and if a bond be enrolled, the party is concluded to say *non est factum*. *Comb.* 248.

20. An avowry for the arrearages of a rent-charge in one thousand six hundred seventy-nine is no estoppel to bring an action of covenant for the arrears in one thousand six hundred eighty; and there is this difference between an acquittance under hand and seal, and under hand only; for in the first case it is an estoppel, and in the other only evidence. *Comb.* 60.

21. After a verdict and judgment, error in fact assigned, that the plaintiff died before the trial, the plaintiff in error is estopped to give in evidence the death of the plaintiff before the action brought. *Comb.* 446.

22. One shall not be estopped but of that which he might take a traverse. *Raym.* 438.

23. The condition of the bond was for the payment of all legacies which *J. S.* had devised by his will; the defendant is estopped to say, that *J. S.* had made no will; but he ought to say that *J. S.* did not give any legacy by his will. *Moor* 420. *Paromore v. During.* 3 *Keb.* 303.

24. Where the lessee shall be estopped from pleading that the lessor had not any estate in such lands, by reason of a special recital in the condition. *Moor* 406.

25. If a bond be made with a condition to enfeoff another of all the lands which descends to him on the part of his father, there he may plead that no such land descended to him; but if it be to enfeoff another of Black Acre which descended to him, he shall be estopped to say, that Black Acre did not descend to him. *Moor* 406.

26. Whether the sheriff's returning the defendant summoned, shall be an estoppel to the executors to say they had no notice of the suit. *Moor* 37.

27. Whether a *Retraxit* operates as a bar or only by way of estoppel. 3 *Cro.* 551. *Dennis v. Payne.*

28. If the condition of a bond be that a stranger shall release all his right, the obligor is estopped to say, the stranger hath no right. 2 *Keb.* 471.

29. Debt

On Actions of Debt.

29. Debt upon an obligation conditioned for the performance of covenants in an indenture, between *William Steed*, and *Anne* his wife on the one part, and the plaintiff of the other part; the defendant pleaded the indenture, as an indenture of *W. S.* and *Anne* his wife, whereas in truth the feme never sealed; the plaintiff replies, that the indenture shewed by the defendant *non suit facta inter William Steed and Anne* his wife of the one part, and the plaintiff of the other part: and thereupon they were at issue; and the jury found that the baron sealed it; but the feme did not; and all the court held that this verdict is found against the defendant, who pleaded it as the deed of the feme: And *Anderson, Glanvill* and *Kingsmill* held, that the plaintiff is not estopped to say, that the deed shewn is not the deed of the baron and feme; but he is estopped by the condition to say, that there is not any such indenture, as 3 Eliz. Dyer 196. pl. 41. *Smith's case*. And *Glanvill* and *Kingsmill* held, that if the baron had sealed and delivered it in name of the feme, it had been the deed of the feme, during the life of the baron; and if they by indenture bargained and sold the land of the feme, rendering rent, it had been a good deed of the feme's, because she afterwards might have accepted the rent, and affirmed it as her deed; wherefore it was adjudged for the plaintiff. Cro. Eliz. 769. *Shipwith v. Steed*.

* Other Cases concerning Estoppels:

(P* 347)

Cro. Eliz. 756. <i>Willoughby v. Brook</i> .	8 Ric. 2. <i>Tit. estoppel</i> 283. 39 Ed. 3 <i>Fitz. estoppel</i> 112.
7-1. _____	46. E. 3 12.
362. <i>Stroud v. Willis</i> .	3 Mod. 216. _____
4 Leon. 43. <i>Duffen's case</i> .	1 Mod. 113. _____
3 Leon. 118. _____	

Concerning Notice and Request in this Action.

1. Where notice is not necessary where the act is to be done by a stranger. 2 Cro. 150. *Normanvill v. Pope*.
2. Where a request is necessary, and where not. Moor 682. *Fudsey v. Newson*. Raym. 39, 40. *Wheeler v. Honour*.
3. Where a request is not necessary upon an award. 1 Brownl. 49. *Brett v. Awerder*.

Readings and Observations

4. In an action of debt upon a bond to perform an award, which was, that one should make a lease to another before the second of October, that was two or three months after the award, and that the other upon making this lease should pay him fifty pounds.

The question came to be, whether notice in this case ought to be given when he would make the lease; for otherwise it was said the other must have fifty pounds always about him, or be in danger to break the award; and it was resolved by the court that no notice was necessary. 1 Ven. 93. *Collet v. Padwell*.

5. *A.* bound to pay *B.* one thousand pounds, after that *B.* had married *A.*'s daughter, and it was not averred that *B.* had given *A.* notice of the marriage; it was adjudged that no notice was necessary. *Hodges v. Moor*. Popham 164, 165.

6. An action was brought by *B.* against *A.* executor of *C.* upon *C.*'s bond, with a condition that if *C.* or his executors, within three months after due proof made of *E.* *C.*'s son having wasted or consumed any of the goods of *B.* either by the confession of *E.* or otherwise; and notice thereof given, the said *C.* should render satisfaction, &c. that then, &c. and it not appearing that notice was given to the executor, it was held a material exception. 2 Cro. 488. *Lee v. Fidgies*.

7. To an action of debt upon a bond where the condition was, That if the defendant paid all such charges as should appear to be due to *John Willis*, who was the plaintiff's attorney in suing the defendant, &c. The defendant in his rejoinder traversed that he had notice what was due; it was held, that the attorney being a stranger to the condition, the defendant ought to take notice at his peril, and is not like the case, where the defendant undertakes to pay for part of goods bought of the plaintiff, after the rate the plaintiff should sell the rest; for there notice must be given by the plaintiff of the sale and price, &c. 4 Mod. 230. *Pitman v. Biddlecombe*.

8. Where the condition of a bond is for the obligor to make a sufficient assurance of lands before such a day; or if the obligor is unwilling to accept of such assurance, and shall request to have one hundred pounds for satisfaction thereof; then if upon such request the obligor shall pay, &c. the time of the request is not tied up to the time of making the assurance; but the obligee hath any time, during his life to make the request. 1 Leon. 185. *Boyton v. Andrews*. Cro. Eliz. 136.

9. Where the condition is, that if a stranger to the deed do such an act, or in default the obligor to pay fifty pounds: the defendant need not have notice that such an act was not done by the stranger. 1 Keb. 230. *Johnson v. Bridges*.

On Actions of Debt.

10. Where an administrator shall be construed to have notice, so that he is not to pay a debt of an equal nature. 3 Keb. 171. *Nightingale v. Leigh.*

11. Concerning notice in an action of debt upon a bond to save harmless. 2 Keb. 529. *The King v. Atkins* administrator, &c.

12. Where notice is not necessary in an action of debt upon a bond to perform an award. 2 Keb. 658. *Mechin v. Wilder.*

Other Cases where Notice and Request have
been held Necessary, and where not.

1 Keb. 232. <i>Anonymus.</i>	1 Roll's Abr. 443. <i>Halfsted's</i>
681. <i>Ellis v. Roberts.</i>	case.
843. <i>Solby v. Walker.</i>	2 Roll's Abr. 250. <i>Smith v. Gar-</i>
Feby. 37. <i>Sheeton v. Gufke.</i>	butt.
Dyer 108. b. 2. <i>Sheeton v. Gufke.</i>	248, 249. <i>Sims v. Smith.</i>
338. <i>Wotton v. Cooke.</i>	3 Keb. 176.
1 Roll's Abr. 549, 460. <i>Sir J. Spencer's case.</i>	222. <i>Johnson v. Muller.</i>
460. <i>Chapman v. Chapman.</i>	Cro. Eliz. 415. <i>Baskin v. Ed-</i>
	monds.
Stiles 31. <i>Stiles v. Stiles.</i>	517. <i>Hallings v. Con-</i>
Cro. Eliz. 136. <i>Stiles v. Stiles.</i>	nard.
1 Lev. 185. <i>Stiles v. Stiles.</i>	548. <i>Cap v. Lancaster.</i>
1 Keb. 155. <i>Stiles v. Stiles.</i>	613. <i>Fox v. Wright.</i>
1 Lev. 47. <i>Stiles v. Stiles.</i>	2 Cro. 242. <i>Dockrey v. Tan-</i>
Cro. Jac. 390. <i>Stiles v. Stiles.</i>	ning.
Palmer 532. <i>Stiles v. Stiles.</i>	274. <i>Lawrence v. Johns.</i>
Godb. 445. <i>Stiles v. Stiles.</i>	1 Brownl. 75. <i>Grubham v.</i>
Jones 314. <i>Stiles v. Stiles.</i>	Thornborough.
1 Roll's Abr. 438. <i>Peeter v. Car-</i>	76. <i>Stiles v. Stiles.</i>
ter.	2 Brownl. 176. <i>Manley v. Jen-</i>
441. <i>Pierpoint v. Thumblely.</i>	nings.
Ibid. <i>Somes v. Squib</i>	Stiles 6. <i>Brooke v. Brooke.</i>
Feby. 44, 45. <i>Pudsey v. New-</i>	Lut. 638. <i>Buxton v. Nelson.</i>
sham.	2 Bullstr. 158. <i>Thursden v.</i>
Moor 682. <i>Pudsey v. Newsham.</i>	Warthen.
1 Brownl. 84. <i>Pudsey v. Newsham.</i>	Hardr. 9. <i>Crawley v. Feme.</i>
7. Jones 195. <i>Nash v. Ashton.</i>	6 Mod. 227. <i>Fitzhugh v. Den-</i>
1 Lut 308. <i>Nash v. Ashton.</i>	nington.
Cro. Eliz. 62. <i>Gallies v. Bud-</i>	2 Mod. 264. <i>Steward v. Allen.</i>
bury.	6 Mod. 259. <i>Fitzhugh v. Den-</i>
3 Mod. 295. <i>Harrison v. Hay-</i>	nington.
ward.	2 Keb. 415. <i>Glover v. Creed.</i>
	3 Keb. 151. <i>Benet v. Benet.</i>

Seventhly,

Readings and Observations

Seventhly, Of the Issue, Trial, and Verdict, and other Matters incident thereto.

1. That the jury cannot find a matter of record. 7 H. 4. 23. 2 Roll's Abr. 691. Letter Q. pl. 1. as they cannot find a fine. Ibid. pl. 5. *which must be thus understood, that they cannot find a matter of record when it is the matter in issue; i. e. they are not to judge of matter of record when it is only a collateral proof of the matter in issue.*

2 The jury are not to enquire of that which is agreed between the parties at issue. 47 E. 3. 19. 18 E. 3. 53. b. 21 E. 3. 35. 28. Affiz. 17. *per* Finchden 28. Aff. 34. 29 H. 8. Dyer 32. b. pl. 7. 2 Co. 4 b. Goddard's case, 2 Roll's Abr. 691. Letter R. pl. 1.

3. The jury may find that which the party himself is estopped from averring. 2 Roll's Abr. 60. Letter O.

4 Where the place is not material, but is only put in for the sake of *Venue*, the jury may find a thing in another place within the same county. 10 Hen. 6. 13. b. 2 Roll's Abr. 689. Letter N. pl. 4. as against an heir or executor; affects in another place or county. *Ibid.* pl. 5. *Ibid.* pl. 7, 9.

(P* 348) *5. The jury cannot see, nor carry with them any other evidence, than what is delivered to them by the court, and put into court by the party producing evidence. 11 Hen. 4. 18. 2 Roll's Abr. 656. Letter D. pl. 1.

6. That a matter alledged to be done beyond sea cannot be tried. 20 H. 6. 11. 29 Aff. 11. 2 Roll's Abr. 571. pl. 1. 2.

7. An action of debt upon a bond in *England*, with a condition to pay money in *Ireland*, may be tried in *England*. Pasch. 2 Jac. C. B. by Walmesley. 2 Roll's Abr. 571. pl. 5.

8. In a writ of error to reverse a judgment for nonage, it may be tried by inspection. Dyer 104. 1, 2. Mar. 10. 50 Ed. 3. 6. Contra, Trin. 11 Car. B. R. between *Scawan* and *Arunell*, *per cur.* 2 Roll's Abr. 572 pl. 1. The like upon a fine, pl. 2.

9. But in all cases where the matter may be tried by the examination or discretion of the judges, they may, if they are in doubt, refuse it, and compel the party to try it by the country, 21 H. 7. 40. *by all the judges*. Brook, Tit. Trial 60. 2 Roll's Abr. 573. pl. 9, 19.

On Actions of Debt,

10. A matter of record before the judges shall not be tried by a jury, whether it is so, as the record proves or not; but it shall be tried by the record itself. 11 H. 6. 42. *By all the Judges.* 2 Roll's Abr. 574. pl. 1, *, 5.

11. In an action of debt against the warden of the Fleet for an escape; if the issue be, whether he was imprisoned upon the execution or for another cause, that shall be tried by the record. 11 Hen. 6. 49. b. 12 H. 6. 3. 2 Roll's Abr. *ibid.* pl. 6.

12. If a sheriff returns a *cepi corpus & quod languidus, est, &c.* and afterwards suffers him to go at large, in an action against the sheriff for it, if he pleads that he never was in his custody; that shall be tried by the record. 12 H. 6. 3. 2 Roll's Abr. 574. pl. 7.

13. But if the sheriff takes a man upon a *capias*, and returns not the writ, or returns *non est inventus*, and suffers him to escape; the taking shall be tried by the country in an action against the sheriff. 12 H. 6. 3. *Ibid.* pl. 8.

14. In an action of debt upon an escape against the Mayor of the staple, for suffering *J. S.* in execution upon a statute staple to escape; if the defendant pleads that he was not in prison upon the execution, but upon a plaint, there this issue shall be tried by the country, because the defendant is to certify the record, if it is to be tried thereby, which is not reasonable in his own case; because, perhaps he will certify it falsely. 9 H. 6. 20. 11 H. 6. 49. b. 12 H. 6. 2. b. Adjudged 2. 2 Roll's Abr. 574. pl. 12.

15. If the plaintiff in an action of debt declares that he sold a horse for forty shillings, and the defendant pleads *nil debet per patriam*, and the jury find that he sold the defendant two horses for forty shillings; this issue is found against the plaintiff, for that is not the same contract which is supposed in the declaration to have been made between the parties. 21 E. 4. 2. *per curiam*, 2 Roll's Abr. 702. Letter C. pl. 1.

16. So *vice versa*, if he declares a sale of two horses for forty shillings, and the jury find a sale of one for forty shillings; or that he sold an ox, and he declares of an horse; it is found against the plaintiff, for it is not the same contract. 21 E. 4. 24. 2 Roll's Abr. *ibid.* pl. 2. So of a sale of trees. *Ibid.* pl. 5.

17. In an action of debt for twenty pounds upon *nil debet* pleaded; if it be found that he owes the plaintiff forty pounds, the plaintiff cannot have judgment, because it is not the same contract. 3 H. 6. 4. b. 2 Roll's Abr. *ibid.* pl. 3.

18. But in an action of debt against an executor for twenty pounds; if upon a plea of no assets in his hands, it be found that

Readings and Observations

that he hath one hundred pounds assets; yet the plaintiff shall have judgment. 3 Hen. 6. 4. b. 2 Roll's Abr. 702. *ibid.*

19. If the plaintiff declares in debt upon a demise, made by him to the defendant for a term of years, of several parcels of land, shewing the certainty, rendering rent, and that for the arrears *actio accrevit*; and the defendant pleads *quod non dimisit & modo & forma*; and the jury find *quod dimisit* all the said lands, except a parcel by name, which he did not demise; the plaintiff can have no judgment. Dyer 260. pl. 22. 9 Eliz. 2 Roll's Abr. *ibid.* pl. 6.

20. But in an action of debt for twenty-four pounds eight shillings, which the defendant had received to the plaintiff's use, upon a sale; if the defendant pleads *nil debet*, and the jury finds that the defendant owes the twenty-four pounds, but not the eight shillings; the verdict is found for the plaintiff, and he shall have judgment; for peradventure he hath paid the eight shillings. Mich. 13. Jac. B. R. between *Baugh* and *Phillips*, *per curiam*. *Ibid.* pl. 7.

21. If in an action of debt it be pleaded that *T. W. Miles Dominus de Ware* was seised in fee, and demised for years, and a traverse is taken, *absque hoc, quod prædictus T. W. Miles Dominus de Ware dimisit*; if it be found that *T. W. Miles* demised, but that he was not Lord *De la Ware* at the time of the demise, his father being then alive; but it was after the death of his father, at the time of the plea pleaded; yet it shall be found for him who took the traverse, for whether he was Lord *De la Ware* at the time of the demise was part of the issue. Dyer 13. Eliz. 300. pl. 34. 14 Eliz. 2 Roll's Abr. 705, pl. 28.

22. If *A.* recovers an action of debt upon a bond against *B.* and takes him in execution; and *B.* brings an *au vitâ querela*, supposing a payment of the condemnation after the execution sued out; and the jury find a payment before the execution sued out; yet this is found for the plaintiff, for payment before is a payment after, and the time is not material. Mich. 40 & 41 Eliz. E. R. between *Malins v. dame Hawkins*, *per curiam*, 2 Roll's Abr. 706. pl. 34.

23. In an action of debt upon a bond, bearing date 25 June 13 Eliz. if the defendant pleads *non est factum*, and the jury find that it is his deed; but that it was delivered eight days after the date; this issue is found for the plaintiff. Mich. 4 Jac. E. R. between *Hane* and *Pleder* adjudged. 2 Roll's Abr. 706. pl. 35.

24. In an action brought by two church-wardens of a church; if the defendant pleads, that at the day of purchasing the writ, they were not church-wardens; and thereupon the parties are at issue, and the jury find that one of them was a church-warden and the other not; this issue is found for the

On Actions of Debt.

the defendant; for they were not church-wardens. 26 Hen. 8.
5. b. Ibid. pl. 38.

25. So if a contract is alledged to be made by two jointly and severally; and it is found that the contract was made only with one of them, the plaintiff shall never have judgment upon that verdict, because it is not the same contract, Paich. 8 Jac. in the exchequer-chamber. *Daux and Reson's case, per curiam*, 2 Roll's Abr. 708. pl. 49.

26. But in an action of debt where the plaintiff declares upon a bond made by the defendant to the plaintiff, and the defendant pleads *non est factum*; and the jury find that it was a joint bill made by the defendant, and another to the plaintiff: this issue is found for the plaintiff, for each of them was bound in the whole; and this is his deed, inasmuch as he hath sealed it and delivered it as his deed. 5 Co. 129. *Whelpdale's case* adjudged; for he ought to have avoided it by special pleading. 2 Roll's Abr. 709. pl. 60.

27. In an action of debt for twenty pounds in arrear, upon a lease for years, payable quarterly; if the defendant pleads that the *plaintiff hath entered into the land before any rent due (to wit) 8vo Augusti, which was after a quarter due; and the plaintiff takes issue, that he did not enter *modo & forma*, and the jury find for the defendant; the defendant shall have judgment, for the words, (to wit) 8vo Augusti, are void, and then *modo & forma* goes to the whole matter. Mich. 7 Jac. C. B. between *Raynold v. Buckle, per curiam*, 2 Roll's Abr. 709. pl. 59. (P* 349)

28. In an action of debt against A. as daughter and heir to B. if the defendant pleads *riens per disconsensum* from B. upon which an issue is joined, and the jury find that B. was seised in fee of lands, and died seised, having issue the defendant his daughter, his wife being big with a son, who was afterwards born alive, and died an hour after; this issue is found for the defendant, because the defendant, the daughter, had the lands as heir to her brother; who was last seised, and not to the father; and so the defendant had nothing by descent from her father but from her brother, and yet the lands would have been assets in her hands, if it had been specially shewn by the plaintiff, as *Dyer*, 22 Eliz. 368. 46. Trin. 16 ar. C. B. between *Duke and Spring: Adjudged upon a Special Verdict*, 2 Roll's Abr. 709. pl. 62.

29. In an action of debt upon a bond, if the defendant pleads that he was a layman unlettered, and that it was read to him in lieu of an acquittance, *Et sic non est factum*; and the jury find that the defendant well knew that it was a bond, and that he was bound in such a sum, and that it was his will to be so bound; this is not a good verdict, because they ought to find precisely,

Readings and Observations

precisely, whether it be his deed or not. 3 H. 6. *Verdict* 3. per cur. 2 *Roll's Abr.* 693. pl. 4.

30. In an action of debt for twenty pounds, if the defendant pleads payment of twenty pounds, and the issue is joined upon the payment; and the verdict is, that the defendant *debet* twenty pounds; this is not good, because it is but an argument of the payment. *Mich.* 13 *Jac. B. R.* between *Baugh* and *Philips*: Adjudged upon a writ of error. *Ibid.* pl. 5.

31. In an action of debt for rent, if the plaintiff counts of a demise for years of twenty-six acres of land, rendering rent: to which the defendant pleads, that the plaintiff demised the said twenty-six acres, and four more, rendering the said rent, *absque hoc*, that he demised the twenty-six acres *tantum*, upon which the parties are at issue; the jury cannot find that he let less than the twenty-six acres, because that is agreed by the parties that twenty-six acres were demised; and the question is, whether there was a demise of more, *Dubitatur*: 26 H. 8. *Dyer* 32. b. pl. 7. 2 *Roll's Abr.* 692. pl. 9.

32. In an action of debt upon a bond, with a condition to perform the award of *J. S.* if the defendant pleads that *J. S.* made an award, and sets it forth; to which the defendant rejoins that *J. S.* did not make such award *modo & forma*, as the plaintiff had alledged: Upon which issue is joined, the jury on a special verdict cannot find any matter *de hors* to make the award void in law, which does not appear in the award itself, as where an award is to make a release of all matters till the first day of *May*; the jury cannot find that he, to whom the release was to be made, was bound to the other in a bond dated *April* before, to perform the award; and so he released that bond, and so the award void; for the submission was admitted and agreed by the defendant, in his plea in bar, when he pleaded *Nullum fecerunt arbitrium*; and besides, nothing is in issue; but whether the arbitrator made such award in fact, as is alledged, and not upon the validity of the award in point of law, for any matter *de hors* the award; for if that matter had been alledged in the rejoinder, it had been contrary to his plea in bar, and a departure; and if it would have been a departure, the jury could not find it, because it is *de hors* the issue; and this issue is all one, as if he had pleaded *Quod non fecerunt aliquod la arbitrium modo & forma*, although it was so pleaded here, to make a difference, *Mich.* 24 *Car. B. R.* between *Kinnison* and *Jones*; adjudged upon a special verdict. *Intratur Mich.* 23 *Car. Rot.* 587. But if he would have aided himself by this matter he ought to have pleaded the whole in his bar, and not to have said that they did not make an award; for that is a departure in his rejoinder to acknowledge an award, because it was void in law.

On Actions of Debt.

law for any other matter that does not appear in the award itself:
2 Roll's Abr. 692. pl. 10.

33. If there are two issues, and one will make an end of the whole matter in dispute, if it should be found, and the other will not, that ought to be first tried that will make an end of the whole. 11 H. 4. 68. 13 H. 4. 36. 2 Roll's Abr. 627 pl. 1.

34. An action of debt was brought upon a bond, which was set forth to be made on the fifteenth of Novemb. 25 Eliz. the defendant pleaded *non est factum*; the jury found it specially, that the bond was dated the fifteenth of Novemb. 23 Eliz. but not sealed and delivered till the eighteenth of Novemb. 26 Eliz. the issue being generally *non est factum*, it was adjudged for the plaintiff; but it was said that peradventure, by special pleading, the defendant might have helped himself. 2 Cro. 136. Lady Lane v. Pledall.

35. If the jury upon *nil habuit in tenementis* pleaded, find for the plaintiff as to part of the land, and for the defendant as to another part; the plaintiff can have no judgment. Moor 80. Shyfield v. Sybill.

36. Where the plea to a bond is, that it was made *per minas*, and the defendant at the *nisi prius* confesseth the action; it is not necessary that the entry be that the defendant confesses the point in issue; *i. e.* that he did it not *per minas*, but *cognovit actionem* is sufficient. 1 Cro. 840. Brown v. Holland.

37. Whether the issue misjoined in an action upon a bond to perform an award. 3 Keb. 72. Holman v. Dodd.

38. See exceptions to an issue and verdict against an executor. Leon. 68. Barker v. Piggott.

39. What a good issue upon pleading a release. 2 Keb. 580. Stokes v. Stokes.

40. How a matter of record is to be tried. 2 Keb. 104. Henly v. Jones.

41. An action of debt was brought for rent by quarterly payments, and the record had not the word *annuatim* in it; whether the trial shall be set aside, the word *annuatim* being inserted after issue joined. 2 Keb. 139. Rimes v. Baker.

42. One entire issue found by the jury as to such a sum *nil debet*, and as to the residue *debet*; when there are two issues joined, is ill. 3 Keb. 469. Cole v. Searle.

43. Where the plaintiff joined issue upon a plea that was repugnant and impossible; yet it being found to be false, the plaintiff shall have judgment. 3 Cro. 25. Knight v. Harvey.

44. Where the condition of a bond is that a feme covert shall make a will, and issue be joined upon that point, and the jury find that she made a will, but was a feme covert; yet though a feme covert cannot make a will to dispose of goods without

Readings and Observations

without her husband's consent, this shall be construed a will within the intent of the condition, and the husband is obliged to perform it. 3 Cro. 219. *Mariot v. Kinsman*.

45. Where the condition was for the payment of money to the obligee within forty days next after his personal being at Rome, and returning to England; whether the personal being at Rome, or the return to England, ought to be the point in issue. Moor 178. *Mollineux's case*.

46. Where a double issue is found for the defendant, and one of them is immaterial; yet that is no mis-trial. Moor 575. *Johnson v. Clarke*.

(P* 350)

*47. An action of debt was brought by A. as administrator of *Eleanor D.* upon a bond against C. who pleaded that *Eleanor*, in her life-time, by the name of *Ellen D.* released; the plaintiff replied *non est factum Eleanoræ*, and it was found by the verdict *Quod non est factum*; and the counsel for the defendant would have it, that the issue was mis-joined; but the court held the contrary: But if this matter had come out properly by way of plea, the defendant might have relied upon it by way of conclusion or estoppel, which would have aided him. Moor 897. *Panton v. Chowles*.

48. In an action of debt upon a bond, upon *non est factum* pleaded, the jury found that the defendant did seal and deliver the bond as his deed; but that after the day, when issue was joined, the seal was pulled off from the bond; yet the plaintiff had judgment; for it was the defendant's deed at the time when the issue was joined; and the trial shall relate to that, though the deed was cancelled. Cro. Eliz. 120. *Michael v. Cockwith*.

49. Where the issue was held not to be well joined in an action against an administrator upon a breach of covenant 1 Brownl. 111. *Hawes v. Leader*.

50. Where a bill obligatory, found by the jury, was held to be agreeable to the declaration. 1 Brownl. 74. *Preist v. Coe*.

51. Whether an issue was mis-joined in an action for non setting out tithes. 1 Brownl. 75. *Cooper v. Bacon*.

52. Where the condition of a bond is for the payment of money, and there are two days appointed for the payment, and an issue is taken upon payment at the day; *Quære* the consequence. Stiles 93.

53. Where an issue joined upon *non est* or *nil debet*, was good. Cro. Eliz. 766. *Werkley v. Harpingham*.

54. Where the jurors finding an executor of his own wrong hath been held not to hurt the issue. Cro. Eliz. 630. *Inland v. Coulter*.

55. Where the issue was held to be well joined upon a bill obligatory. 2 Cro. 137. *Normanville v. Pope*.

56. What hath been held not a good issue upon a bond for the payment of money. 3 Cro. 593. *Darby v. Heming*.

57. Whether

On Actions of Debt.

57. Whether the verdict is esteemed agreeable to the issue, and the bond, according to the declaration, where the bond is in *Quinginta Libris*, and the declaration *Quinquaginta*. 3 Cro. 416.

58. Whether the verdict found by the jury was agreeable to the issue. 3 Cro. 6. *Ascock v. Eel*. 2 Cro. 270. *Harwes v. Leadr.*

59. Whether the issue was mis-joined in an action of debt against an executor. 2 Cro. 67. *Birton v. Mandell*.

60. Where an action of debt was brought for rent upon a lease for a year, and so from year to year, *Quamdiu ambabus annis placeret*, there was a verdict for the plaintiff for two years rent: it was moved in arrest of judgment, that the plaintiff alledges that the defendant entered, and was possessed the first year; but mentions no entry as to the second: but as the jury have at the trial found the rent to be due for both years, it shall be now intended that the defendant was in possession all the time, for which the rent is found to be due.

61. In debt against an heir upon an ancestor's bond, and judgment taken when assets should come; and a *scire facias* being sued out upon that judgment, on the defendant's plea, issue was taken on a fact arising out of the county, and tried by a jury of another, and found for the plaintiff; *Quare* if the jury falsifying the defendant's plea in part, though they have no power to enquire of the issue in the other county, be not sufficient for the plaintiff, an entire debt being demanded by him. 2 Lev. 178.

62. Where an action of debt is brought upon a bond, with condition to perform two things, and a breach is assigned for the non-performance of one, and a verdict and judgment had for the defendant; the plaintiff is perpetually barred, and cannot have an action of debt for the non-performance of the other. *Dyer*. 371.

63. Debt upon a bond conditioned for payment of money, and therefore to be specified in taxation, according to the late act of parliament. *Per Holt* chief justice, upon evidence, if the certificate produced bears date in due time, I will not doubt that it was then delivered, or now, that it bears but very late date; yet if you prove that it was taxed in due time, it will suffice. Lastly, if it has not been taxed in due time, yet if you have a tally to prove that you have paid the double for penalty, it will do; and the plaintiff failing in all, was nonsuited. And here *Holt*, chief justice, put the case, if a negree had been beyond sea all the while; but resolved nothing to that. *Weal v. Goulston*, Mod. Caf. 167.

Readings and Observations

64. Debt was upon a single bill for payment of two hundred thirty pounds on demand; upon *non est factum*, one of the subscribing witnesses was produced, and gave full evidence of the enfealing and delivery of the bond. On the other side was produced a person of the same name and surname with the other subscribing; who acknowledged that the hand was very like his, but it was not his; that he never knew either of the parties nor the other witness, nor could the other witness say he was the man; and both their reputations being made good in proof, *Holt* chief justice ordered them both to write their names; and thereupon left it to the jury, who found for the plaintiff. And *Holt* chief justice ruled, that this being a single bill, it need no specification according to the late statute, because it did not carry interest; yet directed the jury to give damages, viz. interest; and where it was objected, it was payable on demand, and no damages or interest incurred till demand, and none was proved; *Holt* chief justice said, that could not have been taken advantage of upon *non est factum*, or any other collateral issue, but should have been pleaded. *Osbourne v. Hosier. Ibid.*

65. Debt upon an obligation, the defendant pleaded *non est factum*, the jury find that the defendant caused the obligation to be written, and signed and sealed it, and then laid it upon a table, and the plaintiff came and took it; The question was, if this was the defendant's deed; and the opinion of all the justices was, that it was not; without other circumstances found by the jury. *Chamberlain v. Stanton. Cro. Eliz. 122.*

66. That the plaintiff brought debt for twenty pounds, the jury found the defendant only owed ten pounds; and the plaintiff would never recover; but that must be intended of a debt due upon contract, and there the least variance will be fatal. 38 H. 6. 1.

(P* 351)

*Trial by Record.

Vide Pleading Nul tiel Record *antea*.

1. In an action of debt upon a recognizance taken before the Mayor of *Hertford*, and at the day given to bring in the record, the Mayor certifies a recognizance, with a condition under the recognizance, not being within the recognizance, but under or upon the back of it. 36 Hen. 6. 2. adjudged. Roll's Abr. 705. pl. 25.

On Actions of Debt.

2. In an action of debt against *J. S.* upon a recognizance made by *J. S.* himself: if the defendant pleads *Nul tiel Record*, and brings in a record of a recognizance made by *J. S.* and another by which he is bound in the entire sum, he hath not failed of his record. 36 *H. 6. 4. b. per Wangf.* 2 *Roll's Abr.* 705. pl. 26.

3. In an action of debt against a bailiff of a liberty for an escape, &c. where the commitment was in a court within a liberty: if the defendant pleads *Nul tiel Record*, and in the record certified there are several differences in the continuances and in the process; yet if the plaint, count and judgment certified agree with the declaration, the plaintiff shall have judgment. *Hob.* 248. between *Coachman* and *Halley* adjudged. 2 *Roll's Abr.* 576. pl. 1.

4. If upon *Nul tiel Record* pleaded in the common bench, a *Certiorari* issues of the common bench to certify it at such a day, if no *Certiorari* comes at the day; yet that shall not be a failure of the record, but the court shall award process till it is brought. *Hill.* 14 *Jac. C. B. Pie* and *Thrile*, adjudged. 2 *Roll's Abr.* 577. Letter *E.* pl. 1.

5. As if a *certiorari* issues from the common bench to justices of peace, to certify an indictment and a conviction of recusancy; if not certifying by the justices, is not a failure. *Hill.* 14 *Jac. C. B. Pie* and *Thrile*, adjudged. *Ibid.* pl. 2.

6. If the issue be, whether a supposed statute-merchant be true or forged, that shall be tried by the record where it was acknowledged; if the Mayor, who took it, be alive, although he be then out of his office, for that is a matter of record. 17 *Ed. 3. 49. b.* 2 *Roll's Abr.* 574, 575. pl. 13. So if he be dead, for the record continues. *Contra* 17 *Ed. 3. 49. b.* 2 *Roll's Abr.* *ibid.* pl. 14.

7. Although the enrolment of letters patents, or other matter of record, shall not be tried by the country; yet the time of the enrolment of a deed enrolled, according to the 27 *Hen. 8.* shall be tried by the country. 4 *Co.* 71. *b.* for thereby the record is confessed, and the time only in issue. 2 *Roll's Abr.* 575. pl. 20.

8. In debt if the custom of *London* is pleaded, and the issue taken upon the custom; that shall be tried by the recorder, by his certificate, under his seal. 24 *E. 4. 16. b. Long.* 5 *E. 4. Brook*, trial 96. and *Tit. London* 17. 2 *Roll's Abr.* 580. pl. 1.

9. On a plea of a foreign attachment in *London*, by the custom of the city, pleaded to an action of debt upon a bond; that shall be tried by the certificate of the Recorder *ore tenus.* 2 *R. 3. 2. 6. 3.* 22 *E. 4. 30. b.* *Ancient Entries*, *Tit. Debt*

Readings and Observations

157. Dyer 6. 7. 7 Ed. 6. 82. 72. b. 5 Ed. 4. 30. 2 Roll's Abr. ibid. pl. 4.

10. If a plaint be levied before the Mayor of *London* in an action of debt, or before the sheriff there in his court; and a custom of *London* is pleaded, and that denied, it shall be tried by the Mayor and Aldermen, by the mouth of their Recorder. 39 H. 6. 34. b. 2 Roll's Abr. ibid. pl. 7.

11. As in an action of debt before the Mayor of *London*, if the defendant wages his law, and the plaintiff alledges a custom; that if the plaintiff shews any bill or writing of the defendant, sealed with his seal, and delivered by him, witnessing the contract; if the custom be denied, it shall be tried by the Mayor. 39 Hen. 6. 34. b. Brook, Tit. *London* 17. 2 Roll's Abr. ibid. pl. 8.

By whom some Matters are to be tried.

1. General bastardy shall not be tried by the ordinary; if it be not upon a certain issue joined directly upon the plea of the parties. 39 Aff. 14. by all the justices. 19 Hen. 6. 17. b. *contra*. Vide 2 Roll's Abr. 586. pl. 22.

2. Special bastardy shall be tried by the country. 11 Hen. 8. 84. 18 Hen. 6. 31.

3. It hath been said that the right of espousals is always tried by the bishop. 49 E. 3. 18. 39 E. 3. 26. 33. 39 Aff. pl. 8. 2 Roll's Abr. 584. letter P. pl. 3.

4. As if the issue be, whether a wife be *accouple in legali matrimonio*; this is triable by the bishop. 49 E. 3. 15. and not by the country. 7 H. 4. 25. b. 11 Hen. 4. 14. b. 19 H. 6. 18. 39 E. 3. 26. 33. 5 E. 3. 15. 49 Aff. 7. 2 Roll's Abr. 584, 585. pl. 4.

5. But whether a wife be a feme covert or sole, is always triable by the country. 49 E. 3. 18. 39 E. 3. 32. b. 39 Aff. pl. 8. Adjudged 49 Aff. 7. 2 Roll's Abr. 585. pl. 7, 8, 11, 16. 1 Sid. 389, 390.

6. And if the issue be *ne unquez accouple in legali matrimonio* to be tried between strangers; that shall be tried by the country. 50 E. 3. 15. 39 E. 3. 33. 2 Roll's Abr. ibid. pl. 17, 18. And where a spiritual matter concerns a stranger, it shall be tried by the country. 1 Sid. 390.

7. An action of debt was brought upon a bond, conditioned to pay the plaintiff at his marriage, or age of twenty-one, which shall first happen; the defendant pleads that the plaintiff hath not yet attained his age of twenty-one, and that he never was lawfully married; and it was tried by the country, and found

On Actions of Debt.

for the plaintiff; and it was moved in arrest of judgment, that this issue being upon the legality of the marriage, it ought to have been tried by the ordinary, and not by the country; though married or not married, is triable by the country. 2 Cro. 102. But held by the court, that the material part of this issue is whether married or not, for the condition of this bond is to pay at his marriage; and although the defendant put *lawfully* in his plea, for which the plaintiff might have demurred, and hath not, but hath taken issue upon it; yet it being in a personal action, where the lawfulness of the marriage does not naturally come in question, as it doth in the case of dower, or other real actions, the trial is well enough; and though it was not said that he was married *tempore brevis*, yet after a verdict it shall be intended that he was married *tempore brevis*. 1 Lev. 41. *Basset v. Morgan*.

8. And *Ne unquex accouple* is never a good plea, where a marriage *de facto* is sufficient; for there, whether legal or not legal, is not material. 1 Salk. 437. *Alleyn & Ux' v. Grey*.

9. But where the party claims a right by the ecclesiastical law, as administration, &c. there he must prove himself a husband according to that law; but *Quare* whether the wife, or the issue, may not entitle themselves to a temporal right by a marriage *de facto*, though there be not a marriage *secundum leges ecclesiasticas*. Salk. 120.

Where the Trial to be, and of the Venue and (P 352) Venire.

1. In an action of debt upon a bond in one county to perform covenants, or on a lease, and the land and payments are in another county; it shall be tried where the lands lie, and the payments were made. 44 E. 3. 42. 2 Roll's Abr. 607. Letter T. pl. 1.

2. In an action of debt upon a lease in one county, and the payment of rent upon it, is appointed there also; but the lands lie in another county. and the payment was upon the land; it shall be tried where the lands and payment were, for he was bound to pay it there, upon a *distress*. 44 Ed. 3. 42 b. 2 Roll's Abr. *ibid*. pl. 2.

3. In an action of debt upon a bond in London, with a condition to pay all the arrearages out of such lands in Essex; if the issue be between them, whether the defendant held the lands by ten shillings or four shillings rent, that shall be tried in Essex, where the land is. 20 H. 6. 32. 2 Roll's Abr. 607. Letter T. pl. 4.

Readings and Observations

4. But otherwise if they agree upon the tenure, and they are at issue upon the payment; and no place of the payment is alledged, there it shall be tried in London. 20 H. 6. 32. 2 Roll's Abr. ibid. pl. 5.

5. If an action of debt be brought for rent upon a lease for years, and the action is brought where the land is; but the deed of demise bears date in another county; the trial shall be where the lands lie, and the writ is brought. 45 E. 3. 8. b. The issue being whether the lessor hath a conditional estate, and so a lawful eviction. 2 Roll's Abr. 607. pl. 7.

6. The trial of an issue, whether the party be an alien artificer, shall be where the writ was brought. 1 Saund. 8.

7. If a release from the plaintiff be pleaded in bar, dated where the lands lay; although the plaintiff said that he was born in another county, and is of full age; yet that shall be tried where the land is, and the deed bears date. 24 Ed. 3. 36. b. Adjudged, 2 Roll's Abr. 608. pl. 10.

8. If a release or feoffment be pleaded, and the other party replies, that he, who made it, had nothing in the lands at the time of making the release or feoffment; that shall be tried where the lands lie, altho' the deed bears date in another county. 49 E. 3. 5. b. 2 Roll's Abr. 609. Letter Y. pl. 7. Cited in the case of *Orde v. Moreton* in 1 Bulstr. 132.

9. If a lessee for life surrenders in another county, it shall be tried where the surrender was, and not where the lands are. 40 E. 3. 43. 2 Roll's Abr. 610. pl. 15. The same point adjudged in the case of *Wood v. Butts*. Cro. Eliz. 260. pl. 45.

10. If duress be pleaded to an action of debt upon a bond at another place than where the action is laid, it shall be tried where the duress is supposed. 2 Roll's Abr. 615. Letter C. pl. 1. 8 E. 3. 8. Cited in the case of *Kinnerley v. Smart*. Cro. Eliz. 195. where usury was pleaded to a bond in another county, and the cause tried where the usury was, and not at London where the deed was said to bear date. Vide Cro. Eliz. 870.

11. In the case of an assise, if nonage be pleaded, and the other party says he is of full age, and born in another county; yet it shall be tried where the lands lie. 46 E. 3. 7. b. 45 Ass. 12. 46 Ass. 5. The same point adjudged in the case of *Green and Ross* in Cro. Eliz. 818. and the above case of the 46 Ed. 3. 7. was cited, though it does not appear in *Croke* what was the action.

12. But in an action of debt upon a bond in one county, and the defendant pleads that he made it within age in another county, and the plaintiff replies, that it was made where he had counted by the defendant of full age; it is said that it shall be tried where the writ was brought. 3 H. 6. 40. 2 Roll's Abr. 604. Letter R. pl. 6. 605. pl. 9.

On Actions of Debt.

13. And therefore to understand these cases well, see the case of *Orde v. Moreton* reported in 1 Bulstr. 129. 1 Brownl. 150. misnamed by the name of *Meerton* and *Orib*, 2 Cro. 254. misnamed by the name of *Odell* and *Moreton*; but not the same point. *Yelv.* 211. reported as in *Bulstrode*, but not the same point. *Hob.* 138. alike reported, but not the same point. That when nonage concerns the realty, it shall be tried where the lands lie; but if nonage or birth be pleaded as a matter *de hors*, and not to the disabling of the title to the land, but to another purpose; it shall be tried where the action is brought.

14. But in an action of debt in one county, upon a bond dated in another county; and the issue is, whether he was within age at the time of executing it, or of full age; (it is said) it shall be tried where the bond bears date, and not where the writ was brought. 17 E. 3. 13. 2 Roll's Abr. *ibid.* pl. 7. If it is alledged that he was born where the writ is brought, it shall be tried there. 2 Roll's Abr. 605. pl. 15.

15. The plaintiff declared in covenant of a lease made in Hampshire of a house in Berkshire, and assigned a breach in not repairing the house; the defendant pleads *non infregit conventionem*; and this issue was tried in Hampshire: three judges against Windham were of opinion that this was a *mistrial*, for that it ought to have been tried in Berkshire where the lands lie; for he said he agreed that a particular issue would bring the trial to the county where the matter in issue arose, and would oust the plaintiff of his election to try it in which county he pleased; but he thought that upon this plea of *non infregit conventionem*, it was not such a particular issue, but that other things may be given in evidence upon it; but it seems the other three judges held, that this plea shall be intended only an answer to the breach, and that triable only where the house was situate. 1 Lev. 114. *Gilbert v. Martin*. Mich. 15 Car. 2. 1 Sid. 157.

16. By the act of 16 & 17 Car. 2 cap. 8. entitled, An Act to prevent arrests of judgment, and superseding Executions, (in *alio*) it is enacted, That judgments shall not be staid or reversed, for that there is no right Venue, so as the cause was tried by a jury of the proper county or place where the action is laid; and held that the want of a Venue, is aided by this statute. 1 Saund. 229.

Act of 16 & 17 Car. 2. to aid a wrong Venue.

17. Before this act of parliament, if a lease was pleaded to be made at the parish of *Rock*, of lands at *L.* in the parish of *Reck*, the Venue was not to be of the parish, but of *L.* 1 Roll's Rep. 363. 14 Jac. *Collier's* case, *Hob.* Rep. 257. between *Dorrell* and *Andrews*, Mich. 11 Jac. B. R. between *Fenking* and *Smith*. Adjudged Pasch: 8 Car. B. R. between *Crooke* and *Littlepage*, 2 Roll's Abr. 620. pl. 12.

Readings and Observations

18. In an action upon 2 Ed. 6, for carrying away the tithes of *Silkston*, and the *venue* came from *D.* in the parish of *Silkston*; that was not good. Hill. 14 Jac. B. R. *Robson v. Cutler* adjudged.

19. And if an issue was joined, which was to be tried by the *venue* of *D.* and *S.* and the *venire* was awarded of *D.* *S.* and *U.* that was not good, because it was more large than it ought to be. Hob. Rep. 52, 105, between *Banks* and *Parker*; and a multitude of other cases concerning the *venue* may be seen in 2 Roll's Abr. Tit. Trial.

20. Where an action of debt was brought upon a bond, and the action was laid in *London*, and the condition was for performance of covenants in an indenture, by which a walk called *Shrupwalk*, in the county of *Northampton*, was granted, &c. and the *venue* was of *Shrupwalk*, and the cause was tried at *Northampton*; and after a verdict for the plaintiff, it was insisted that here was a mis-trial, because the *venire facias* could not come from a walk in a forest, which is only an office or liberty, *sed per curiam*: This being tried by a jury, where the matter in issue did arise, 'tis within the statute of 16 & 17 Car. 2. c. 8.

(P* 353) 'Tis true, *the words of that statute are, (*viz.*) it shall be good if tried by the county where the action is laid; but that must be understood by the county where the matter in issue did arise; for otherwise it would destroy the whole law concerning juries, to try it in a county foreign to the issue, as it may, if tried in the county where the action is laid. 3 Salk. 364. pl. 9. Sid. 325. 1 Lev. 208. See 3 Salk. 364. pl. 11. The same point adjudged 2 Saund. 252, 258, 393, 404. 1 Saund. 8, 229, 247.

21. But in covenant for not repairing a house in *Chester*, the defendant pleaded *reparavit*; upon which they were at issue, and the *Venire facias* was from the county of *Chester* at large: after a verdict for the plaintiff, this was held a mis-trial, and not aided by any statute, but only a wrong *venue* in a proper county; as if the issue was at *Islington* in *Middlesex*, and the *venue* was of *Hampstead* in the same county; that was right, and the *venue* only wrong as to the place, and that aided. 3 Salk. 364. pl. 12. 5 Mod. 405. See 3 Salk. 363. pl. 8. Raym. 85, 86, 181.

22. An action of debt was brought for rent in *Middlesex*; the defendant pleaded an entry before the rent became due, and that he was held out at such a place in *Hertfordshire*, where the land lay; this issue being tried in *Middlesex*, it was adjudged a mis-trial, and a *Venire facias de novo* awarded. Comb. 75. *Lander v. Elliott*.

23. A trial by consent may be had in a foreign county where such consent is entered upon the roll; otherwise not.

Raym.

On Actions of Debt.

Raym. 362. But in the case of *Edwards and Crowe*, 1 Roll's Rep. 28. *contra*, and the judgment reversed, notwithstanding the agreement of the parties. 1 Sid. 339.

24. Seisin of lands in *Kent* tried in *London*, seemed to the court to be well enough after a verdict, by the statute of 16 & 17 Car. 2. c. 8. Raym. 392.

25. Nonage may be tried where the party was commorant, and not where the writ was brought, if collateral to the action. Raym. 458.

26. A lessor brought an action of debt for rent against his lessee, upon a demise at *London* of lands in *Jamaica*; the defendant pleaded to the jurisdiction of the court, that the matter ought to be tried in *Jamaica*; and it was urged, that the lessor cannot bring debt here against the assignee of a term of lands in *Ireland*, and that if *entry* and *ouster* were pleaded, it could not be tried here; and in this case the right of the plaintiff and defendant depends on foreign laws, which cannot be given in evidence here; *et per cur*, where an action is local, it must be laid accordingly; therefore if the lessor declares on the privity of estate that lies in *Ireland*, the action must be brought there, for the estate is local; therefore such lessor cannot maintain debt here against an assignee of a term in *Ireland*, for the action is founded on a privity of estate; otherwise where it is founded on a privity of contract, which is transitory, as debt for rent by lessor against lessee, for that may be maintained where the land lies not; here it is by the lessor against the lessee, on the privity of contract; and if a foreign issue which is local, should happen, it may be tried where the action is laid; and for that purpose there may be a suggestion entered on the roll, that such a place in such a country is next adjacent, and it may be tried here by a jury from that place, according to the laws of that country; and upon *nil debet* pleaded, you may give the laws of that country in evidence. Salk. 651. *Way v. Tally*, vide *Barker v. Dormer*, 1 Show. 191.

27. A bond dated at *Chester* may be sued in *B. R.* or in *C. B.* if the obligor lives out of the jurisdiction; for in that case the franchise cannot do the party right. 12 Co. 114. Comb.

28. *Per Holt*, in the case of *Jennings and Hankey*, Comb.

29. *Smith v. Sephton*, the same point adjudged.

30. By the statute of 4 & 5 *Anna* cap. 26. a venire out, of courts of record at *Westminster* shall be awarded of the body of the county, except in appeals and judgments of felony and murder, and indictments and presentments of treason, and in writs, bills or informations on penal statutes.

31. If an action of debt was brought against *J. S.* of *D.* and the defendant pleaded there is *Over D.* and *Nether D.* in the same

Readings and Observations

same county, and none without an addition, and traversed that there is such a place as *D.* without an addition; here the venue before this act of Parliament should arise *de corpore comitatus*. 2 Roll's Abr. 616. pl. 3. so upon *nul tiel vill* pleaded *ibid.* pl. 4. So that in some cases it may be observed the venue before this act was to come *de corpore comitatus*.

30. Before that act of Parliament, if a thing had been alledged in a ward in the city of *Brissol*, the venue was not to be of the city, but of the ward. Mich. 10 Jac. C. B. between *Robinson* and *Puddey* adjudged; and so adjudged there in *Smith's* case, 2 Roll's Abr. 621. pl. 28.

31. And if a thing was alledged to be done at *D.* the venue was not to be of *D.* but *de Vicineto* of *D.* or otherwise the neighbourhood would be excluded; which it ought not to have been. Roll's Rep. 14 Jac. *Pescott's* case, Mich. 14 Jac. C. B. between *Bullen* and *Fervaise*, *per curiam*. 2 Roll's Abr. 620. pl. 33.

32. If a lease was said to be made at the parish of *Rock*, of lands at *Linden* in the parish of *Rock*; the venue was not to be of the parish, but of *Linden*. 2 Roll's Rep. 620. pl. 12.

33. It would be needless to mention any thing more of the venue coming from *Vicineto*, since it is now to be of the body of the county; but as to that particular, turn to 2 Roll's Abr. 600, 601, 602, 603.

34. Where the plaintiff lays a transitory matter in one county, the defendant cannot by his plea bring the plaintiff to try it in another county, but he must plead it in the same county; but otherwise where the matter of the plea is local, *i. e.* would not be good at any other place; there he may plead it in the county where the local matter arises, and thereby bring the plaintiff to try it in another county. 1 Lev. 149. *Collins v. Sutton*.

35. When a breach of covenant is assigned in *Berwick*, the venue shall arise from the next place in *Northumberland*. Ven. 58. 1 Lev. 252. See the act of 7 & 8 W. 3. for awarding a *venire facias de novo*.

Of changing the Venue.

1. Where there is no likelihood to have an indifferent trial it is a reason for changing the venue. 1 Ven. 365.

2. At common law all actions were laid in the proper county, that there might be a jury *de vicineto*. Salk. 668.

On Actions of Debt.

3. But it is now allowed, and become the course of the court, to change the *venue* for the defendant, upon the common affidavit, that the cause of action arose in such a county; and this practice, *Holt* said, he had heard by old practisers, came up first in King *James* the First's time; but that rule had never been obtained in cases of privileged persons, as barristers, &c. who are to attend at *Westminster*; and therefore they have the liberty of laying their actions in *Middlesex*. *Salk.* 670.

4. So that if the defendant be a barrister, he may have the *venue* changed into *Middlesex*. *Salk.* 668. *Seaman v. Lucy*. But denied where he was joined with another, or when he is charged in *auter droit*. *Mich.* 11 *Geo.* Mod. Cases in Law and Equity 316.

5. And if an attorney, being plaintiff, lays his action in *Middlesex*, the *venue* shall not be changed; but said to be otherwise, if he lays his action in *London*. *Salk.* *ibid.*

*6. And *per Holt* Chief Justice, the motion to change the *venue* ought to be within eight days after the declaration delivered; but this rule is not always strictly adhered to: And it was said by *Aston*, that one might move to change the *venue* at any time before judgment signed; which *Holt* Chief Justice denied, saying that heretofore it was never granted after the rules to plead were out. *Salk.* 665. *Anonymous*. (P* 354)

7. If the point in issue arises in two counties, the plaintiff may lay it in either; and therefore the general practice is, if the defendant hath a rule to change the *venue*, the court will discharge it; if the plaintiff enters into a rule to give evidence in the county where the action is laid. *Salk.* 669.

8. To change the *venue* there must be an affidavit of the time of the delivery of the declaration. *Salk.* 670.

Trials at Bar.

1. It is a right of any gentleman at the bar, to have a trial at bar; and it has been said, it never has been denied to an officer of the court. *Salk.* 651. 6 *Mod.* 123.

2. A motion for a trial at bar, ought to be in the term precedent to the trial. *Salk.* 649. *Turner v. Barna'y*.

3. A cause cannot be tried at bar, where the action is laid in *London*, by reason of their charter. *Salk.* 644.

4. In any cause of value or difficulty, a trial at bar may be had of common right. *Salk.* 648.

5. So where the King is a party, a trial at bar may be had the last paper-day in term. *Salk.* 625.

Notice

Readings and Observations

Notice of Trial.

1. If a cause has lain at issue four terms, there must be a full term's notice of trial, exclusive of the term wherein the issue was joined. Salk. 650. 6 Mod. 18.

2. New notice of trial is to be given after a *ne recipiatur* entered at the sittings. Salk. 653. And if a cause be not entered two days before the sittings, the defendant may enter a *ne recipiatur*.

3. But if the plaintiff's attorney gives a notice of trial within the fourth term, that is construed a proceeding within the year, sufficient to make fourteen days of trial good for the affizes. Salk. 645. 6 Mod. 18.

4. But suing out a *venire facias* after the expiration of the four terms, tho' it bears teste within the term, is not such a proceeding as to make the common notice of trial to be good. Salk. 650. *Lazall v. Dyer*. 6 Mod. 57.

5. When a new trial is awarded, it is to try the same issue; and therefore where the plea-roll of the action was of Easter term, *Anno 11.* and by the memorandum it appeared that the bill was exhibited in Hillary term before; and upon the rule for a new trial, the plaintiff did not proceed upon the same roll, but made up a new plea-roll, as of that present Michaelmas term, and a memorandum exhibited of a bill in Trinity-term last past; and thereupon a trial was had, and the plaintiff had another verdict; but upon a motion it was set aside for irregularity, because this was another cause, as it now appeared to be; and the plaintiff had not pursued the rule of court for a new trial, which was to try the same issue, which was tried before in the first action. Carthew 499.

6. *Per Aston*, the plaintiff may countermand notice of trial, and give new notice to try it the next sitting, but not to try it sooner than the day prefixed; and this (it seems) was admitted by the court. Comb. 65.

New Trial.

1. A new trial is never granted in another term after signing the judgment. *The King v. Pollard*, Trin. 10 Geo. 1725. Modern Cases in Law and Equity 264.

On Actions of Debt.

2. A new trial ought not to be granted for want of evidence, which the party might have had at the trial, and had not; but if it be proved that endeavours had been used, but the party was prevented by some unforeseen accident, as sickness of the witnesses, &c. it may be a good cause for a new trial. 6 Mod. 22. Vide 2 Salk. 653. Far. 156, 157.

3. Where a double issue is joined for the defendant, and one of them is immaterial, yet that is no mis-trial. Moor 574. *Johnson v. Clarke.*

4. A motion was made for a new trial, because the jury found a general verdict by the judge's directions, and that he refused to sign a bill of exceptions; but denied, because not made before the judgment signed; otherwise the court would have granted it. Hill. 10 Geo. *Pocklington v. Hatton.* Mod. Cases in Law and Equity 220.

5. Upon a trial at *nisi prius*, the jury gave excessive damages; and for this cause a new trial was granted: The second jury gave the same damages again, and a second new trial was moved for, and denied; because there ought to be an end of things. Salk. 649. *Clerk v. Udall.*

6. A new trial shall be granted if the judge of *nisi prius* misdirects the jury; because these trials are subject to the inspection of the court; *per Holt* Chief Justice. Salk. 649. Anonymus.

7. A new trial is rarely granted in hard actions. Salk. 644, 648, 653.

8. No new trial can be against the equity of the cause, nor for the absence of counsel. Salk. 643, 644, 646.

9. Nor for a defect of preparation at the trial. Salk. 653. or any omission of the party. Salk. 273, 647.

10. Nor for a mistake in point of law, or want of notice after a defence. Salk. 646.

11. Where a new trial was granted, because the foreman of the jury declared the plaintiff should never have a verdict. Salk. 645.

12. The jury after being gone from the bar, sent for an act of common council produced in evidence; yet a new trial was denied. Salk. 645.

13. No new trial can be in an inferior court. Salk. 201, 650.

14. Nor any motion for a new trial, after a motion in arrest of judgment. Salk. 647. Comb. 84.

15. Where a new trial was directed by the Lord Chancellor, where the former verdict was complained of in a bill before him, the complainant paying the costs of the former trial.

16. After

Readings and Observations

16 After a trial at bar, no new trial can be had in the same cause, unless it appears that there hath been some corruption or misdemeanour in the jury. Carthew 507.

17. If there be a fault in the declaration on which the plaintiff must have been non-suited, and the defendant taking notice of it prepares no defence for the trial, but depends thereon; and the plaintiff amends his declaration, without a rule of court first had for that purpose, and so surprizes the defendant, and gets a verdict; the court will set it aside. Hill. 32 & 33 Car. 2. B. R. 2 Show. 155.

18. Where a new trial was denied, tho' the evidence was doubtful. 5 Mod. 88.

19. Upon a motion for a new trial, *Twissden* said, that in his practice the heir, in an action of debt against him upon a bond of his ancestor, pleaded *riens per descensum*; the plaintiff knew that the defendant had levied a fine; at the trial it was produced, but because they had not a deed to lead the uses, it (P* 355) was urged that the use was to the conuzor *and his heirs; and so the heir in by descensum; whereupon there was a verdict against him; and it being a just and true debt, the defendant could never after get a new trial. 1 Mod. 2. *Goodwin v. Harlow*.

This case was mentioned by *Holt*, in the case of *Wits and Polehampton*, where a new trial was moved for, because the defendant having pleaded a composition, and forgot to carry down witnesses to prove the subscribers hands, and denied.

20. A new trial it seems had been granted, because the counsel were absent, not thinking the cause would come on and no defence was made, but a like motion was denied in *B. R. per Holt* Chief Justice: Also in one *Coppin's* case, a cause came on at seven in the morning, and an old witness could not rise to be there time enough; but it was denied, unless he would make an affidavit of what he knew, and would answer so that the court might judge of it, and how it was material. Salk. 645.

Of Evidence.

Evidence on *Non est factum*.

1. If upon *non est factum* pleaded to an action upon a bond the jury find it the deed of the defendant, and another, who is alive; the verdict must be for the plaintiff, for it is matter in debate, and not of evidence. Cro. Jac. 152. *Stead v. M...*

2. U

On Actions of Debt.

2. Upon *non est factum* 'tis no evidence to shew that the bond was made upon an usurious contract, or that the sheriff's name is mistaken, &c. in a bail-bond; or that the bond is joint or several, or delivered at another place; or that it is void by a statute, but it must be pleaded in abatement. 1 Inst. 283. Hob. 72.

3. But to prove that the seal was broken off, and put on again, or to prove a rasure of the deed delivered as an escrow; &c. this is good evidence, if it were done before the action brought; but if the seal was broke off, &c. by chance, after issue joined, the jury may find it specially.

4. Coverture may be given in evidence upon *non est factum*, because coverture makes it no deed. 6 Mod. 250. Raym. 395.

5. If an action of debt be brought by an administrator upon *non est factum* pleaded, the plaintiff in evidence need not shew the letters of administration, for they are admitted by the defendant's plea of *non est factum*; and if the letters of administration bear teste after the action brought, no advantage can be taken of that in evidence.

6. In an action of debt upon a bond, if the defendant pleads generally *non est factum*, he may give in evidence any special matter, to prove that it is not his deed; as to say that he sealed it, and commanded B. to keep it till some conditions were performed, whereby it never was his deed. 9 Hen. 6. 38. Quære 2 Roll's Abr. 683. pl. 8.

Evidence on Nil Debet.

1. On *Nil debet* pleaded to an action of debt for rent upon a lease, it is said to be good evidence, to prove that the lessor was never seised of the land: but otherwise upon the plea of *riens in arrear*, or levy by distress. 2 Roll's Abr. 677. pl. 21.

2. Whether eviction or expulsion may be given in evidence upon *nil debet* pleaded to an action of debt for rent. See *Wingfield v. Seckford*, 2 Leon. 10. Goldsb. 81.

3. In Owen 55. March 80. to have been adjudged that in an action of debt for rent, entry and suspension cannot be given in evidence: but in 1 Mod. 35, it is reported to have been said by *Twisden* that it may; and so said to be the opinion of all the judges in 1 Mod. 118.

4. What is sufficient evidence of an entry to amount to a suspension of the rent, so as to bar the party of his demand. 1 Leon. 110.

5. Note,

Readings and Observations

5. Note, if the lessor enters into part, the whole rent is suspended; but if a stranger doth evict the lessee of part of the land, the rent must be apportioned. 2 Roll's Abr. 235. pl. 16.

6. Where the defendant pleads *nil debet* to an action of debt for an escape, he may give in evidence a fresh pursuit, or any thing that destroys the duty. Mod. Rep. 116.

7. In an action of debt for servants wages, (*i. e.*) twenty shillings or a robe yearly; the defendant may plead payment of the robe, but of money only he must plead *nil debet*, and give the payment in evidence; and the defendant may plead that the plaintiff departed out of his service, and shall not be forced to the general issue. 9 E. 4. 20.

8. At the *nisi prius* at Hertford, it was adjudged *per Holt* Chief Justice, that in an action of debt for rent upon *nil debet*, the statute of limitations may be given in evidence. Anonymus, Salk. 278.

9. In an action of debt for rent, if the defendant pleads a *levy by distress*, *Et sic non debet*, a release or payment is good evidence; for it proves there is no debt, and that is the issue. Cro. Eliz. 140. But if the defendant pleads a rasure, *et sic non est factum*, nothing is evidence but the rasure, *per Holt* Chief Justice. Salk. 284.

10. Where an action is brought for forty two pounds nine shillings and eight pence, and the plaintiff declares for several wares sold, and upon retainers for work; if upon *nil de et* pleaded, the jury find that the plaintiff owes thirty pounds, part of the sum demanded; and as to the residue, that he doth not owe, and do not apply to which of the contracts the money is owing, and to which not; it is an ill verdict. Cro. Jac. 653. Hob. 328. Co. Lit. 227.

11. In an action of debt upon the arrearages of an account; if the defendant pleads *nil debet*, he may give it in evidence, that there was never any such account. 20 Hen. 6. 24. 2 Roll's Abr. 683. pl. 7.

Of Evidence on Non Dimisit.

1. Upon an issue joined on *non dimisit* in an action of debt for rent, it may be given in evidence that the lessor had nothing in the land at the time of the demise. 2 Roll's Abr. 680. Letter C. pl. . Dyer 122. b.

2. In an action of debt for rent upon a demise of two houses; the plaintiff cannot give in evidence a demise of one only. 1 And. 14.

On Actions of Debt.

3. If a man lets lands by indenture, dated 30 Aug. 23 Hen. 8. to hold from the feast of St. *Michael* next ensuing for twenty-one years; and afterwards the same lessor by indenture reciting the said lease, and that it bore date 6 Aug. 23 Hen. 8. let it for years, to commence from the expiration of the former lease; and it is pleaded that he let it by indenture, dated 30 Aug. 23 Hen. 8. as above; and afterwards, by another indenture, reciting that he had demised it by an indenture, dated 30 Aug. 23 Hen. 8. demised it, &c. (*ut supra*) and an issue is taken *Quod non dimisit modo & forma*; the last indenture may be given in evidence, though the date of the first indenture be mistaken. Dyer 2, 3. Ma. 116, 70. so adjudged. 2 Roll's Abr. 682. pl. 6.

*Of Evidence in Actions for an Escape.

(P* 356)

1. In an escape against the marshal, the plaintiff must prove the person that escaped in actual custody since the *committitur*; which *committitur*, either in the marshal's book or on record, is not sufficient without a proof of being in actual custody since. Vide 1 Keb. 375, 775. 2 Keb. 384. What may be given in evidence upon an information of negligent escape against the marshal of the King's bench, as a recovery in the original action, and where the plaintiff allowed a witness, because he neither gains or loses

2. In an action of escape of a prisoner, and the issue is joined, whether the gaoler, immediately after the escape, made fresh suit; if the prisoner hath escaped a day and night before the gaoler knew it, and then he makes fresh suit, it is sufficient to prove the effect of the issue; for convenient pursuit is immediate fresh suit in law. 2 Roll's Abr. 681. pl. 4.

3. Fresh suit may be given in evidence in an action of debt for an escape on *nil debet* pleaded, *per Hale* and *Wild contra Twissden*: *Hale* said he always allowed it, and so said *Wild* in *Justice*. Mod. Rep. 116. *Mosdale's case*.

4. A prisoner having escaped, may be a witness to prove the escape voluntary, upon a traverse upon an inquisition for the escape against the gaoler. Salk. 690. And a bond given by the prisoner to the gaoler, is a collateral matter to the escape; and not so material as to disable him from being a witness to prove the escape voluntary.

Evidence

Readings and Observations

Evidence on Riens per Discent.

1. What are assets upon *riens per discentum* pleaded. 2 Leon.
11. *Hind v. Lyon*.

2. Whether the plaintiff ought to produce a bill on *riens per discentum* pleaded *tempore exhibitionis billæ*. 1 Keb. 793.

3. In an action of debt against an heir, &c. upon *Riens per discent*, &c. pleaded, a feoffment was given in evidence made before the action; that it was fraudulent, may be given in evidence, though not pleaded. 5 Co. Rep. 60. *Gooche's case*, Hob. 72. Vide *Fitz Tit. Garranty* 88. 2 Roll's Abr. 684. pl. 4.

4. So upon *Riens per discent* pleaded by an heir to an action of debt upon an obligation, that the defendant aliened the assets by fraud and covin; and so void by the statute of 13 Eliz. may be given in evidence, because these are the general issues. 2 Roll's Abr. 684. pl. 4.

5. In debt against the heir, who pleads *Riens per discent*, a proof that the father was seised, and that the heir did enter after his death, is well enough; for it shall be presumed a fee-simple till the contrary be shewn.

Evidence on Plene Administravit.

1. In an action of debt against an administrator, who pleads *plene administravit*, and gave in evidence judgments, without pleading them. By *Henden* 1638. *York assizes*, Clayton 65.

2. *Trials per pais* makes a *Quære*; for says the book, judgments be kept on foot by fraud, and given in evidence how can a creditor, who sues for a just debt, be prepared to detect the fraud?

3. In *Kelway* 59. it is held that upon *Plene administravit* pleaded, the executor cannot give a judgment in evidence. *Kelway* 59. *Stiles* 373. And in the case of *Stiles* it is reported to have been said by *Roll* chief justice, that the general issue to be pleaded, and to give the special matter in evidence, is in itself mischievous, and we will not enlarge it; and this is not the general issue intended by the statute, though it be a common issue; for the general issue intended ought to be an issue proper to the action; and who

On Actions of Debt.

tell upon this plea what the party may give in evidence, and so the plaintiff can never be prepared for the defendant at the trial.

4. In an action of debt against an executor, and *plene administravit* pleaded, the defendant cannot give in evidence a bond satisfied, wherein the testator and the executor were obligors. *Per Coventry Lord Keeper, 33 Eliz. Perkins v. Perkins.*

5. Upon *plene administravit*, if it be proved that the executor hath goods of the testator in his hands, he may give in evidence that he hath paid of his own money for the testator, to the value of those goods. *Co. Lit. 283. Dyer 2.*

6. If the issue be taken whether assets or no assets in *London*, to prove assets in another place is sufficient. *Dyer 271. 3 Salk. 156.*

7. Where the defendant pleads *plene administravit* to an action of debt, he admits the debt, but not so in an action upon the case. *Show. 81.* This must be thus understood, that in an action of debt upon *plene administravit* pleaded, the debt being certain it is admitted; but in an action upon the case damages are admitted, but not the *Quantum*; so that the plaintiff's demand consisting in damages only, the plaintiff upon *plene administravit* must prove his debt, otherwise he shall recover but a penny; so held by *Holt* chief justice. *Shelley's case in Salk. 296.*

8. In an action of debt against an executor, and issue being taken whether assets or not; 'tis good evidence for the plaintiff to shew, that the executors have sold lands under the will of the testator, and that they had the money paid them; so that they recovered damages in trespass for goods taken in the lifetime of the testator. *3 H. 6. 3.*

9. What proper evidence upon *plene administravit* pleaded. *1 Lev. 154. Hawkins v. Laws.*

10. Upon *plene administravit* pleaded, payment of some debts, and delivering over the residue of the personal estate to the infant executor, when he came of age, was allowed to be given in evidence. *1 Mod. 174.*

11. If the defendant, upon *plene administravit* pleaded to an action upon a bond, would prove payment of the bond, it is said he must prove the sealing and delivery of the bond; but to an action of debt upon a simple contract, he need not. *Show. 81.* because if it was not a bond, payment of the money to that action is a good administration. *Ibid.*

Of

Readings and Observations

Of other Evidence by and against Executors and Administrators.

1. Upon *plene administravit* pleaded, it is said the account given to the ordinary shall not be given in evidence, nor any respect be had to it. 2 Roll's Abr. 678. *Turvie's* case.

2. But *Quare*, for upon a trial, whether there was a *devastavit* or no, the lord chief justice *Pemberton* allowed for evidence an inventory (though not exhibited by the party defendant) by commissioners, on a commission out of the spiritual court; and he said, that if the defendant would not, or did not exhibit an inventory, it should be taken *pro confesso* that he had assets. 2 Show. 163.

(P* 357) *3. And by *Holt* chief justice, - all separate debts mentioned in the inventory, shall be counted assets in the executors hands; for that is as much as to say, they may be had for demanding, unless the demand or refusal be proved; and in strictness no funeral expences are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk and bearers fees; but not for pall or ornaments. *Shelley's* case, Salk. 206.

4. An executor, with his own goods, redeems the goods of the testator which were pawned, or he expends his own money in suits as executor, or pays the debts of the testator; the goods of the testator shall for so much be charged into the proper goods of the executor; and these matters are good evidence to support a plea of *plene administravit*, for there is no other way in law to satisfy the executor, but by the returning in his hands so much of the testator's goods; and by construction of law, to change them into the property of the executor, as aforesaid. 20 Hen. 7. 2. Dyer 2. 32. Keylway, 20 H. 7. 66. Jenkin's Rep. 188.

5. An executor sells goods for a small value, a creditor brings debt against him, he pleads *plene administravit*; the creditor may give the increase of the value in evidence, if that be any advantage to him; so of a delivery of all the goods to one creditor for his debt; in this case the other creditor may aver that the goods were worth more, but such averment does not lie upon a *fieri facias* upon a sale made by the sheriff, for he is a sworn officer, and a public minister; the executor is not so. Jenk. Rep. 189. 20 H. 7. Keylw. 64.

6. Where an executor in an action of debt pleaded no assets at the day of the writ; and upon evidence it appeared there

On Actions of Debt.

was money to the value of the debt, delivered to the defendant at the day of purchasing the writ, by an order of court to redeliver to another creditor; which he did, yet it was held to be assets in his hands. *Dyer* 208.

7. An executor pleaded *ne unquex*, &c. the plaintiff replied that he administered as executor, and gave in evidence an administration granted to him, by which he administered, and held good upon this issue. *Dyer* 305.

8. In debt against an executor *de son tort*, who pleads *ne unquex*, &c. it is sufficient to charge him by proving that he hath administered of never so little value. *Clayton* 6.

9. Against an executor *de son tort*, who pleaded that he fully administered; the evidence was, that the intestate made a bill of sale of his goods to the defendant, who was bound with him in a bond, as surety for his counter-security; but the goods remained in the intestate's possession, during his life, for some few hours; it was ruled a fraudulent deed; by *Barkley* justice; at *York*, 11 *Car. Legard* and *Binley*; *Clayton* 30. *Quere*. But a gift of the goods to him the defendant may give in evidence.

10. *Per Holt* chief justice, you cannot give letters of administration in evidence upon a plea of *Ne unquex Executor*; but letters *ad colligendum* you may. *Comb* 221.

11. In an action of debt against an executor, suggesting a *devastavit*, any evidence that proves assets is not sufficient; but an actual *devastavit* must be proved, for he is thereby chargeable in his own right. 2 *Keb*. 676.

12. If an executor suffers judgment to go against him by default, upon executing the writ of enquiry he shall not give in evidence a want of assets; for he is estopped, as if it had been in the case of an heir. 6 *Mod*. 308.

13. Debt against an executor, upon *plene administravit*, it appeared that the executor meddled, and administration was granted to another, and that several sums were recovered against the administrator: It was said by *Periam* justice, 1. That if an administrator (who is a stranger) administer without the commandment of the executor, the executor cannot give such administration in evidence to prove his issue. 2. That in the principal case, the executor having administered, he could not refuse; and so the administration is granted without cause; and what he did was without warrant, and no administration. *Leon*. 134. *Hawkins* and *Lawse's* case at *Bury* assizes 1682: before judge *Wyndham*: The executor gave the administration of the administrator in evidence, and allowed; but there what the administrator did, was by the executor's consent, in *Mr. Lynn* and his mother's case.

14. An executor *de son tort* cannot give in evidence his retaining of goods to pay himself; for he cannot retain; but if

Readings and Observations

he takes out letters of administration, although (*pendente lite*) he may retain for a debt of as high a nature, and plead this in bar; for the administration purges his wrong; and although he shall not abate the writ by taking out letters of administration, yet he may plead this in bar. *Stile's Rep.* 338.

15. Upon this plea the executor may give in evidence a retainer for a debt due to himself of as high a nature, or payment of debts with his own money; and that he kept goods of the testator in lieu; for this alters the property.

16. The original need not be shewed in evidence upon this plea, nor upon the issue assets at the day, &c. because the day is agreed in pleading. *Show* 272. yet see *Sid.* 462.

17. Agreed by the whole court, that if in evidence the executor give in evidence the probate, under the seal of the ordinary, nothing can be given to the contrary that he is not executor, for causes testamentary belong entirely and originally to the ordinary; and if the will be forged, the suit ought to be in the spiritual court to repeal the probate, according to 4 Hen. 7. 12. So of letters of administration, it cannot be alledged that there was a will; but if there be a suit, it must be in the spiritual court to repeal it. *Fitz. estoppel*, 9 Bro. Testm. 4. 22 Hen. 6. 52. 21 Ed. 4. 50. a. *Plow.* 2. Com. 282. 9 Co. 31. a. *Old Entries* 325. 1 Bro. 79. Although upon evidence it may be proved that the probate or letters of administration were forged. 1 Lev. 235.

18. In the case of *Brereton and Tatam*, Mich. 1656. B. R. *Glyn* chief justice cited the *Lord Chandos's* case in this court, where one *Gates* an executor was produced to prove the will as a witness; to which he as counsel excepted, because of his executorship; it was answered, that he had fully administered; he replied, that assets might afterwards come to his hand; but the court resolved, that it should not be presumed, to bar his testimony; which was allowed in the principal case, being in ejectment. *Trials per pais* 309.

19. If an obligee devises the debt to the obligor, and his executors deliver up the bond in satisfaction of the legacy, which is cancelled; and after the validity of the will is questioned, &c. whether the testator was *compos mentis*, &c. the obligor is a good witness for the will, because, by the cancelling of the bond, his debt was discharged; but *contra* in the case of a mortgage, for though the deed be cancelled, if it be no good will, he must pay the money. *Goodman v. Turbervil*, Mich. 1657. B. R. *ibid.*

Evidence on Nul tiel Record.

1. What is proper evidence upon nul tiel record. 1 Bullstr. 110. *Scot v. Scot.*

O

On Actions of Debt.

*Of Proceedings being Evidence.

(P* 358)

1. An answer in chancery is not to be evidence at law, either for the party, or against a third person. Mod. Cases in law and equity 181.

2. An affidavit made in chancery shall not be read as evidence, but only as a letter; unless oath is made by a witness that he was present when the affidavit was sworn before the master. 3 Mod. 36.

3. The answer of a guardian in chancery shall not be read as evidence to conclude the infant. 3 Mod. 259.

4. Depositions in chancery *de bene esse* are good evidence at law, where the witnesses die before the answer. Salk. 278. 1 Show. 363.

5. But no depositions in *perpetuam rei memoriam* are evidence in any case, as long as the witnesses live. Salk. 286, 555. Raym. 335, 336. in no case but where an answer is filed.

6. If one makes an answer in chancery, which prejudices his estate, it may be given against him, but not against his alienee. Salk. 286.

7. In *Godbolt* 326. it was the opinion of *Ley* chief justice, *Chamberlain* and *Dodderidge* justices, that a defendant's answer in an *English* court is a good evidence to be given to a jury against the defendant himself; but it is no good evidence against other parties: if an action be brought against two, and at the assizes the plaintiff proceeds only against one of them; in that case he, against whom the plaintiff did surcease his suit, may be allowed a witness in the cause: and the judges said, that if the defendant's answer be read to the jury, it is not binding to the jury; and it may be read to them by assent of the parties: and it was further said by the court, that if the party cannot find a witness, then he is, as it were, dead unto him; and his deposition in an *English* court, in a cause betwixt the same parties, plaintiff and defendant, may be allowed to be read to the jury; so as the party make oath that he did his endeavour to find his witness, but that he could not see him nor hear of him.

8. It is reported to have been said by Serjeant *Maynard* to the court, that nothing was more usual than to read a sentence in the court, or a decree in chancery, as evidence of a fact; and the decree was allowed to be read. 2 Mod. 231.

Readings and Observations

9. Where a witness was *subpoena'd* to give evidence at a trial, and it was sworn by the *Exeter* waggoner, that he came as far on his journey as *Blandford*, and there fell sick; his depositions were read as evidence. 1 Mod. 284.

10. Proceedings in the spiritual court are not to be evidence where the title of lands come in question. Modern cases in law and equity 181. Stiles 10.

11. A verdict may be given in evidence between the same parties, but not where they are different persons, unless they are all united in the same interest. 3 Mod. 142.

12. Nothing can be given in evidence against the probate of a will but forgery, or its being obtained by surprize. Raym. 405.

13. Though evidence be conclusive, yet it is said the jury may hazard an attaint if they will. Raym. 405.

14. Wheresoever it may be presumed that any thing must of necessity have been given in evidence, the want of mentioning it in the record, will not vitiate it after a verdict. Raym. 487.

Of Evidence relating to Deeds, Wills and Records.

1. By 5 & 6 W. & M. cap. 21. no deed shall be given in evidence in any court, either of law or equity, until it be stamped as the law requires.

2. And the clause being thus, "That if any person shall write on parchment or paper, charged with the duties payable by that and former acts, he shall forfeit ten pounds; and that it shall not be given in evidence, till the duty and penalty are paid." This construction hath been put upon that statute, that as the act was only to secure the duty to the crown, and not to take away any evidence from the parties, upon payment of the duty and penalty; the writing is made good evidence. Pasch. 11 Geo. 1726. Mod. Cases in law and equity 365.

3. It is reported to have been said by *Holt*, that the copy of any original is evidence, wheresoever the original is evidence, if proved a true copy; but the copy of a probate of a will in the ecclesiastical court is no evidence, because that is but a copy of a copy. Comb. 337.

4. In the case of *Stanyon v. Davis*, *Holt* chief justice said he remembered the case of *Mayo and Combe*, in my lord *Hale's* time, where the counterpart of an antient deed was admitted in evidence; and a special verdict being found in the case, finding the original deed, it concluded *prout per le counterpart* it did appear;

On Actions of Debt.

pear; and this was so done to preserve the precedent. 1 Mod. 4, 94, 114. 2 Keb. 31, 546. 3 Keb. 1, 2. 5 Mod. 211. And now all the court held, that the counterpart of an ancient deed, which might be lost, was good evidence without other circumstances; but that a counterpart of a deed, leading the uses of a fine, was of itself good evidence. Mod. Cases 225.

5. *F. D.* had an estate in lands for her life by a jointure; but at the trial, the jointure-deed could not be produced; but they proved that in 1661, she levied a fine *sur concessit*, and did demise the same to one *Woolly* for ninety-nine years, if she lived so long, for securing the payment of four hundred pounds; which mortgage was afterwards assigned to one *Monteatz*, and both of them joined in a lease to *William Wade* for sixty years, if the said *F.* lived so long, under the yearly rent of two hundred pounds.

6. This was admitted to be a sufficient proof of the jointure; and to the like purpose they produced depositions in Chancery, which they offered to be read, the bill and answer being taken off the file and lost; but they offered to give an account that it was once filed, which was by the six-clerk's book, and produced an enrolment of the decree, which mentioned both bill and answer; and the court being of opinion that the jointure-deed being lost, they might supply the proof by memorials thereof, since it was impossible to shew the deed itself; so the plaintiff had a verdict for so much as was in jointure. 5 Mod. 211.

7. But to prove a settlement by the father, whereby the son had an estate tail, the plaintiff produced a witness, who said, that he being to purchase an estate from my Lord ———, the father, one *Mr. Nicholls*, who was then of counsel to my Lord, gave him a copy of such a deed, to shew what title my Lord had; but being asked, whether he did see the very deed and compare it with that copy, he answered in the negative; whereupon the court would not allow his testimony to be a sufficient evidence of the deed; and so the verdict was for my Lord *Mordant*. 1 Mod. 94. *Henry Lord Peterborough v. John Lord Mordant*.

*8. Upon a trial at bar, the plaintiff produced a deed indented, made between two parties, the father and son; and the father did agree to give the son so much; and the son did agree to pay such debts, and sums of money; and there were some particular expressions resembling the form of a will, as that he was sick of body, and did give all his goods and chattels, &c. but the writing was both sealed and delivered as a deed; and they gave evidence that he intended it for his last will; which

(P* 359)

Readings and Observations

which the court held to be a good proof of a will. 1 Mod. 117. *Green v. Proude*.

9. If the defendant pleads a feoffment made to him by a deed by J. S. a stranger to the plaintiff; and the plaintiff makes a title to himself, and traverses, *absque hoc*, that J. S. enfeoffed the defendant *modo & forma*; it may be given in evidence that he enfeoffed him by another deed or without; for the substance of the issue is upon the feoffment. Contra 12 Ed. 4. 4. *per Littleton*. 2 Roll's Abr. 682.

10. A fine or common recovery may be given in evidence, though it be not under the Great Seal or seal of the court, and without vouching the roll of the recovery, and the part indented is the usual evidence, that there is such a fine, though they which saw the fine, are also good evidence. Plow. 410. Stiles 22.

11. So if a lease be pleaded, a lease upon condition is good evidence. 1 Hen. 8. 20. because the *Genus* comprehends the *Species*: So of a feoffment pleaded, a feoffment upon a condition or a fine, which is a feoffment of record, is good evidence, 44 E. 3. 39. A special agreement is evidence for an agreement. Plow. 8.

12. But if a feoffment be pleaded in fee upon an issue of *non feoffavit modo & forma*; a feoffment upon condition is no evidence, because it doth not answer the issue; and wherefore evidence is contrary to the issue, and doth not maintain it, the evidence is not good. 11 Hen. 7. 5. If the indorsement be of a livery by attorney, the letter of attorney must be shewed.

13. To prove the sealing and delivery of a deed, and not know the party that did it, is not good evidence; but if he knows the party upon sight of him, it is good enough. Keilw. 59. *Quære de hoc*.

14. When records are pleaded, they must be *sub pede sigilli*; *contra*, if given in evidence. Stiles 22. White's case.

15. A copy of a deed is good evidence, where the defendant has the deed, and will not produce it. *per* Vernon Justice, Clayton 15.

16. A deed of feoffment without livery may be given in evidence, as a release. *Per* Berkely, 11 Car. Clayton 32.

17. A deed cancelled by practice, was allowed to be read in evidence; in an action under that deed, the practice being proved. Hetley 138.

18. If in pleading an indenture of demise, you mistake the recital, and the issue is *non dimisit & modo & forma*, the mistake shall not hurt; for the effect of the issue is upon the demise. 2 Roll's Abr. 682. pl. 6.

19. Upon

On Actions of Debt.

19. Upon *non habuit seu tenuit ad firmam contra formam statuti*, the parson may say he took the farm for maintenance of his house, according to the proviso in debt upon the statute of 21 Hen. 8. 2 Roll's Abr. 683.

20. If a condition be to pay money at a certain day and place, to avoid a feoffment, acceptance before the day is good evidence, the issue being joined on payment at the day and place. Moor 47.

Other Cases concerning Evidence.

1. If a witness is to testify what another said at a former trial upon his oath, who is then dead; the record of that trial must be produced, or else such evidence is not to be admitted. 2 Show. 163.

2. If a witness accepts of a shilling, and of a bare promise of the payment for his charges, that acceptance is a sufficient foundation for an action; but if there is no such acceptance, the party to be entitled to any action upon the statute of 5 Eliz. for not giving evidence, must tender him his reasonable charges, and at a reasonable time before the trial. W. Jones 430.

3. Who may or who may not be a witness in an action brought by assignees of a bankrupt. 2 Keb. 348.

4. Where evidence of payment before the day was held not to prove the issue of payment at the day. Godb. 10.

5. Where the town of *Uxbridge* pretended to be incorporated, and to have a right for toll, and brought an action; it was held that no burgholder could be a witness. 1 Ven. 212.

Of Evidence in Actions upon Statutes.

1. What adjudged proper evidence to prove a declaration upon the statute of 8 Eliz. for suing an action in another's name. 2 Cro. 188. *Adred v. Mathew*.

2. In an action of debt upon the statute of 2 Ed. 6. for tithes of *Eltham Park* in *Kent*, the general issue was pleaded, and upon a trial at bar, it was held upon evidence by *Hale* Chief Baron, and the whole court, that the King is not by virtue of his prerogative discharged of tithes, for the ancient demesnes of the crown; but that he is capable of a discharge *de*
non

Readings and Observations

non decimando by prescription, because he is *persona mixta*, as well as a bishop. Vide 2 Rep. *L'Evesque dr Winchester's* case. But if the King aliens any of the lands that he is so discharged from tithes, his patentee shall pay tithes; and not only say so, but the prescription is destroyed for ever, though the same lands should afterwards come into the King's hands again by escheat or otherwise. Hard. 313. *Compest v. —*.

3. In debt upon the statute of 5 & 6 Ed. 6. c. 14. concerning ingrossers, &c. for ingrossing two thousand quarters of oats; after *nil de et* pleaded, it appeared in evidence upon a trial, that they were foreign oats, and exempted by 13 Eliz. cap. 13. as foreign victuals; which the court agreed; and also that the defendant being a licensed badger, was exempted from the penalty of the statute; and it was held by Hale Chief Baron, that any thing in the same statute, upon which the same is commenced, may be given in evidence; but if it be in another statute, it must be pleaded; but that since the statute of 21 Jac. 1. upon the general issue any thing may be given in evidence, and in excuse of the party; and thereupon the plaintiff was nonsuited. Hard. 231. *Hammond v. Taylor*.

4. In an action upon a Penal Law, if the defendant pleads not guilty *contra formam statuti*, if he discharges himself by any proviso in the same statute, he may give it in evidence upon this issue; for he is not guilty *contra formam statuti*. Mich. 15 Car. B. R. so held by Justice Jones. 2 Roll's Abr. 653. pl. 10.

5. In an action of debt upon the statute of 21 Hen. 8. for a spiritual person taking lands to farm, if the defendant pleads *non habuit seu tenuit contra formam statuti*; upon which an issue is joined, the defendant may give in evidence a taking to farm for the maintenance of his house, according to the proviso of the statute, for that is against the statute 27 H. 8. 21. b. 2 Roll's Abr. 683. pl. 12.

(P* 360) 6. If an action, or an information be brought upon a penal statute, and there is another statute which exempts or discharges him from the penalty of that statute: Upon the general issue pleaded, without pleading the statute, he cannot give in evidence this later statute, although it be in the nature of a proviso; because it is not in the same statute which gives the penalty, but in another statute; and therefore he ought to plead it. Mich. 15 Car. B. R. *Per Jones*, said to be resolved in the Exchequer. 2 Roll's Abr. 683. pl. 13.

7. In an action against a Hundred upon the statute of *Winton* of Hue and Cry, if a man hath lands within the Hundred, but is not an inhabitant within the Hundred, but before the action brought hath leased the lands to J. S. for years yet to come, for an annual rent, which J. S. dwells upon the

On Actions of Debt.

the lessor may be a witness in this case, to prove any thing to discharge the Hundred, because it appears by the statute of Eliz. cap. by which a contribution is appointed by all the inhabitants of the Hundred, that it limits it to the inhabitants within all the vills, parishes and hamlets, and not generally upon the lands or tertenants; and there is no reason that the lessee, being an inhabitant, shall be charged, and also between *Bennet* and the Hundred of *Hertford* in Com. Hertf. *per curiam*; so ruled upon evidence at bar. 2 Roll's Abr. 685. pl. 6.

8. In such an action against the hundred, brought by the master being a carrier, upon a robbery committed upon his servant in the master's absence: *Quare*, whether the master, being the plaintiff in the action, may be a witness to prove that he delivered the money, of which the servant swore he was robbed, before his servant went his journey wherein he was robbed, because it cannot be proved by any other; and no person is to be a witness in his own case; but for the necessity, as if the party himself be robbed, although he be the plaintiff, yet he may be a good witness to prove himself to be robbed, and of what sum of money, or of what else; and also to prove that he gave notice to the next vill, and made Hue and Cry; because it is of necessity for want of other proof: But afterwards to prove the delivery of the money to his servant before the robbery, and before he went his journey, that may be proved by some other person, as well as by himself; though it was objected, it is not safe or usual for men to call witnesses when they deliver monies to be carried a journey, for the danger of discovering it; and upon that reason, against the opinion of *Roll*, it was ruled, that it was evidence to be received; and so he was accordingly sworn. Mich. 1650, between *Bennet* and the hundred of *Hertford* in Com. Hertf. 2 Roll's Abr. 685, 686, pl. 7.

Of Evidence in Actions of Debt for Rent.

1. In debt for rent upon a lease for years, the issue being joined, if the rent was paid or not; the defendant gave in evidence for part of the rent, that the plaintiff was by covenant to repair the house, and it did not; and thereupon he expended the rent in repairing the house; and the question was, if this evidence will maintain the issue: *Gaudy* conceived it did, for the law giveth this liberty to the lessee to expend the rent in reparations, and to recoup the rent. Vide 12 H. 8. 1 Fitzh. Tit.

Readings and Observations

Tit. Bar 242. 14 H. 4. 27. Fenner: It is no evidence; for if the lessor will not repair it, the lessee may have his action of covenant against him. *Glench* seemed he might well expend the rent in reparations but he ought to have pleaded it, and cannot give it in evidence upon the general issue; and thereupon they moved the jury to find the special matter.

Note; This remark is added to this case in trials *per pais*.
 " So that it seemed to the Justices, that the defendant had
 " liberty to expend the rent in the reparations, they being to
 " be done at the plaintiff's costs; but then, that he ought to
 " have pleaded this matter, as it was done in almost the like
 " case. *Fitzh. Tit. Bar 242.* yet why might he not give it in
 " evidence upon the general issue; for if the law allows this
 " to amount to a payment of the rent, then the defendant owes
 " nothing, which maintains *nil debet*. And I think the other
 " book of 14 H. 4. 27. rejects this sort of special plea upon
 " this reason, that the plea amounted to a general issue; but
 " there indeed the rent was pleaded to be laid out at the plain-
 " tiff's command, here only by authority in law: I should be
 " glad if any one would reconcile these two books better: I
 " know there is another reason in the book, and assigned by
 " *Roll's* in his abridgment of the case, why the plea was re-
 " jected, *viz.* that the duty was acknowledged by the plea,
 " and therefore the matter of the plea not good, without shew-
 " ing a deed of it; but I should have been better pleased with
 " him, if he had assigned the other reason, *viz.* that it amount-
 " ed to the general issue, which made *Cheyne* that he durst not
 " join in demurrer; for it is not intended in either case that
 " the deed ordered the rent to be laid out in the repairs.
 " And in that case in *Fitzh.* where there was no express order
 " of the plaintiff, it may be, the judges allowed the special
 " matter to be pleaded, because the jury should not be entrusted
 " with the law upon the general issue, which may be said for the
 " special pleading this matter in our case, although it may
 " amount to the general issue.

But as to the residue, the defendant shewed he paid it to others by the plaintiff's order, which was held clearly good for what is paid by the lessor's appointment, is a payment to himself. *Cro. Eliz. 223. Taylor v. Beal. Vide Roll Tit. Debt. 605. 34 H. 6. 17. Bro. Debt 27. 1 Leon. 237.*

2. What is proper evidence to maintain an issue in debt for rent, and a *nomine pœna*. 1 Leon. 119. *Sibell Hill.*

On Actions of Debt.

Of the Verdict, and what shall be deemed to be aided or intended thereby.

1. Where the jury finds that the party *concessit*, which between jointenants is repugnant; yet the court to aid the verdict, shall adjudge that the party *relaxavit*. 2 Saund. 97. yet if the party had pleaded *concessit* instead of *relaxavit*, it would have been ill; so that a Verdict need not be so precise as a plea must be.

2. If the breach of a condition be ill assigned, and the verdict is thereby rendered incertain; that is a fault not aided by the verdict. 2 Saund. 179.

3. Though the plaintiff joins issue upon an ill plea, yet if it be found for him, and his declaration good, he shall have judgment; as where the defendant in the first year of Car. 1. pleaded a recovery in the fifth year of Car. 1. which should have been in the fifth year of Jac. 1. and no assets *ultra*; and the plaintiff replied that the recovery was by fraud; which being found for him, he had judgment. Cro. Car. 25. *Knight v. Harvey* administrator, &c. 5 Co. 43. a. 2 Cro. 86.

4. But where a bond was for the payment of fifty-one pounds six shillings and eight pence, and the defendant pleaded that he paid the twenty-one pounds six shillings and eight pence; and the plaintiff replied, that he did not pay the fifty-one pounds six shillings and eight pence, though it be found for him; yet there is no issue at all, and the judgment was reversed. Cro. Car. 593. *Derby v. Heming*. The same point adjudged in the case of *Sandback and Turvey*, Cro. Jac. 585, and said to be not like the case of *Hale and Bonython*, Cro. Jac. 549, 550, where the defendant pleaded payment on the fourteenth of June; and *the plaintiff replied a non-payment (P* 361) the said fourteenth day of August; and the jury find a non-payment the fourteenth of June, for the mistake of the month shall not in this case hurt; but it shall be read that he did not pay, &c. *prædicto die*, and the month shall be rejected: Cited in the above case of *Sandback and Turvey*.

5. Without an Affirmative and a Negative no issue can properly be joined; but yet if upon such issue the cause be tried and found for the plaintiff, he shall have judgment; held Cro. Jac. 579, 588. *Walihall v. Aldrich*, Cro. Jac. 79, 80, *Oxford v. Rivet*: The same point adjudged, where the verdict

Readings and Observations

verdict was found for the defendant; the same point adjudged where the verdict was for the plaintiff. Cro. Jac. 316, 317. *Parker v. Taylor*.

6. Where an issue was joined upon payment at an impossible day, viz. the thirty-first of September; yet the jury finding that he had not paid it then, or at any time before, they find in effect it was never paid, and consequently the substance of the issue; and the judgment for the plaintiff upon a writ of error was affirmed. Cro. Jac. 78. *Purcase v. Fegon*. Vide Noy 89. Jones 140. Latch. 158. 2 Co. 5. a. Co. Lit. 40. b. So where a declaration laid a fact to be done on a day impossible. Carthew 389.

7. What defects were held to be cured by a verdict in an action of debt upon a judgment in an inferior court. Carthew 87. *Skinner v. Kilby*.

8. The like in an action of debt upon the custom of London for not weighing goods at the common beam. Carthew 6. *Jefferies Mayor of London, v. Watkins*, 3 Mod. 161.

9. Where an act of Parliament was misrecited, the court were all of opinion, that though it was misrecited, and ought to have been otherwise; yet being after a verdict, it is well enough: and the rather because this is a particular act of Parliament, and so they are not bound to take notice of it; and therefore if it be mistaken, the defendant ought to have pleaded *nul tiel record*; but since he hath admitted it by pleading, they will intend that there is such a statute as the plaintiff hath alledged, and they could not judicially take notice of the contrary. 2 Mod. 241.

10. Debt in B. R. upon a judgment given in the Hundred-court; the declaration begins with the judgment, and doth not set forth the plaint, and mentions the judgment to be *coram sectatoribus* without naming them; and also it doth not appear in the declaration that the cause of action arose within the jurisdiction: There was a verdict for the plaintiff, and on a motion in arrest of judgment, the Chief Justice held the not shewing the plaint, which was in the inferior court, is aided after a verdict; otherwise it would have been upon a demurrer, and so of the other exceptions: And as to the objection, that it appears not that the cause of action arose within their jurisdiction, that shall be intended to have been given in evidence: An executor brings debt for rent arrear in his own time, but sets not forth what estate the testator had; yet helped after verdict. 1 Sid. 297, 218. *cur*; the statute of 16 & 17 Car. 2. helps all after verdict where the right has been tried. Judgment for the plaintiff. Comberb. 149. *Lewis v. Weekes*.

11. An action of debt was brought upon a bond, with a condition to deliver fifty quarters of wheat; the defendant pleaded in

On Actions of Debt.

in bar that he had delivered thirty quarters of wheat pending the bill, which the plaintiff had accepted, &c. and upon this issue was taken, that he had not accepted, &c. and found for the plaintiff; and it was moved that it was no plea, so no issue; but it was resolved that it was helped by the statute, and the plaintiff had judgment. Cro. Eliz. 260. *Andrews v. Kirk*.

12. Where the plaintiff declares upon a bond against the defendant as brother and heir to J. S. the defendant pleaded *rians per descens* from his said brother; and issue being thereupon, a special verdict was found, that the obligor was seised in fee of such lands, and had issue, and died seised, and the issue died without issue; whereupon the lands descended to the defendant, as heir to the son of the brother, Et si super totam, &c. and after argument it was adjudged for the defendant; for although he is chargeable as heir upon this bond, yet he is but a collateral heir, and it ought to have been specially declared so, and the issue ought to be joined accordingly; but upon this issue it is found against the plaintiff, for he hath nothing as immediate heir to his brother, but by descens from the son of his brother; and if he would charge him, he ought to have made a special declaration; wherefore it was adjudged for the defendant. Cro. Car. 151.

13. A writ of error was brought upon a judgment in the King's bench in debt upon an obligation of two hundred pounds, conditioned for the payment of one hundred pounds, by John Arscott, John Chichester, and John Vigniers, or any of them, they being all jointly and severally obligors; the defendant John Arscott pleads, that he paid it at the day; the plaintiff replies, that neither the said John Arscott, John Chichester, nor John Vigniers, nec eorum aliquis, had paid the said one hundred pounds at the day, et hoc paratus est verificare; & praedictus Johannes Arscott similiter; the jury found that the aforesaid John Arscott had not paid the said one hundred pounds, as the defendant had pleaded; and thereupon judgment was given for the plaintiff, and the error assigned was, because the verdict was not according to the issue, for it might be paid by any of the other, which had sufficed: but the court held it to be well enough, for the addition of John Chichester and John Vigniers, not mentioned in the bar, was but surplussage; and their finding that John Arscott did not pay the money, is sufficient; and it shall not be intended that either of the other two had paid it; and if it had been proved that either of the other two had made the payment, the jury would have been directed to find that the defendant had paid it by such, &c. whereupon judgment was affirmed. 3 Cro. 6. 7. *Arscott v. Heal*.

14. The

Readings and Observations

14. The true reason why any thing is aided by a verdict is, for that the thing shall be presumed to have been given in evidence. 3 Mod. 162.

15. A verdict finding the issue precisely for the plaintiff or defendant, and new matter contrary to it, is good according to the issue, and void for the surplusage found. 3 Cro. 75, 130, 131, 198, 212.

16. Three exceptions were taken to a declaration in an action brought against a hundred for a robbery. 1. That it did not appear that the parish mentioned in the declaration was within the hundred. 2. That it did not appear that the robbery was committed on the highway. 3. That the plaintiff had not alleged that it was done in the day-time; for if it was not, the hundred is not liable at law: but all these exceptions were disallowed, because it being a verdict, the court will suppose that there was evidence given of these matters at the trial; so the plaintiff had his judgment. 3 Mod. 258. *Young v. The inhabitants of Totnam.*

(P* 362) 17. Where words will bear a double construction, the court will construe them in that sense, as will best support the verdict: as where the agreement was to ride without whip or stick, or other weapon, (except boots and spurs) and the plaintiff set forth that he did ride *sine flagello & baculo vel aliis armis*; and after a verdict the court held that it must be intended that the agreement was sufficiently proved, and they put such construction upon the finding of the jury, as would best support the verdict: and that the disjunctive *Vel*, in the latter part of the *sentence qualified the conjunctive *et*, and disjoins that copulative, and makes it in a disjunctive sense. Mod. Cases in law and equity 240. *Burges v. Bradshaw.*

18. An action of debt brought for rent reserved upon a lease for years, and no place is alleged where the deed was made and the defendant pleads a release, and the plaintiff replies *non est factum*; and thereupon issue is joined; now, whether the Count which was ill, was made good, according to 5 Hen. cited in this case: *Mountague* chief justice held that it had; but *Dodderidge* and *Houghton* *e contra.* 2 Roll's Rep. 66.

19. The verdict was held ill where it was found for *pa debet*, and for the other part *non debet*; the action being found upon several matters, whereas they ought to have given a special verdict. 1 Roll's Rep. 270.

20. *E.* brought an action of debt upon a bond against *S. B.* as heir to *F. S.* the defendant pleaded *riens per discent* in fee simple; the plaintiff replied that he had assets by discent in several lands in such counties; and the jury find that he has divers lands in fee by discent; whereupon a general judgment was given against the defendant upon a writ of error. *Trotter* mov

On Actions of Debt.

moved that the judgment was erroneous, alledging that the plea and verdict were uncertain, (viz.) that he had divers lands, and doth not shew what, as 40 E. 3. 15. The jury found that an executor had assets, but not to what value, and therefore not good, *Quod fuit concessum per curiam*; but the court held that it was otherwise here, because in that case the plaintiff ought to recover according to the assets found; but in this case it is not so, for by the false plea of the heir, if he hath any assets, judgment shall be given generally against him; and therefore the quantity of the assets is not material: *Trotman* argued that though he might have divers lands and tenements by descent, which may be true, yet they might not be assets, as in 12 Eliz. *Tray's* case. A reversion expectant upon an estate-tail is not assets, yet it is a tenement; but said the court, that shall not be intended, unless it be alledged; and the judgment was affirmed. 2 Roll's Rep. 234.

Other Cases.

1. In debt upon a penal bill for three hundred pounds, the defendant pleaded *nil debet*; and the jury find *nil debet* as to two hundred pounds, and *debet* as to one hundred pounds: it was argued that this debt could not be apportioned, though this was ill, yet the verdict has made it good; it shall be intended two hundred pounds were paid, and an acquittance under seal produced in proof; and that the jury might as well apportion here, as on a simple contract. Salk. 664. *Hadley v. Miles*.

2. An action of debt was brought for the treble value of the same upon the statute of 2 Ed. 6. 13. and it was moved for judgment, that the single value laid in the declaration is thirty-five pounds, and the treble value laid to be seventy-three pounds, whereas it really is one hundred and five pounds; and the jury find forty pounds, part of the seventy-three pounds: this is not like the case where a sum certain is demanded, as twenty pounds upon a bond, or for a quarter's rent; there if the defendant demands but ten pounds, and doth not shew how the rest is paid, it is naught; but here the value is uncertain, and to be ascertained by the jury, who are not bound by the sum in the declaration. Comb. 283. *Austin v. Burdett*, Carthew 304. In the same case, but not the same point.

3. In debt against one as administrator, who pleads *plene administravit*; the plaintiff replies, that at another time he brought an action of debt against him, and that he was thereupon outlawed.

Readings and Observations

lawed, which was reversed for its insufficiency; and that at the time of purchasing the first writ, the defendant had assets, and concludes to the country; and it was held good after a verdict. 2 Cro. 989.

4. What hath been held to be aided by a verdict in pleading payment. Cro. Eliz. 455. *Chamberlain v. Nicholls*.

5. What hath been held cured after a verdict upon *ne unus executor* pleaded. Cro. Eliz. 472.

6. Where the want of assigning a breach of covenants was held to be aided after a verdict; and these three positions laid down by *Show*. 1. Wheresoever the matter pleaded in bar is collateral to, or *dehors* the condition of the bond, there needs no assignment of a breach; and though the plaintiff does not demur, but makes a superfluous idle *replication*, he ought to have judgment if such bar be ill. 2. Wheresoever the bar is insufficient, in substance or matter, to exclude the plaintiff of his action. 3. Or wheresoever the plea in bar is to and of some special single particular matter, though it be contained in the condition, if it be ill, 'tis with the plaintiff, though he doth neither demur nor assign a breach, but makes an idle replication. 2 Show. 364.

7. Charging the administrator as assignee was held well after a verdict. 2 Keb. 819. *Sewell v. Young*.

8. What shall be intended after a verdict upon an issue married or not married. 1 Keb. 105. *Glascock v. Morgan*.

9. Where it shall be intended after a verdict in an action upon an escape that the party was in custody. 1 Keb. 632. *Hargell v. Creamer*.

10. If the issue be impertinent, yet if it appears that the jury have found enough to charge the defendant, the verdict will be good, as where the award was to pay, &c. and the plaintiff assigns a breach that the defendant had not paid, and the defendant rejoins that he had not paid; yet the jury having found that he had not paid, the plaintiff shall have his judgment upon that verdict. 1 Keb. 234. *Harrison v. Knight*.

11. The original being sued out before the money payable and that appearing upon *oyer* of the condition, it is not aided after a verdict. Cro. Eliz. 325. *Buckly v. Williamson*.

12. Where an issue upon *non concessit* replied by the plaintiff to a plea, that the rent was granted to *J. S.* pleaded to an action of debt upon a bond for the payment of rent, was held to be well joined after a verdict. Cro. Eliz. 259. *Gurny & Ux. v. Sir Edward Clere*.

13. If an issue be joined whether *J. S.* was taken in execution upon a *capias ad satisfaciendum*; and the jury find that he was not taken upon a *capias ad satisfaciendum*, but do find that he was taken by virtue of an *alias capias ad satisfaciendum*.

On Actions of Debt.

recordo minima specificat; yet having found the *alias capias* at large, which was of the same test and return, and all other matters, though they did not find that the persons and judgments were the same; it is a good verdict, for it shall be intended to be the same; for it is against reason that the jury would have made, or the court have suffered a special verdict, as a doubt, if the *alias, &c.* had been upon another judgment, or between other parties. Hob. Rep. 52, 53, 54.

14. In an action of debt upon a bond for performance of covenants, one whereof was, that the lessee should commit no waste, and issue was taken whether he felled twenty oaks; it was found that he had not felled twenty oaks; but he had in truth felled ten; and it was adjudged for the plaintiff; yet if upon the first point it had rested there, it had been found for the defendant.

*Note. Ten did not prove the issue literally, but it proved the breach clear within the issue: *Quare*, if it had been found oaks for ashes, or the like; for either had been a waste; and the very issue, in the consideration of law, is waste or no waste; and the rest is a certainty of form, as in *Townsend's case*, Plow. Com. 111. Hob. 53. (P* 363)

15. An action of debt was brought upon the statute of Ed. 6. for not setting out of tithes; and the plaintiff declared as well for the predial tithes, as for tithes of lamb and wool; and upon the trial the jury found as well for the first that would, as the last that would not bear an action; and the judgment was arrested. 1 Bro. 65. *Paine v. Nichols*.

16. Where an action of debt was brought against the defendant as executor for arrears of rent, in the time of the testator; and he pleads that it was levied by distress, *et sic non detinet*; and upon issue joined it was found that a stranger, who was an assignee of the term from the executor, had paid the rent to the plaintiff, who had accepted it; but no distress was taken for it: and though *Walmesley* was of opinion that the substance of the plea was the *levying by distress*, and that only material; yet the other judges were clearly of opinion that the substance of the plea was found for the defendant, inasmuch as it appeared that the rent was paid, and so *non detinet*. Cro. Eliz. 140. *Cecil v. Harris*.

17. Where several executors plead that they fully administered, and the verdict found that some had fully administered, and that others had goods; the verdict ought to be that they had not fully administered. Stiles 134. *Hill v. Harris*.

18. Not setting forth by whom the administration was granted, aided after a verdict. Stiles 236. *Marshall v. Leesham*.

Readings and Observations

19. A special verdict upon *non est factum* where the date of the bond and the delivery were at several times. 2 Cro. 136. *Lane v. Pledall*.

20. A special verdict on the statute of Ed. 6. for not setting out tithes. 2 Cro. 252. *Hunston v. Cockett*, 3 Cro. 346. *Swift v. Eyres*.

21. What was a good deed upon a special verdict on *non est factum*. Cro. Eliz. 613. *Fow v. Wright*.

22. Where a special verdict was found upon *plene administravit*; and the question was, what shall be construed assets. Cro. Eliz. 43. *Brightman v. Keightly*.

23. The like where the question was, what was a good administration. Cro. Eliz. 120. *Stant v. Hutchins*.

24. A special verdict in an action of debt for rent, where the question was, whether there was a sufficient surrender. Cro. Eliz. 173. *Perry v. Allen*.

25. What was no mis-trial upon a plea of an usurious contract. *Kinnesley v. Smart*, Cro. Eliz. 195.

26. If an action of debt be brought against the bailiff of a town upon the statute of 21 H. 6. for not returning the plaintiff a burghers of that town; and the words of the statute are, *That the sheriff shall send his precept to the Mayor; and if there be no Mayor, then to the Bailiff*; after a verdict it shall be intended that there was no Mayor, for that ought to have been shewn by the other side. Hob. 78. *St. John against St. John*.

27. The condition of a bond was, that if the plaintiff had possessed and enjoyed the office of beadle-ship of the court of conscience in London, that then, &c. and the defendant pleaded *Quod habuit, gavisus fuit & occupavit*; whereupon the jury found that the plaintiff did exercise and occupy that office from the time of the bond made: the jury found a special verdict, that if the court should adjudge it to be an having, possessing and enjoying of the office, they found for the defendant, otherwise for the plaintiff; the court gave judgment for the defendant, and took this difference between an office in fact and an office in reputation only; for of an office of reputation only, and not in fact, one cannot have any other possession than by the occupation thereof; and the occupying it, is all the enjoyment that can be had of it; for it is not an office of interest, but only in the name and the use thereof; and therefore there cannot be any interest thereof but by using it, as to have the office of marshal or cryer before the justices of assize, or the like. 1 Cro. 382. *Dudley v. Kingston*.

28. Where the jury finding payment before the day, was held a good verdict upon an issue taken upon payment at the day. Moor. 267. *Bann v. Richardson*.

29. Where

On Actions of Debt.

29. Where the plaintiff declares in the *detinet* for foreign money amounting to so much sterling; it is not enough for the jury to find that the defendant detained so much *Flanders* money, but they must find the value. Moor 704. *Plaine v. Bagshaw*, Cro. Eliz. 536.

30. Where it was adjudged that a knight or no knight ought to be tried by the country. Raym. 379. *Sparrow v. Draper*.

31. Of an issue upon an usurious contract. 1 Leon. 148. *Kinnerley v. Smart*.

32. What hath been held a mis-trial, and what not. Cro. Eliz. 867. *Savil v. Roads*.

33. On a special verdict upon *non est factum*, what hath been construed a good delivery of a bond. Cro. Eliz. 122. *Chamberlain v. Stanton*.

34. Several points in question on a special verdict in an action for not setting out tithes. W. Jones 435. *Vicars of Litchfield v. Ayres & al'*.

35. Exceptions to an issue upon payment. 2 Leon. 102. *Aldersley v. Duparry*.

36. Where it was adjudged the issue was found for the defendant upon *non dimiserunt* pleaded. 4 Leon. 50. *Thetford v. Thetford*.

37. Exceptions to an issue upon an action for the performance of covenants. 1 Leon. 278. *Huddy v. Fisher*.

38. To an issue upon payment at the day. 1 Leon. 311. *Bond v. Richardson*.

39. Whether the verdict agreeable to the issue of *non est factum*. 1 Leon. 322. *Dennis v. Sir John*. 5 Mod. 282. *Crumwell v. Grundall*.

40. Whether an action of escape maintainable upon a special verdict found in an action of escape. 2 Leon. 84. *Ognell v. Paslon*.

41. What shall be construed the deed of the ancestor upon a special verdict against the heir. 1 Leon. 152. *Diggory v. Row*.

*Of Variances.

(P* 364)

1. What was held no variance between the judgment certified and that mentioned in the declaration. 1 Brownl. 68.

2. What was held no variance upon *non est factum* pleaded. 1 Brownlow 57.

3. Whether there was a material variance between a lease found by a verdict and that set forth in the declaration. Stiles 19. *Cornish v. Cowfys*.

L 1 2

4. What

Readings and Observations

4. What hath been held variances between the bond and declaration, and what not. 2 Cro. 309. *Biggins v. Tytherton*. 2 Cro. 261. *Dobson v. Keys*. 3 Cro. 418. *Downes v. Hathwayte*. 2 Cro. 290. *Ellis v. Clarke*. 2 Cro. 203. *Mathew & al v. Vaughan*.

5. Where a variance between the writ and declaration was an incurable fault after judgment. Cro. Eliz. 198. *Berkinhead v. Nuthall*.

6. Other cases concerning variances between the writ and declaration. Cro. Eliz. 333. *Annesley v. Stokes*. 2 Cro. 190. *Gregg's case*. Cro. Eliz. 896. *Walter v. Pigott*. Godb. 119. *Warren's case*.

7. In an action of debt for not setting out tithes upon 2 Ed. 6. if the plaintiff declares that *J. S.* was parson, and let the tithes to him for five years, if he should be parson so long, and so long live, and the jury find that he let it for five years if he should so long live, without the words *and should continue parson*; yet that is not any material variance, because the addition of these words is no more than the law implies, for the lease determined by his deprivation or resignation; and therefore, though there be an addition of these words, yet 'tis not any variance in substance. Trin. 11 Jac. *B. R.* adjudged. *Wheeler and Haydon*; Mich. 11 Jac. adjudged. 2 Roll's Abr. 717, 718. pl. 10. Moor 834. *S. C.*

8. If a man declares of a lease made by two, whereas one had nothing in the lands, and so void in law; yet that is a material variance. Mich. 10 Jac. *B. R.* between *England* and *Long* adjudged. 2 Roll's Abr. 719.

9. So if a man declares of a lease made by baron and feme, and gives in evidence a lease made by the husband only; this is a material variance. Mich. 10 Jac. *B. R.* adjudged. 2 Roll's Abr. 719. pl. 24.

10. If a man declares of a lease made by two, and it appears upon evidence that the two lessors were tenants in common, and so several leases; this is a material variance. Mich. 10 Jac. *B. R. per curiam*; and said to be adjudged. 2 Roll's Abr. 719. pl. 25.

11. But otherwise is it, if it appears upon evidence that the two lessors were coparceners; for that is a lease being made by them both. Mich. 10 Jac. *B. R.* 2 Roll's Abr. 719. pl. 26.

12. In debt the plaintiff declared on a deed, whereby the defendant covenanted to pay the plaintiff thirty-five pounds per hundred for every hundred of wood in such a place, and that he delivered so many hundreds and one half, which came to one hundred eighty-two pounds ten shillings; the defendant demurred, *et per cur.* there can be no apportionment, and the demand

On Actions of Debt.

demand for the half hundred is demanding more than can be due by the contract; and the question was, whether a *remittitur* could be entered for that, and judgment given for the rest: *et per Holt* chief justice, where the sum demanded depends on the deed itself, and on nothing extrinsecal, as in case of debt or covenant to twenty pounds, there can be no *remittitur*; for the variance which is made, is inconsistent with the deed upon which the duty that is demanded entirely depends; otherwise where it may be more or less by matter extrinsecal, as in debt for rent, or in the case at bar; in that case, if more be demanded than is due, it may be remitted, for the variance is not inconsistent with the deed; as the plaintiff is to recover on a trial which appears on evidence to be due, so on a demurrer he is to have judgment for no more than he ought to recover, and may remit the rest. Vide *Hob.* 178. *Dyer* 65. *Yelv.* 66. 10 *Hen.* 6. 5. 1 *Saund.* 206, 286. *Salk.* 658. *Incedon v. Grips.*

What have been adjudged Variances material, and what not.

1 <i>Leon.</i> 185. <i>Osborn v. Kir-</i> <i>ton.</i>	2 <i>Bulstr.</i> 154. <i>Bust v. Wades-</i> <i>worth.</i>
<i>Hardr.</i> 35. ———	1 <i>Bulstr.</i> 184. <i>Harris v. Sher-</i> <i>ley.</i>
3 <i>Bulstr.</i> 84. <i>Hanmer v.</i> <i>Clive.</i>	<i>Cro. Eliz.</i> 897. <i>Feild v. Win-</i> <i>love.</i>

Of Amendments.

1. Where the day of the release upon the pleadings hath been amended after issue joined. 1 *Keb.* 359. *Brooke v. Sharpe.*
2. Where a judgment in another term was amended in the omission of the words *si tantum testatoris habuit.* 2 *Keb.* 810. *Chapman v. Gage.*
3. Where an amendment was prayed by aiding a *profert hic in* *omnia literas testamentarias*, and denied notwithstanding the statute of 17 *Car.* 2 cap. *Young v. Gape.* 3 *Keb.* 138.
4. Where an amendment allowed in a judgment. 3 *Cro.* 74. *Healing* against the Mayor, &c. of *London.*

Where

Readings and Observations

Where a Judgment, Imparlance-roll, and other Proceedings have been allowed to be amended, and where not.

1 <i>Brownl.</i> 57 <i>Burnell v. Bowes.</i>	2 <i>Cro.</i> 135. <i>Hilliard v. Redner.</i>
67 <i>Garrard v. Bennet.</i>	186. <i>Maynay v. Collins.</i>
66. ———	3 <i>Cro.</i> 278. <i>Merchant v. Royston.</i>
75. <i>Elliot v. Golding.</i>	3 <i>Keb.</i> 117. Of the date of the bond.
87. <i>Berkett v. Manning.</i>	2 <i>Show.</i> 491. <i>Jennings v. Hawkey.</i>
<i>Yelv.</i> 65. ———	<i>W. Jones</i> 199. <i>Forger v. Sales.</i>
<i>Cro. Eliz.</i> 435. <i>Vita v. Vita.</i>	302. ———
572. <i>Rogers v. Bird.</i>	1 <i>Bulstr.</i> 217. <i>Benton v. Ayres.</i>
609. <i>Scarling v. Sharpwell.</i>	5 <i>Mod.</i> 148. ———
667. <i>Allen v. Salisbury.</i>	69 <i>Walker v. Slackloe.</i>

Ninthly, Of the Damages and Costs.

1. If damages are insufficiently assessed or not assessed where they ought to be, the plaintiff by releasing the damages, shall have judgment for the rest. 11 Co. 56. a.

2. But in an action of debt for not setting out as well predial as personal tithes, and damages are given entirely; the plaintiff cannot have any judgment. 1 *Brownl.* 65. because the action would not lie for part.

3. If the plaintiff concludes his replication with *petit judicium & debitum*, omitting *dampna*; yet the court will give damages as incident. 2 *Lev.* 222, but it is ill upon a special demurrer. *Ibid.* 245.

(P* 365) 4. An action was brought for fifty pounds recovered in a court-baron; the case was, that a feme recovered dower of a copy-hold, according to the custom of the manor, by a plaintiff in a court-baron; and for that her husband died seised, she recovered by a judgment there fifty pounds damages, and declared thereupon; and the court held, notwithstanding the exception, that a court-baron generally shall not *hold plea of above forty shillings, yet that the damages were well awarded for as they may hold plea of land, so for the damages as far

On Actions of Debt.

as the demandant is damnified. Cro. Eliz. 426. *Shaw v. Thompson.*

5. How it is proper to take the damages found upon two contracts. 1 Brownl. 70.

6. An action was brought upon two bills, and one appeared not to be due, by remitting the damages for that which is not due, the plaintiff may take his judgment. 1 Brownl. 68.

See more of Costs under the Tit. Judgments against Executors.

Tenthly, Of the Judgment and Execution.

In treating of JUDGMENTS in DEBT shall be considered,

First, *As to the Subject Matter upon which the Judgment is given.*

Secondly, *Of the Parties to the Judgment.*

Thirdly, *The Form of the Judgment.*

Fourthly, *Of the Act of the Court in giving Judgment.*

Fifthly, *Who shall give Judgment, and their Power over it when given.*

Sixthly, *Of the Time and Manner of giving Judgment.*

Seventhly, *Of the Method to be used by the Parties to avoid a Judgment.*

Eighthly, *Of the Effect of a Judgment.*

First, *As to the Subject Matter upon which Judgment is given.*

It must be a proper Action for the Thing thereby demanded, to which the Party must have a sufficient Title, and the Proceedings must be all regular to be a proper Foundation for the Court to give Judgment.

1. Where there was a variance in the sum mentioned in the declaration from the sum demanded by the writ; and adjudged no error in the judgment. 2 Cro. 311. *Lovell v. Jenifer.*
For

Readings and Observations

For that the defendant *obtulis se in placito debiti* of the sum mentioned in the count, had prevented its being a discontinuance.

2. Where a judgment was reversed for variance from the original, it being assigned for error. 1 Brownl. 59. *Sherle v. Harris*. 1 Brownl. 96. *Harrison v. Pulsford*.

3. Where a judgment was reversed, because the money demanded was not yet payable. 2 Saund. 107, 108,

4. Where a judgment in debt upon a bond was reversed, because the *teste* of the original was before the day of payment. Moor 598. *Williams v. Bentley*.

5. What hath been held a discontinuance. 2 Cro. 620. *Cave v. Polewhel*.

6. What was held a discontinuance not aided by the statutes of jeofails. 2 Cro. 236. *Molineux v. Molineux*.

7. Where the process being discontinued by no default in the party was held to be aided. 2 Cro. 135. *Boslock v. Snell*.

Other Cases concerning a Discontinuance.

1 Bulstr. 144. <i>Basepoole v. Freeman</i> .	5 Mod. 86.	Walwin v. Smith.
Yelv. 115. <i>Passon v. Lusber</i> .		

1. Where an infant sued as executor, and appeared by attorney; and held well after a verdict. Cro. Jac. 420, 441. *Cotten v. Westcot*.

2. Where a judgment was reversed in an action of debt on a statute merchant acknowledged before the Mayor of Lincoln. Moor 405. *Askew v. Hollingbrook*.

3. What hath been adjudged error, and what not in the venire. *Falsowe v. Thornye*. *Cundey v. Edgcomb*. Moor 696. Raym. 66.

4. Where the defendant pleads payment at the day, without an acquittance to an action brought by a single bill; after a verdict the defendant shall not assign that for error, which was a fault in his plea. *Chamberlain v. Nichols*. Moor 692, 696. *Wilcocks v. Hewson*.

5. Where the several sums in the count did not amount to the sum demanded by the writ, the judgment was reversed. Moor 298. *Smith v. Vowe*.

6. An action of debt was brought for four hundred pounds, and a *fieri facias* issued, upon which one hundred pounds was levied and returned; and after a *capias ad satisfaciendum* issued out for the whole four hundred pounds; upon which the defendant

On Actions of Debt.

Defendant was outlawed, and the judgment to have execution was reversed, because it was returned upon the record by the *feri facias* that one hundred pounds was levied. Moor 598. *Wells v. Denny*.

7. A. brought an action against B. as assignee of C. and counted that D. devised the rectory of *Allington* for sixty-six years; which lease, by mesne conveyances came to one E. the testator, who demised to C. for twenty years, rendering rent, that C. by will demised it to one E. for ten of the last years of the term, and died possessed; that E. entered, and granted his interest to B. the defendant pleaded that E. devised the residue of the term *Sibill*, and died, she being his wife and executrix, who married B. and they brought an action against the defendant, and judgment was given for the plaintiff; and upon a writ of error the judgment was reversed, and the errors assigned were, that C. the first lessee devised ten of the last years to E. and it was not alleged that the deviser made any executor, nor that the devisee entered by any such executor's consent, nor that he was possessed *virtute legationis predictæ*; but generally that he entered after the death of the deviser. Moor 703. *Edmunds v. Boskin*.

8. Where a judgment was reversed upon a writ of error for its being in the disjunctive to do one of two things. 1 Brownl. 87. *Taylor v. Hardman*.

9. Where a writ of error was brought upon a judgment against an administrator, for that the judgment ought to have been conditional *de bonis testatoris si habuit, &c.* 1 Brownl. 116. *Morgan v. Sock*.

10. Where a judgment was arrested in an action of debt upon a bond, there not being convenient time to perform the condition. Stiles 11. *Williamson v. Henley*.

11. Where it was adjudged that the court could not give judgment upon a demurrer upon *nul tiel record*, when the record was removed into the Exchequer-chamber. Stiles 124.

12. Where it was held that a *mittimus* must go out of the Chancery to certify a record pleaded to an action brought upon a judgment in the court of King's Bench. 3 Cro. 297. *Latterell v. Lee*.

13. Where the judgment was entered *nil capiat per breve*, when it ought to have been *nil capiat per billam*; and adjudged erroneous. 3 Cro. 581. *Raymond v. Budge*.

14. Where a judgment was reversed by the ill finding of the jury. Cro. Eliz. 133. *Fynnimore v. —*.

15. Where it was held that the *incrementum* of the court as to the costs, thereby making the damages more than the plaintiff declares for, will not hurt. Cro. Eliz. 544. *Wolf v. Meggs*.

Readings and Observations

- (P* 366) *16. See concerning a judgment in debt upon a condition of the defendant's accepting a lease and fealing a counterpart. 3 Cro. 560. *Lee v. Russell*.
17. Where the defendant had judgment upon a by-law, it being made in restraint of trade. 1 Brownl. 48. *Weavers' company v. Scape*.
18. If a corn-rent be reserved upon a lease for years, the lessor may have an action of debt for the corn in arrear, and shall declare in the *detinet*; but he shall not have the corn, but so much money as it was worth every separate year. 3 Leon. 260. *Cheney's case*.
19. Where A. makes B. his executor, and B. makes C. an infant his executor, and B. dies; and during the minority of the infant, administration is granted to D. who as administrator to B. brings an action of debt upon a bond made to A. this is error. *Limmer v. Every*.
20. Whether the entry of a *retraxit* against one defendant amounts to a release so as to discharge all. 3 Cro. 551. *Dennis v. Payne*.
21. Where the plaintiff demands more than is due, and releaseth that part which is not due, he shall have judgment for the residue. 5 Mod. 214. *Thwaytes & Ux' v. ———*.
22. It was made a question whether in action of debt the plaintiff after a demurrer might upon the record release the surplus, which appeared not to be due, and entered judgment for the remainder; and to prove that he might, the case of *Godfrey* in 11 Co. 45. was cited, That where a man brings an action for two shillings, and it appears that he cannot have an action for the one at all, the writ shall not abate, but he shall have judgment for that of which the action is well brought; but if it appears that he may have an action for the other in another form, the entire writ shall abate; but in this case the plaintiff can have no action for the surplus; there it is good. 1 Saund. 285.
23. Where in debt upon the statute of usury for two several twenty pounds, the plaintiff declares insufficiently for one of them; the plaintiff, after a verdict or upon a demurrer, shall recover the twenty pounds for which he hath well declared, and shall be barred for the other. 1 Saund. 286.
24. So in debt upon three bonds, where it appeareth that one of three is not forfeited; yet the plaintiff shall have judgment for the two other bonds. 2 Saund. 286.
25. So if debt be brought against an executor upon an obligation, and upon a simple contract together, and they demur upon the whole; the plaintiff shall recover his debt upon the obligation, and shall be barred for the other. *Ibid*.

On Actions of Debt.

26. If the defendant in an action of debt upon a bond acknowledges the sealing and delivery, but pleads that he delivered it to *J. S.* to be kept till certain conditions were performed; and that *J. S.* delivered it before the conditions were performed, and so concludes that it was not his deed; yet the plaintiff shall not have judgment upon the verdict, because it is not a good issue, inasmuch as he could not conclude that it was not his deed against his own acknowledgment before; but the plaintiff shall have judgment upon the acknowledgment before in his plea in bar. 9 H. 6. 37. b. *per cur.* Vide 6 Hen. 7. 11. where this is cited; and it is said that he might relinquish the issue, and, if he would, might pray judgment, and shall have it. 2 Roll's Abr. 99 pl. 2.

27. If the defendant in an action of debt upon a contract and a bond, acknowledges the action for the bond, and wages his law for the contract, judgment shall immediately be given to recover the debt upon the bond. 3 H. 6. 37. b. 2 Roll's Abr. 103. pl. 12.

28. But he shall not have judgment for the damages till the wager of law be determined, because the defendant may make default at the day appointed for waging his law; and so the plaintiff would recover twice upon the same original, which would be inconvenient. 3 Hen. 6. 37. b. 38 Curia. 18 H. 6. 29. 2 Roll's Abr. *ibid.* pl. 13.

29. If the defendant in an action of debt acknowledges part of the debt, and pleads to issue as to the residue; the plaintiff shall have judgment for that which is acknowledged, if he will release the damages. 2 Roll's Abr. 103. pl. 14.

30. If an action of debt be brought against two, and one acknowledges the action, and the other pleads a release; the plaintiff shall not have judgment against him that acknowledges the action, till the issue be tried as to the other. 7 H. 6. 33. b. 2 Roll's Abr. *ibid.* pl. 3.

31. Where the defendant pleaded an insufficient plea, and it was found for him, though he confessed the debt due by his pleading; yet the court held the plaintiff should not have judgment. 1 Brownl. 74. *Rawdon v. Torton.*

32. If it appears to the court that the plaintiff hath a good cause of action, and the declaration be good, though the plea be naught and the replication naught; yet the plaintiff shall have judgment. 1 Brownlow 51.

33. But judgment shall not be given to the plaintiff upon an insufficient bar, if the replication be insufficient; and shews the plaintiff to have no title to his action. Hob. 14, 128.

34. If an action of debt be brought upon a bond to perform an award, and the defendant pleads no award made; the plaintiff shews the award which makes an issue, yet he must assign a breach

Readings and Observations

a breach of that award, which though not issuable, is so material a form that as the plaintiff could have no cause of action without it, he can have no judgment without shewing it. Hob. 198, 199. 1 Saund. 102, 186. 2 Cro. 221.

35. If the plea of the defendant be entire, and falsified by a verdict as to part, the plaintiff shall have an entire judgment: As where if there be three replications, and one of them superfluous; yet the plaintiff shall have judgment upon the two others that are good. 1 Saund. 338.

36. If an executor obtains a judgment, and afterwards it appears the will was forged; the judgment shall be vacated, and the cause of vacating it shall be entered upon the roll, 1 Ven. 78.

37. An action of debt was brought for rent reserved upon a lease of copyhold and freehold lands, and the defendant pleaded in bar that he was evicted out of all the said lands before, &c. and the plaintiff replied that another person was seised of the freehold, and traverses the seisin, which was alleged by the defendant in his plea; upon this issue being joined, and a verdict for the plaintiff, it was assigned for error, that here appeared a title to the plaintiff but for half the rent, for it ought to be apportioned; and the plaintiff in his replication hath answered only as to part; But the court were of opinion that the plea being entire, and the part falsified by the verdict, the plaintiff ought to have his judgment general. 2 Show. 399, 400. *Randal v. Breefe*.

38. A writ of error was brought to reverse a judgment in an action of debt upon a bond for the performance of covenants, for that after a *relicta verificatone* the judgment was entered *quod capiatur*, which was held naught; and the judgment reversed 2 Show. 203. *Melhuish v. Carnesham*. See 8 Rep. 58. But now by the act of the amendment of the law this is aided.

39. The sheriff having returned to a *scire facias* upon a recognizance that he had levied five hundred pounds, and had it ready to deliver to the plaintiff upon request; the plaintiff demanded the money, and for non payment brought an action; and as to three hundred pounds the sheriff pleads *nil debet*; and as to two hundred pounds he pleads payment to the plaintiff, and an acquittance: It was adjudged as to the three hundred pounds for the plaintiff, and as to the two hundred pounds (P* 367) that *the receipt and acquittance was confessed by the demurrer. Moor 88. *Speake v. Richards*.

Other

On Actions of Debt.

Other Cases where Exceptions have been taken to Judgments for Faults in the Venue or Venire in this Action.

<i>Cro. Eliz.</i> 258. <i>Cottinghall v. Griffith & al'</i>	<i>Stiles</i> 2. <i>Knight's case.</i>
259. <i>Guorney & Ux' v. Cleare.</i>	7. <i>Dickinson v. Preston.</i>
565. <i>Mathew's case.</i>	<i>Stiles</i> 8. <i>Browne v. Evering.</i>
703. <i>Scroggs v. Spencer.</i>	20. <i>Cook v. Allen.</i>
782. <i>Forth v. Harrison.</i>	66. ———
820. } <i>Kerchever v.</i>	107. <i>Wright v. Martin.</i>
804. } <i>Wood.</i>	264. <i>Cribble v. Orchard.</i>
762. <i>Woodyard v. Dannock & al'.</i>	2 <i>Cro.</i> 28. <i>Hudson v. Banks.</i>
853. <i>Willoughby v. Egerton.</i>	137. <i>Normanvill v. Pope.</i>
879. <i>Skidmore v. Winsler.</i>	11. ———
<i>1 Br. 211.</i> 52. <i>Bawker v. Isted.</i>	150. <i>Normanvile v. Pope.</i>
69. ———	239. <i>Cunningham v. Hare.</i>
78. <i>Milton v. Percie.</i>	315. <i>Willoughby v. Egerton.</i>
100. <i>Oliver v. Collins.</i>	3 <i>Cro.</i> 38. <i>Aylesworth v. Chadwell.</i>
<i>1 Br. 211.</i> 165. <i>Browning v. Strelly.</i>	2 <i>Keb.</i> 137. <i>Birch v. —</i>
<i>Godb.</i> 23. ———	440. <i>Ashburnham v. Braham.</i>
	3 <i>Leon.</i> 193. ———
	4 <i>Leon.</i> 167. ———
	2 <i>Bulstr.</i> 210. <i>Baker v. Chew.</i>
	34. <i>Stanton v. Barton.</i>
	1 <i>Bulstr.</i> 59. <i>Lord Cavendish v. Earl of Shrewsbury.</i>
	46. <i>Merley v. Larpham.</i>

Secondly, Of the Parties to the Judgment.

1. If an action of debt is brought by five executors, whereof two are summoned and seerved, because they would not sue; and afterwards the other three prosecute the action upon a second, and the defendant pleads *non est factum*, and it is found against him; the judgment may be given for the two executors only who sued, without naming the other two who were summoned

Readings and Observations

moned and severed; for though they continue executors, notwithstanding the summons and severance, yet they are out of court by the severance. Mich. 11 Car. B. R. between *Aprice* and *Parkehurst* adjudged in a writ of error upon a judgment in the common pleas, and the judgment affirmed accordingly, entered of Hill. 10 Car. Roll 716. and when the judgment was affirmed, the certificate of two of the prothonotaries of the common pleas was read; that it was the practice in the common pleas to give judgment in the manner this was given. 2 Roll's Abr. 98. pl. 3. 3 Cro. 400. the same case.

2. If a verdict be found for the defendant, though the defendant will not pray judgment, yet judgment shall be given for the defendant at the instance of the plaintiff; because he may have his attaint against the jury. Dyer 3. Eliz. 194. sect. 34. 2 Roll's Abr. 97. letter A. pl. 2.

Thirdly, Of the form of the Judgment.

A Judgment in debt is thus: (a) Ideo Consideratum est quod predictus A. (b) Recuperet versus prefatum C. debitum suum predictum necnon quadraginta solidos pro (c) Dampnis suis que sustinuit tam occasione detentionis debiti illius quam pro misis et custagiis suis (d) per ipsum circa sectam suam in hac parte appositos eidem A. per Curiam dicti Domini Regis nunc hic (e) ex Assensu suo adjudicatos (f) Et predictus C. in misericordia.

1. There is this difference between the form made use of in the common pleas and that in the King's bench, which is as above, that the plaintiff do recover against the defendant his debt, and also (so much) *pro dampnis suis qua sustinuit tam occasione detentionis debiti illius quam pro misis & custagiis*, &c. whereas in the common pleas they adjudge thus: *Ideo consideratum est quod predictus A. recuperet versus prefatum C. debitum suum predictum & (so much) pro dampnis suis qua sustinuit occasione detentionis debiti illius.* 6 Mod. 236.

2. And agreeable to this form of the common pleas, there is a case in Cro. Jac. 420. *Ashmore v. Ripley*, where the judgment was *Quod recuperet debitum predictum*, and (so much) *pro dampnis suis occasione*, &c. and no mention made of *Misis & Custagiis*; and it was adjudged to be good without it, for damages includes both.

(a) Ideo

On Actions of Debt.

(a) Ideo Consideratum est.

3. The forms of the judgments of the courts of law have for many hundred years been invariably preserved, through the steadiness of the judges of the respective courts; and by the words (a) *ideo consideratum* is meant, that the court gives judgment upon mature and deliberate consideration; and so tenacious were they of that particular form, that where the entry of the judgment was *ideo ad petitionem querentis consideratum est adjudicatum & assessum per curiam quod querens recuperet*, they adjudged it error, and said that the judgment is the act of the court, and the shorter the better; and if they were not confined to some form, there would never be an end of new and senseless words; whereby it would in the end become necessary to have one judgment to expound another: so in the case reported in Latch 76. *concessum* for *consideratum*; and in the same book 83, the same point was adjudged error, and the judgment reversed, and a multitude of cases there are in the books as to that point; but there have been, and still are, so many advocates for ignorance and confusion, that the forms of law proceedings, which ought to be certain and uniform, are at present very uncertain, and will hereafter be unknown; and 'tis much to be feared; if our laws, pure and unsullied in themselves, receive many more changes, our properties will be as precarious in the hands of the most skilful lawyer, as our lives are in the hands of the physician.

4. The statute of 16 & 17 Car. 2. c. 8. hath provided, that no judgment shall be arrested after a verdict, for the words *concessum* for *consideratum*.

5. And by the statute of 4 & 5 Queen Anne of the amendment of the law, this fault and others that were aided after a verdict, are aided in judgments by default.

*(b).Recuperet.

(P* 368)

6. This word *recuperet* must be translated *do recover*, for a judgment being the act of the court, it is a recovery (*eo instanti*) that the court pronounce it; agreeable to which it is said by the late lord chief justice Holt, upon an objection having been made to the word *mereretur* in a *Quantum meruit*, that in all our judgments the entry is *Quod recuperet*, which is a subjunct, and yet it is a present act, and not a future one; for it would be ill

Readings and Observations

ill to make it future; and (says he) it must be translated that he *do recover*, in the present tense. *Clerke v. Tewdall*, *Barry* 106.

(c) Pro dampnis suis.

7. Upon a judgment in debt by default or confession, the court doth award so much for the damages, by reason of detaining the debt, as well as for the costs of suit; and that being by the parties consent, which is always entered upon record, it concluded the defendant; but if the plaintiff will not consent to it, then he may have a writ of inquiry of damages *occasione detentionis debiti illius*. 2 Saund. 107. Vide 1 Std. 443. Latch 113. Yelv. 152. 1 Brownl. 214, 215. 3 Leon. 213. Dyer 105. Cro. Jac. 415. 1 Roll's Abr. 571.

(d) Per ipsum circa sectam suam in hac parte appositos.

8. Roll chief justice, in the case of *Crible* and *Orchard*, reported in *Stiles* 164. where the jury in assessing the damages said *pro missis & custagiis*, but did not say *circa sectam expensis*; and so it cannot appear for what the costs and damages were assessed; and held it ill; and (further says he) 'tis true, that the judgment is right entered; but there is no verdict to warrant such judgment; and therefore it cannot be good.

(e) Et assensu suo.

9. The reason of the use of these words sufficiently appears above; and in *Cro. Jac.* 465. pl. 3. where the judgment was *ideo consideratum est quod recuperet 4 s. pro missis & custagiis*; omitting the words *ex assensu suo per curiam et adjudicat*; it was reversed for that omission.

(f) Et prædictus C. in misericordia, H.

10. This word *misericordia* signifies that the court have given judgment against the defendant, that the plaintiff recover his debt or damages; but the court having done with the suit, and finished their judicial authority, leave him entitled to compensation; and Bracton gives us a description of this, to shew the

On Actions of Debt.

reason why the defendant ought to be thus left by the court entitled to compassion; that is, not to be *imprisoned*, but only to be *amerced*, Bracton 106. b.

But these amercements were entirely at the discretion of the lords, stewards and judges of the courts-baron and courts-leet, the legislature finding that people were amerced sometimes unmercifully; therefore the statute of 9 Hen. 3. c. 14. provided, *That no freeman should be amerced but according to the greatness of the offence, and that by his peers; and by that statute another's villain should be amerced, saving his wainage, if he falls into our mercy, says the statute.*

And it appears by *Fleta*, Lib. 2. c. 66. that when any lord or steward did amerce a party without any compassion, and not according to the nature of his offence, the party was entitled to a writ of *moderata misericordia*, which commanded that they should not amerce the defendant contrary to the tenor of *magna charta*; but I submit it, whether the conclusion of the judgment had not better be that the defendant be amerced; or if any person should be fond of the word *mercy*, because the conclusion of the judgment is with the word *misericordia*, then the conclusion of the entry may be, *and be the defendant in the mercy of our sovereign lord the King*; and this form of the entry of a judgment by *misericordia*, is in contradistinction to a judgment that was to be entered by *capiatur*: For in actions of debt, account, actions upon the case, and several other actions for wrongs that were not directly in breach of the King's peace, or against any positive statute law, the judgment was, that the plaintiff should recover his debt or demand, or for that the defendant had not accounted, or whatever else was the judgment of the court, he was to make satisfaction; and there they left him entitled to mercy, i. e. only to be amerced.

But in actions of trespass, assault, and imprisonment, in actions of deceit, and upon penal statutes, or for offences against statute-laws, the court gave a more severe judgment; that is, that, besides making satisfaction to the plaintiff, he should be taken and imprisoned till he paid the King a fine for his offence; and so where a man pleaded that a deed declared upon, or that came out otherwise on the pleadings, was not his deed; there if it was found to be his deed, the judgment did not entitle him to mercy; but the judgment was *quod capiatur*, i. e. that he should be taken for the King's fine, and imprisoned till he paid it.

And where a *misericordia* was entered by the plaintiff, instead of a *capiatur*, though it was for the benefit of the defendant, yet it was error: But by the statute 4 & 5 W. & M. cap. 12. this fine is taken away, and the judgments are entered in *misericordia*, as in other actions; but because the statute of W. & M. mentions

Readings and Observations

M. mentions only trespass, ejectment, assault and false imprisonment, yet a *capiatur* should have been entered upon a *non est factum* pleaded, and found for the plaintiff, after this act of parliament; because that is *casus omissus* out of the act.

But by the statute of the amendment of the law of 4 & 5 Annæ, cap. 16. which cures all faults in judgments by default, as well as if they had been by verdict, except the want of an original or warrants of attorney, a *capiatur* entered instead of misericordia; and so vice versa is not error, because by 16 & 17 Car. c. 8. those faults are cured after a verdict.

Fourthly, Who shall give Judgment, what Judgment is to be given, and the Power of the Court over their Judgment.

1. If judgment given for the defendant on a special verdict be reversed in the exchequer-chamber, that court shall give the new judgment; but otherwise upon a demurrer, because the court of exchequer cannot award a writ of inquiry of damages. Salk. 403.

2. Where in ejectment a judgment was given for the defendant in the King's bench, and the house of lords reversed that judgment, though it was pretended that the lords could not give the new judgment, because they have only the transcript of the record before them: yet per Holt chief justice, the house of lords have in judgment of law the very record before them; for the writ of error says *recordum & processum*, and not *transcriptum*; and he said further, that where a judgment given for the plaintiff is reversed, the defendant is *in statu quo*, and no new judgment need be given; but here where the first judgment given for the defendant is reversed, a new judgment must be given to put the plaintiff in possession of what he demands; and the court agreed they could not enter a new judgment for the plaintiff, because when they have once given judgment upon the original, they have executed their authority; and therefore upon application to the lords they entered the new judgment. Salk. 403. Phillips v. Berry.

(P* 369) *3. If a rule be granted to stay a judgment till the court be further moved, and the court is then divided, there needs no further rule for judgment; but if it be upon an argument, or a *curia advisare vult*, and the court be divided, there can be no judgment. 6 Mod. 202. but upon a motion in arrest of judgment.

On Actions of Debt.

ment where the court is divided, the plaintiff must have his judgment.

4. If a writ of error be brought in the King's bench upon a judgment in the court of common pleas to abate the writ, and the judgment is reversed; the court of King's bench shall proceed upon the original writ, and give such judgment as the court of common pleas ought to have done, if the writ had not been abated. 2 Saund. 256.

5. So if a writ of error be brought to reverse a judgment given in Ireland or Wales, in the court of King's bench; this court shall give such judgment, as the courts there ought to have done. 2 Saund. 257.

6. If an action of debt be brought upon a contract, and the defendant after an imparlance pleads an outlawry in bar; and upon *nul tiel record*, and a day given to bring in the record, the party fails, a peremptory judgment shall be given. 3 Cro. 566.

7. But if at the time of pleading the plaintiff was outlawed, and before the day of bringing in the record it be reversed, the court shall only give a judgment that the party shall answer over. Yelv. 36. But if the plaintiff prays a *respondeas ouster*, where he might have had a peremptory judgment, a *respondeas ouster* may be entered; and it is no error. Cro. Car. 566. Dawson v. Lee. Cro. Jac. 484.

8. A writ of error was brought upon a judgment in the court of Windsor, for that the judgment was *sed quod ipse sit in misericordia*, whereas it ought to have been *ipse & plegii sui sint in misericordia*; and then it was *nil capiat per narrationem*, whereas it ought to have been *nil capiat per querelam*; judgment was reversed: but per Holt we must give a new judgment, which they ought to have given. 1 Show. 400.

9. If a judgment in an inferior court be for the plaintiff, and upon a writ of error in the King's bench, and judgment is reversed; yet if the record will warrant it, the court ought to give a new judgment for the plaintiff; but if the judgment be erroneous, and against the plaintiff upon the merits of the cause, that judgment ought to be reversed, and a new judgment given for the defendant in error: if an erroneous judgment be given for the defendant, and 'tis reversed, and the merits appear for the plaintiff, he shall have judgment; if the merits appear for the defendant, he shall have a new judgment: so it is in the exchequer, for they are to reform, as well as to relieve and affirm. Salk. 401. 6 Mod. 3.

10. Where an action is brought upon a bond, and the plaintiff demurs to the defendant's plea in bar, and the defendant has judgment upon that demurrer; if that judgment upon a writ of error is reversed (though doubted) yet at last resolved

Readings and Observations

that the plaintiff shall have judgment to recover his debt and damages. 1 Leon. 33. Taylor v. Moore.

11. The King's bench cannot reverse, although it be in the same term, without a writ of error; but this is where error lies in the same cause in the same court, as upon an outlawry; but if no error lies in the same court but in parliament, then the King's bench may reverse the judgment without writ of error being the same term. Poph. 181.

12. If the defendant moves in arrest of judgment, upon which judgment is staid several terms; and then the plaintiff dies, the court may give judgment *nunc pro tunc*, i. e. as of the first term, wherein the plaintiff was alive. 1 Sid. 462.

13. The court may amend their judgments of the same term, because the term (to some purposes) is considered in law as but one day. 3. Lev. 430.

14. But note, to some purposes the whole term is not considered as one day in law, as if a judgment be signed after trinity-term, and a *ca. sa.* be issued out, tested the first day of trinity-term; if the party enters the continuances from the declaration to the judgment, the *ca. sa.* thus issued will be wrong to ground a *testatum ca. sa.* but if he enters no continuances, then the judgment in construction of law relates to the first day of the term wherein it was given; it will be good, and is well issued. Mod. Cases in law and equity 189, 190.

Fifthly, Of the Time and Manner of signing the Judgment.

1. The party against whom the verdict is given, is by law to have four days exclusive of the day in bank, i. e. the day on which the *distringas* or *habeas corpora*, if upon a verdict, or the writ of inquiry, if upon a judgment by default, is returnable, to move in arrest of judgment; and therefore if a judgment final be signed before the four days be expired, it will be irregular, and the court on a motion will set it aside. Salk. 401.

2. But these four days are not to be considered always as a time for the party to move in arrest of judgment, as where the *distringas*, *habeas corpora*, or writ of inquiry, is returnable so late within term, that there are not four days wherein to move in arrest of judgment; or if on the last day of the term, when there is only that day to move for that purpose, yet the party shall have the four days exclusive notwithstanding; for within the

On Actions of Debt.

the four days he may bring a writ of error, and it is construed to be given him for that purpose, as well as the other. 1 Salk. 399. 5 Mod. 205. Mod. Cases in law and equity 237. 1 Salk. 77.

3. So that though the plaintiff does not execute his execution till after the four days; yet if he signs the judgment it will be irregular, and be set aside. Ibid. 3 Salk. 215. 6 Mod. 241.

4. A judgment may be given after the plaintiff's death, if it be within two terms after the verdict. Salk. 401.

5. A judgment cannot be entered up, on a warrant of attorney after a year, without the leave of the court. 6 Mod. 212. But for the necessity of the case a judge will grant such leave in the vacation upon a proper affidavit.

6. In the King's bench the party is obliged to enter a four days rule for judgment; and it is said in Lill. New Pract. Regist. 120. Letter C. 23 & 24 Car. B. R. that the defendant hath all the term wherein a verdict is given to move in arrest of judgment, if the plaintiff has not entered this four days rule, and signed judgment; and in the same book 121. Letter A. that one may move in arrest of judgment given upon a *nil dicit*, at any time during the same term wherein judgment is given; for that there it is said the defendant is more to be favoured in a judgment given against him upon a verdict; because in the former case he makes no defence, but in the latter case it is intended he had made a full defence.

7. The having a rule for judgment gives the party no power to enter up the judgment in another term, as of the term in which the rule was granted; but such judgment was set aside. Hedges and Tempter 13.

Sixthly, Of the Method to be used by the (P 370) Party, to avoid or set aside a Judgment.

A Judgment is to be vacated and rendered ineffectual these three following ways:

First, *By arresting the judgment on a motion to the court.*

Secondly, *Setting it aside for irregularity, or to have the merits*

jud.

Thirdly, *Reversing it by a writ of error.*

First,

Readings and Observations

First, Of Motions in Arrest of Judgment.

1. Arrest of judgment is said to be either for matter intrinsic, i. e. such as appears by the record itself which will render the judgment erroneous or reversible; or extrinsic, i. e. some foreign matter suggested to the court, which proves the writ abated; for it is not enough that it proves the writ abateable only: and the old course of taking advantage in arrest of judgment was thus; the party after a general verdict having a day in court, did assign his exceptions in arrest of judgment by way of plea; and it was called pleading in arrest of judgment. 1 Salk. 77. 6 Mod. 143.

2. Which motion in arrest of judgment cannot be made till the *posse* is brought into court; and as the *posse* in the King's bench is delivered over by the judge's marshal, at the time of the trial to the attorney, for the party, there must be a motion for the attorney to bring it into court; but in the common pleas the associate keeps it till the four days in court are expired for moving in arrest of judgment; so that upon notice given to him he will attend the court with the *posse*, for which you pay him six shillings and eight-pence. 6 Mod. 24. Wood v. Shepherd. Mich. 10 Annæ.

3. And note, there cannot be a motion for a new trial after a motion in arrest of judgment; though there may be a motion in arrest of judgment, after a motion for a new trial has been denied. Salk. 647.

Secondly, Of setting aside a Judgment for Irregularity.

1. In either court of King's bench or common pleas, if the plaintiff's attorney signs judgment before the rules for pleading are out, the court will set aside the judgment if the defendant's attorney applies before the writ of inquiry is executed, but not after; but if it be in debt, where the party had no opportunity to apply to the court before, the court will set aside the judgment signed before the rules were out, or for other irregularities even after execution executed, and order restitution: But note, the court will not set aside a final judgment in case, trespass, &c.

On Actions of Debt.

for irregularity as to the time to plead, or in the service of the process, when the party has neglected to apply to the court after the interlocutory judgment, and before he has put the plaintiff to the trouble and expence of executing his writ of inquiry.

2. Upon payment of costs judgment will be set aside, though regularly obtained, if the plaintiff has not lost a trial. Salk. 402.

3. And if he has, the court will do it in some cases, giving a judgment in debt to stand as a security, and upon payment of costs. Mod. Cases in law and equity 289. and that is the constant practice.

4. But a judgment by default is not to be impeached where the defendant made a defence upon the writ of inquiry. Mod. Cases in law and equity 289. Paterfon v. Dyer.

5. And 'tis said the court of King's bench will not refer a judgment to be examined by the master for irregularity after a writ of error is brought. Pasch. 4 Annæ, 1 Salk. 402.

Thirdly, Of avoiding Judgments by a Writ of Error.

It is proper here to speak somewhat of writs of error; but as Mr. Danvers hath already abridged the cases under that head; and as there is a treatise already called the Law of Errors, therefore what has been adjudged error, and what not, and of other incidents relating thereto, are here omitted; I shall therefore content myself with shewing the several sorts of writs of error, and the practice of the courts relating to writs of error, which is here divided under the following heads:

First, Of the several kinds of Writs of Error, and some few necessary matters incident to the writs themselves.

Secondly, Who may bring a writ of error.

Thirdly, Of the manner of suing it out, and what the party so suing it out is to do thereon.

Fourthly, What the party, who after a writ of error brought is called the defendant in error, is to do to maintain and support, and what the plaintiff in error is to do to reverse the judgment.

Fifthly, What is to be done after the judgment is reversed or affirmed.

Sixthly, Where the parties are entitled to costs.

First,

Readings and Observations

First, Of the several Kinds of Writs of Error, and of some Matters incident to the Writs themselves.

There are Four Kinds of Writs of Error on Judgments.

1. The first and highest writ of error is a writ of error in parliament, which lies upon a suit in the court of King's bench by original, or where the King is a party; and by 31 Eliz. cap. 1. where a writ of error is brought in the King's bench upon a judgment in the common pleas, and the judgment is reversed or affirmed, the party aggrieved may have a writ of error returnable in parliament.

And here it is proper to observe what the late lord chief justice Holt said in the case of the King and Queen and Knollys, Trin. 6 W. & M. B. R. The House of Lords (says he) has no jurisdiction over an original cause mixed with matter of fact, because first, That supreme court is the *dernier* resort; besides, that for the most part original causes are mixed with matter of fact, and it is below the dignity of so supreme a judicature to try a matter of fact; 'tis for this reason error in fact in the court of King's bench must of necessity be redressed before the judges of that court. Secondly, If the parliament should take cognizance of original causes, the subject would lose his appeal so much indulged by the common law in all cases. Causes come not thither till they have tried all other judicatures; for this reason within these four years (adds he) judgment was given against the Earl of Macclesfield in the exchequer, and he brought error in the House of Lords; and the question was whether by 31 El. c. 3. the exchequer-chamber should not interpose; and the writ was abated, and it was held that the exchequer should interpose. 2 Salk. 511.

(P* 371) 2. The Second writ of error is on judgments obtained in the Common Pleas; and there the writ of error is brought, returnable in the King's Bench.

3. The Third is upon erroneous judgments given in the Court of King's Bench, which before the statute of 27 Eliz. c. 8. were reversible only in Parliament; but by that statute a writ of error lies out of Chancery upon all judgments given in the King's Bench, when the suit is by bill (except the King

On Actions of Debt.

King is a party to the suit) returnable in the Exchequer-Chamber, before the Judges in the Common Pleas and Barons of the Exchequer, who are to examine the errors, and reverse or affirm the judgments other than for errors concerning the jurisdiction of the court, or want of form of writs, pleadings, &c. and after the errors are examined, and the judgment affirmed or reversed, the record is remitted back to the King's Bench to proceed and award execution.

4. So that if the suit is by original writ, or upon a *qui tam*, &c. where the King is a party, a writ of error lies only to the Parliament.

This statute reciting, "That erroneous judgments given in the Court of King's Bench had used only to be reformed in Parliament; enacted, that where a judgment shall hereafter be given in the King's Bench in actions of Debt, Detinue, Covenant, Account, Case, Ejectment or Trespass first commenced there, other than such where the Queen shall be a party, the plaintiff or defendant against whom such judgments shall be given, may at his election sue out a writ of error directed (as above) and the persons there authorized to affirm or reverse the judgment other than for errors, &c. and the record to be remitted into the Court of King's Bench for execution to be made there."

Upon which statute the several resolutions following have been given; That this act extends only to such cases wherein there was no other remedy than in Parliament, and not to errors in fact; for those might before have been examined in the King's Bench. 2 Lev. 38. Hopkins and others against Wigglesworth. 1 Ven. 207, 208. S. C. Cro. Jac. 5. so adjudged in the King's Bench, contrary to the opinion of the judges in the Exchequer Chamber, who had reversed the judgment; but the court of King's Bench would not grant restitution upon this judgment to the defendant, who was put out by the first judgment. Vide Cro. Eliz. 731. Price's case, Hob. 5. 3 Cro. 614. W. Jones 413. 411. By these latter resolutions it seems the Court of Exchequer, may by virtue of this statute reverse judgments for errors in fact; but how it shall be tried by a record of *nisi prius* out of the Court of Exchequer, or out of the court where the action was first brought, see the above cases in Cro. Car. and W. Jones.

5. It hath been resolved that this writ of error doth not lie in an action of Replevin, it being *casus omissus* out of the act. 2 Roll's Rep. 438.

6. And that it lies not on a *scire facias* against bail. Yelv. 57. Cro. Jac. 171. Lancaster and Leyleigh, Cro. Car. 300. Jones 325. But in Cro. Eliz. 730. Cockeyn & al' v. Hawkins. It was held by all the judges and barons, except Periam and

Readings and Observations

First, Of the several Kinds of Writs of Error, and of some Matters incident to the Writs themselves.

There are Four Kinds of Writs of Error on Judgments.

1. The first and highest writ of error is a writ of error in parliament, which lies upon a suit in the court of King's bench by original, or where the King is a party; and by 31 Eliz. cap. 1. where a writ of error is brought in the King's bench upon a judgment in the common pleas, and the judgment is reversed or affirmed, the party agrieved may have a writ of error returnable in parliament.

And here it is proper to observe what the late lord chief justice Holt said in the case of the King and Queen and Knollys, Trin. 6 W. & M. B. R. The House of Lords (says he) has no jurisdiction over an original cause mixed with matter of fact, because first, That supreme court is the *dernier resort*; besides, that for the most part original causes are mixed with matter of fact, and it is below the dignity of so supreme a judicature to try a matter of fact; 'tis for this reason error in fact in the court of King's bench must of necessity be redressed before the judges of that court. Secondly, If the parliament should take cognizance of original causes, the subject would lose his appeal so much indulged by the common law in all cases. Causes come not thither till they have tried all other judicatures; for this reason within these four years (adds he) judgment was given against the Earl of Macclesfield in the exchequer, and he brought error in the House of Lords; and the question was whether by 31 El. c. 3. the exchequer-chamber should not interpose; and the writ was abated, and it was held that the exchequer should interpose. 2 Salk. 511.

(P* 371) 2. The Second writ of error is on judgments obtained in the Common Pleas; and there the writ of error is brought returnable in the King's Bench.

3. The Third is upon erroneous judgments given in the Court of King's Bench, which before the statute of 27 Eliz. c. 8. were reversible only in Parliament; but by that statute a writ of error lies out of Chancery upon all judgments given in the King's Bench, when the suit is by bill (except the King

On Actions of Debt.

King is a party to the suit) returnable in the Exchequer-Chamber, before the Judges in the Common Pleas and Barons of the Exchequer, who are to examine the errors, and reverse or affirm the judgments other than for errors concerning the jurisdiction of the court, or want of form of writs, pleadings, &c. and after the errors are examined, and the judgment affirmed or reversed, the record is remitted back to the King's Bench to proceed and award execution.

4. So that if the suit is by original writ, or upon a *qui tam*, &c. where the King is a party, a writ of error lies only to the Parliament.

This statute reciting, "That erroneous judgments given in the Court of King's Bench had used only to be reformed in Parliament; enacted, that where a judgment shall hereafter be given in the King's Bench in actions of Debt, Detinue, Covenant, Account, Case, Ejectment or Trespass first commenced there, other than such where the Queen shall be a party, the plaintiff or defendant against whom such judgments shall be given, may at his election sue out a writ of error directed (as above) and the persons there authorized to affirm or reverse the judgment other than for errors, &c. and the record to be remitted into the Court of King's Bench for execution to be made there."

Upon which statute the several resolutions following have been given; That this act extends only to such cases wherein there was no other remedy than in Parliament, and not to errors in fact; for those might before have been examined in the King's Bench. 2 Lev. 38. Hopkins and others against Wigglesworth. 1 Ven. 207, 208. S. C. Cro. Jac. 5. so adjudged in the King's Bench, contrary to the opinion of the judges in the Exchequer Chamber, who had reversed the judgment; but the court of King's Bench would not grant restitution upon this judgment to the defendant, who was put out by the first judgment. Vide Cro. Eliz. 731. Price's case, Hob. 5. 3 Cro. 4. W. Jones 413. 411. By these latter resolutions it seems the Court of Exchequer, may by virtue of this statute reverse judgments for errors in fact; but how it shall be tried by a record of *nisi prius* out of the Court of Exchequer, or out of the court where the action was first brought, see the above cases in Cro. Car. and W. Jones.

5. It hath been resolved that this writ of error doth not lie in an action of Replevin, it being *casus omisus* out of the 2 Roll's Rep. 438.

6. And that it lies not on a *scire facias* against bail. Yelv. Cro. Jac. 171. Lancaster and Leyleigh, Cro. Car. 300. Jones 325. But in Cro. Eliz. 730. Cockeyn & al' v. Haw-
It was held by all the judges and barons, except Periam and

Readings and Observations

and Glanvill, that a writ of error lies for the bail upon a judgment on a *scire facias*; for this suit against them is within the statute of 27 Eliz. and is in the nature of an action of debt in Cro. Car. 286. in the case of Nevil v. South & al' it was doubted whether it would lie upon a judgment in a *scire facias*, by an executor to have execution of debt recovered by the testator, and whether this *scire facias* being grounded upon an action of debt, be not within the equity of the statute: So in Cro. Car. 464. Bramston Chief Justice, Jones and Berkley doubted: Crook held that he might. 1 Mod. 79. Hales held that he might; because it is in effect a piece of one of the actions mentioned in the statute. Vide Cro. Jac. 384. Cro. Car. 142. Hob. 72. 1 Mod. 297.

7. It lies not in an action of rescue, that action not being mentioned in the statute. Moor 694. Cro. Jac. 171. nor in a Ravishment of Ward. 1 Roll. Rep. 134. nor upon any judgment affirmed upon a writ of error in the King's Bench. 2 Bulstr. 162. nor upon a judgment obtained upon a *scire facias* sued out upon a judgment in the King's Bench. 1 Roll's Rep. 264. nor by a suit there by an original. 1 Saund. 346.

8. It lies upon an action of debt upon the statute for not setting out tithes. 1 Sid. 240. But it is there doubted whether it lies upon the statute for usury, because actions which concern the King, are not within that statute; for which reason in an action upon the statute of *scandalum magnatum*, it hath been held not to lie in the case of Lord Say and Seal v. Stevens, reported in Cro. Car. 135. W. Jones 194. But in the case of Scott and Knapton, in Raym. 275. it was resolved that this writ doth lie in an action of debt upon the statute of 1 Eliz. c. 3. and 23 Eliz. c. 1. for *absenting from church for eleven months*; for the King is not properly a party, though he is to have part of the penalty.

9. Upon these words *that the Judges and Barons, &c. shall reverse or affirm the judgment, and after the same shall be brought back again for the Court of King's Bench to award execution*; this construction hath been put upon the statute, that where the plaintiff in a writ of error is non-suited, or the suit discontinued, the record shall be remitted for the court of King's Bench to award execution, 2 And. 123. So that no execution can be granted out of the Exchequer-chamber. Vide the case of Lumley and Nevil, Stiles 238.

10. And this construction hath likewise been made upon this statute, where a judgment is given upon a demurrer for the defendant; and the court of Exchequer reverse that judgment, and give a new judgment that the plaintiff do recover, the record shall be remitted into the King's Bench, and they shall award a writ of enquiry, and proceed to execution, notwithstanding

On Actions of Debt.

standing it was argued and objected that this is a new judgment not mentioned in the statute; and that it was *casus omissus* out of the act; for otherwise the party would be without remedy; and therefore it was reasonable such an exposition should be made. *Faldoe and Ridge, Cro. Jac. 206. Noy 129. Yelv.*

11. And this construction hath likewise been put upon this statute, that where a writ of error is affirmed in the Exchequer-chamber, that court have executed their power and authority; and therefore if the plaintiff sues out a *scire facias* upon that judgment in the court of King's Bench, and obtains judgment thereupon, which is an adjudication of execution, no writ of error lies upon this adjudication of execution for the reason above; but if a judgment be had upon a *scire facias* brought upon the affirmance of a judgment in the King's Bench, there a writ of error will lie to the court of Exchequer. 1 *Salk.* 63. *Hartop v. Holt.*

12. The Fourth kind of writs of error, is a writ of error *de recordo quod coram vobis residet*, which lies in the court of King's Bench for errors in fact in the judgment in the same court, as for the nonage of the party, want of an original, or other matter which doth not proceed from any error in giving their judgments; but a writ of error of this kind doth not lie for matter of law, for that would be to reverse their own judgments. *Cro. Jac. 254.*

13. So if a record be once removed into the court of King's Bench, and the writ of error be abated or quashed for any imperfection therein; and the record be sufficiently described, a writ of error *quod coram vobis residet* will lie. 1 *Roll's Abr. 753.* Letter Q. pl. 1. *Yelv. 6.*

14. Where a stranger brings a writ of error, and the record is removed; and after he is non-suited, another that has good cause may bring a writ of error *quod coram vobis residet*. (P* 372)
Lev. 107.

15. Where a writ of error is abated by plea or death, the record being well removed, the superior and not the inferior court shall proceed thereupon. *Latch 198. per cur'*, and a writ of error *quod coram vobis residet* will lie. *Stiles 470.*

16. If a writ of error be disagreeable to the record of the judgment, or otherwise bad; yet if the record be removed by another writ *quod coram vobis residet* will lie. 1 *Roll's Abr.* Letter Q. pl. 2.

17. But if a writ of error abates for a mistake of the name of either party, or of the damages: or that the plaint below is mis-recited, or otherwise, that the record is not well removed, a writ of error *quod coram vobis residet* will not lie. *Ibid. 754.*
2 *Bulstr.*

Readings and Observations

2 Bulstr. 170. Latch. 198. Yelv. 212. Cro. Jac. 284. Hob.
72. 1 Roll's Rep. 294. 1 Lev. 137. Cro. Car. 561. Bridg. 56.
57. 1 Roll's Rep. 200. Cro. Car. 310. March 30. pl. 97.

*Where a Writ of Error abates, and where not. Vide Danvers's
Abridgment of Error.*

By an act of 5 Geo. cap. 13. sect. 1. It was enacted, "That
" all writs of error wherein there shall be any variance from
" the original record, or other defect, shall be amended and
" made agreeable to such record, by the courts where such
" writs of error shall be made returnable; and where any
" verdict hath been, or shall be given in any action, &c. in
" any court at Westminster, or other court of record in Eng-
" land or Wales, the judgment thereon shall not be staid or
" reversed for any defect or fault, either in form or substance
" in any bill, writ original or judicial, or for any variance
" in such writs from the declaration or other proceedings."

18. It became a question in Hill. 4. Geo. 2. B. R. upon
writ of error out of Ireland, in the case of the Hollow Sword
Blade Company and Dempsey, where the writ sets forth, that
the defendant in error had recovered against the plaintiffs as
one Francis Edwards, and then shewed the death of T. and
concludes the writ *ad grave dampnum* of the plaintiffs, and
one Mary Edwards, *filia & hæredis prædicti T. E.* whether the
were amendable inasmuch as the counsel for the defendant in
error would have it, was making a new writ by adding the
party M. E. But the court held the writ amendable, and that
it was not like adding a new party, for the right of bringing
the writ did not survive to the company by the death of T.
and that adding the words *ad grave dampnum* of the plaintiffs
and of the daughter of T. was but surplusage. Fitz-G.
Rep. 201.

19. The Fifth writ of error is upon erroneous judgment
in the Court of Exchequer, which by 31 Ed. 3. the Chancellor
and Treasurer taking to them the justices, and other
persons, shall examine the errors; and if any there be, shall
correct the rolls, and send them into the Exchequer, and make
execution.

20. A Sixth kind of writs of error, is a writ of error
Ireland or Wales, or to counties palatine, and to inferior
courts in England.

21. A writ of error lies not to the Parliament of Ireland
nor to the King's Bench in England upon a judgment given
the Common Pleas in Ireland; but a writ of error must

On Actions of Debt.

be brought returnable in the King's Bench there, before it can be brought to the King's Bench in England. F. N. B. 22. Letter E. Yelv. 118. and if judgment in the Common Pleas in Ireland be reversed there, and that judgment of reversal be reversed here in the King's Bench upon the merits, then the judges here must make a mandate to the Chief Justice to make execution; but the record cannot be remanded back to Ireland: But if the judgment here be reversed for a discontinuance of process, or in the pleading; *Quare*, what is to be done, whether the plaintiff in error in *England* may have a writ of error *coram nobis residet* in England; for though in 1 Roll's Abr. 752. pl. 8. it is said, that if a writ of error be brought in the King's Bench in England, upon a judgment in Ireland, that the original is not removed; yet in Yelv. 117. it is said, that at first the transcript only is said to be sent for the danger of its miscarriage; but when it is come safe, and entered in the rolls here, then it ceases to be a record in Ireland, and is a perfect record here; but there it is said, as well as in Cro. Jac. 534. that if the judgment here be affirmed, the Court of King's Bench here cannot award execution, for they have no officer to do it, but must direct a mandate as above.

22. A writ of error lies not upon any judgment in Scotland, because a distinct kingdom, and governed by distinct laws. Cases in Parl. 33.

23. And for cases relating to a writ of error from Ireland, vide 4 inst. 256. Kelway 202. b. Calvin's Case 18 a. 1 Leon. 3. 3 Leon. 159. Yelv. 118. Stiles 386. Vaugh. 290, 402. Roll's Rep. 17. 2 Bulstr. 163.

24. A writ of error lies not to an inferior court not of record. Co. Litt. 288.

25. By the 34 & 35 Hen. 8. cap. 26. Errors in judgments in pleas real and mixed, before the justices in their great sessions in Wales, shall be redressed by a writ of error in B. R. in England; but errors in pleas personal shall be reformed by the president and counsel: But this court is dissolved by 1 W. & M. cap. 27. And by the same act errors in pleas personal are to be redressed, as errors in pleas real and mixed are by 34 & 35 Hen. 8.

26. To what court a writ of error would lie, and to what. Vide Danv. Abr. Tit. error 8, 9.

Secondly,

Readings and Observations

Secondly, Who may bring a Writ of Error.

1. The writ of error shall be brought by him who would have had the thing for which the judgment is erroneously given, if such judgment had not been given. *Dyer* 1. *Ma.* fol. 9. pl. 5.

2. And none can have a writ of error but those who are parties to the record, or who are privy thereto, in construction of law; and all that are defendants in the original action must assign errors, and are compelled to join.

3. For example; where the plaintiff recovers a judgment against B. who afterwards dies, and a *scire facias* is sued on against the tertenants; and three being returned tertenants plead several pleas, and thereupon several judgments are given against them; and afterwards one brings a writ of error, he cannot assign error in the first judgment given against B. *Trin.* 9. *Car.* B. R. *Hill v. Whitlach.* 1 *Roll's Abr.* 756. *Lett. T.* pl. 1.

4. Nor can bail assign errors of the first judgment against the principal, or the principal of a judgment against the bail. 2 *Lev.* 4. *Cro. Car.* 408. but if judgment be had upon a *scire facias* against the bail, and that is recited, 'tis said he may then assign error in the second judgment. 1 *Roll's Abr.* 748, 749.

5. If one brings a writ of error, and he and another assigns errors; this will be good as to him who brought the writ, and void as to the other; but if two bring a writ of error, and one only assigns errors, this is void as to the whole. *Mich.* 9. *Jac. in Scaccario.* *Shakly v. Porter.*

(P* 373) *6. If a judgment be given against B. and the monies of are attached by force of an attachment in London, C. shall not have a writ of error, because he comes in by garnishment only by the custom; and is neither a party or privy to the record. 22 *Ed.* 4. 31. 1 *Roll's Abr.* 747. pl. 10.

7. Executors shall have a writ of error of an outlawry pronounced against the testator; and if it be reversed, they shall have restitution of the goods of the testator. 1 *Leon.* 325.

8. As the defendants in a writ of error are not to recover but discharge themselves from a personal charge; therefore a nonsuit of one shall not hurt the other. 6 *Rep.* *Ruddock case.* Nor shall an outlawry of one of the plaintiffs in error be any plea for the defendant in error, because they are compelled to join. *Cro. Jac.* 616. *Bithall & al' v. Harris.*

On Actions of Debt.

9. But note, if two plaintiffs bring an action of debt, and are barred, it is a good plea that one of them is outlawed to hinder them from prosecuting a writ of error upon that judgment, because they are to recover. *Ibid.*

10. If J. S. binds himself and his heirs in a bond, and thereupon judgment is obtained against J. S. and J. S. makes his will, and makes his heir at law his executor, and dies, leaving lands to descend; it was questioned whether the heir might bring a writ of error; and though it was argued for the plaintiff in error, that notwithstanding the action upon which the judgment was had, was but a personal action; yet as the land of the heir may be charged by the judgment by an *elegit*, therefore the judgment concerns him as heir, as well as executor; and that therefore it is but reasonable that he should bring a writ of error: But by Roll Justice he shall not have a writ of error as heir, for he is not privy to the judgment; and when an extent is made upon him, he is considered as a tenant; but after the lands are taken in execution, he may have a writ of error. Trin. 23 Car. between White and Thomas. Hil. 38, 39. but the cause was adjourned.

11. So the feoffee of him against whom a judgment is given, shall not have a writ of error before the lands are taken in execution; but after he may. Danv. Abridgment of Error, fol. pl. 39. cited in the margin. Godb. 379.

12. If an execution upon a judgment is sued by *elegit*, and the lands only extended; and after the defendant dies, his administrator may have a writ of error, for he is privy to the record, and may *in futuro* have loss by it. Hill 35 Eliz. between Rogers and the Lord Mordaunt, Cro. Eliz. 994. and at the end of the case, it is said, *nota*, that the execution of the land may be avoided, and then the administrator may be damnified.

13. But if a man be outlawed for felony, and dies, his executor may have a writ of error to reverse it; for they are privy to the judgment, and possibly may have all the loss, as if the testator had only goods. Pasch. 33. Eliz. Marsh's case. Cro. Eliz. 5. 273, 274.

14. And the objection that the testator was attainted, and so had no goods, nor could make an executor, was held not material in this suit, which is to reverse the outlawry, by which the disability arises: This case is reported in Owen 147. and it is said that the heir shall have a writ of error to reverse the outlawry in felony, and to restore him to his blood; for it is a part of the punishment to have the blood corrupted, and therefore of the attainder, he cannot attain any ancestor; therefore he having the damage, it is but reasonable that he should reverse it. Vide 1 Lev. 125. 5 Co. 111. a. Cro. Eliz. Godb. 379.

Readings and Observations

15. In a writ of annuity against an heir upon an annuity granted by his ancestor in fee upon *non est factum* pleaded, if a verdict be found for the plaintiff, and thereupon judgment is given that the plaintiff shall recover his costs, damages and arrears of the lands, descended from the same ancestor; and thereupon a writ of execution is awarded to levy it of the lands descended, but no return thereof appears upon the record; and after the heir dies intestate, his administrator cannot have a writ of error upon this judgment, inasmuch as he loses nothing; for if it be levied, it is of the lands descended, the which, nor the profits thereof, he cannot have, nor be restored to it, if he reverses the judgment. Hill 11 Car. B. R. between Franke and Stukely, *per cur'* in a writ of error upon a judgment in Banco. Intratur Hill. 10 Car. Rot. 990. Danvers's Abridgment, Tit. Error 16. pl. 26. 1 Roll's Abr. 749. pl. 26.

16. Where a judgment is had against two defendants in an action of debt, and one of them brings a writ of error, when it should be brought by both; he, who would not prosecute, ought to have been summoned and seivered; which not being done, this was held to be a fault not amendable; and thereupon the writ of error was quashed, and the like judgment was given in Hillary term 6 Geo. in *banco regis*, in the case of Brewer v. Turner, Modern cases in law and equity 305. Cowper v. Ginger.

17. But if two bring a writ of error, and make two attorneys upon the *scire facias*, and one attorney assigns error, to which the defendant takes issue, and then the other would plead in abatement of the writ; *per cur'*, if one of the plaintiffs had made default, he should be seivered; but if they go on they must proceed jointly; and if an attorney for one will assign error, &c. for both, without an authority from both, we cannot help him who gave no such authority; let him take his remedy against the attorney. 6 Mod. 40. Shepherd and Baily.

Thirdly, Of the Manner of suing out Writs of Error, and what the Party so suing them out is to do thereon.

1. Where the plaintiff has obtained a judgment in the Common Pleas, whether by a Verdict or Default, the defendant's attorney is to leave a *præcipe* or a copy of the declaration with the Curfitor of the proper county, as instructions for

On Actions of Debt.

him to make out the writ of error; for which, when sealed, he is to pay thirteen shillings, and must carry it to the clerk of the errors, who at present is Mr. Brewster in the Inner-Temple, for him to allow it; for which he is to be paid two pounds two shillings and six-pence, and he gives you a certificate of the allowance; a copy of which allowance must be forthwith served on the plaintiff's attorney, by leaving him a copy thereof; and if the execution be not served, it then becomes a *superfedeas*; but if it so happens that the plaintiff's attorney, before receiving such allowance, has made out an execution, and delivered the same to the sheriff; so that the sheriff is going on to execute his writ; the clerk of the errors will make out one or more writs of *superfedeas*, and the same must be allowed with the sheriff of the proper county, which he will return to the execution if not executed; but if executed, it comes too late.

2. If the plaintiff's attorney, who hath obtained a verdict or executed his writ of enquiry, if the action be upon the case, or a judgment in debt upon a demurrer, (which obliged the defendant to sue out this writ of error) neglects to sign it, in order to defeat the defendant of the benefit of his writ of error; the court upon a motion, or a judge at his chambers, (if in vacation) on making this appear, will oblige the plaintiff's attorney to sign and enter up his judgment of the term in which it was obtained; so that the defendant may not be tricked out of the benefit of his writ, or will make him sue out a writ of error at his own expence.

3. And this caution is necessary to be given, that when the defendant's attorney in error has carried in the roll, if the plaintiff's *attorney in error knows of any error upon the face of the record, it is proper for him to examine the roll by the issue delivered; and if it varies from it, or if it varies from the declaration where the judgment is by default, he must apply to the court of common pleas, and move that the defendant's attorney in error may make the roll agreeable to the declaration or issue delivered; and then move the court of King's bench that the transcript may be made agreeable to the roll; otherwise that which the plaintiff's attorney in error was advised to be erroneous, will appear right upon the record in error; and the judgment will be affirmed, because the court of King's bench are to judge from the record, as it stands before them. [P* 374]

4. After a writ of error is brought, the plaintiff's attorney in the action below; must take care to procure an original to warrant his judgment, which must be of the same term with the judgment; and therefore in every case where there is a judgment by default, it is incumbent upon the plaintiff's attorney

Readings and Observations

ney to bespeak his original in that term he obtains judgment; though the court of chancery *ex gratia* do give leave for the attornies to bespeak their originals at any time within seven days from the first day of the succeeding term, after the judgment obtained; but afterwards, in case a writ of error is brought, the curfitor will not make it out; and an original upon a petition to the court of chancery has been denied in that case.

5. Care ought also to be taken that the warrants of attorney are filed; but since the late rule in the common pleas that the prothonotaries shall not sign any judgment, till it appears upon the judgment-paper that the warrants of attorney are filed, there can be now no such neglect there. Vide the book of rules.

6. If the judgment was obtained upon a verdict, or upon a bond for the payment of money only, or on a contract; there the party must not only allow his writ of error, but must also put in bail.

7. Which bail are bound that the defendant in the action, now plaintiff in error, shall prosecute his writ of error with effect, and shall pay the money if the judgment be affirmed, or they will do it for him; so that no tender of the body is any discharge of the bail; but they are in effect bound to pay the debt in default of the plaintiff in error.

8. The manner of putting in this bail is thus: the defendant's attorney in the original action, having allowed his writ of error, is to procure the clerk of the errors to carry his bail-book to one of the judges of the common pleas, and there the bail enter into a recognizance in double the sum recovered; and the clerk of the errors first enters a note of this recognizance in his book.

9. And where bail is required, the writ of error is not *superfedeas* till it be thus put in; but the court allows four days for putting it in from the return of the writ of error. *Fan* 120.

10. The defendant has twenty days to except against the bail, which is done by the defendant's attorney in error taking out a rule, and serving it on the plaintiff's attorney or agent to put in better bail; and if that is not done, and such defect is certified, the defendant in error may take out execution. *Mod.* 230. *Gibbon v. Dove.*

11. Though bail is not requisite in the case of a bond for the payment of money, and performance of covenants, because the words of the act are *upon bonds for payment of money only*; yet in an action of debt upon a judgment obtained upon such bond, bail must be put in; otherwise the writ of error

On Actions of Debt.

is no superseadeas. Pasch. 9 Geo. Mod. Cases in law and equity, 122.

12. The not assigning the error is a breach of this recognizance to prosecute the writ with effect, according to the statute of 16 & 17 Car. 2. c. 8. Sid. 294. Cooper v. Price.

The manner of suing out the other writs of error, is the same, as above.

13. When you bring a writ of error in parliament, you leave your instructions with the curfitor, and he gets a warrant from the King and the writ sealed, for which and the writ you pay six pounds one shilling and six-pence, and then you are to get it allowed with the clerk of the errors of the King's bench, for which you pay him four pounds; and then in full parliament the lord chief justice of the court of King's bench carries up the record, and also a transcript thereof to the House of Lords; and after it is there examined, he leaves the transcript with the lords, and brings back the record into the court of King's bench; so that the parliament have only a transcript; and when the judgment is either affirmed, reversed or non-pros'd, the clerk of the parliament will remit the transcript back to the court of King's bench, for them to enter upon record the affirmance or reversal of that judgment, at the end of the judgment given in the court of King's bench for execution to be made there.

14. But though the House of Lords have only the transcript left with them, yet it is proper to consider what the late lord chief justice Holt says as to that point: for in the case of Phillips and Berry, Salk. 403. the question was, whether the House of Lords or the court of King's bench should enter up that judgment; and though it was argued the House of Lords could not, because they have only the transcript of the record before them; and therefore the court of King's bench should enter up the judgment, or there would be a failure of justice: The House of Lords (says he) have in judgment of law the very record before them; for the writ of error says *recordum & transcriptum*, and not *transcriptum* only.

Readings and Observations

Fourthly, What the Defendant in Error is to do to maintain and support the Judgment, and what the plaintiff is to do to reverse it.

1. The attorney for the defendant in error, after notice of the writ of error and of bail, (where necessary) is to carry in his roll to the prothonotary's office, and there docket it, and get the clerk of the judgments to enter up the final judgment, and then carry it to the clerk of the errors, who from thence having transcribed the record, transmits it to the court of King's bench, and leaves it with Mr. Hawley at the King's bench office; and then the defendant's attorney is to sue out a *scire facias* to assign errors, which must be served upon the plaintiff in error, by the delivery of a notice to him, which is done by the sheriff's officer.

2. And if the sheriff summons not the plaintiff in error on the first *scire facias*, but returns a *nihil* thereupon; then you must make out an *alias scire facias* returnable fifteen days after the return of the first; upon which last *scire facias* you must get the sheriff to return a *nihil*, and these two *nihils* thus returned, amount to a *scire feci*.

3. After the return of the *scire facias*, where there is a *scire feci* returned, or of the second *scire facias* where there are two *nihils*, the defendant in error must enter a rule with the clerk of the rules, for which you pay one shilling and four pence, for the party to appear within four days and assign errors, of which rule there needs no service; and if he does not, the defendant must get another rule from the clerk of the rules, for which you pay likewise one shilling and four pence, for the plaintiff in error to assign errors *de recordo* within four days more; and if errors *de recordo* are not assigned within the time, the defendant in error being possessed of the transcript, is entitled to a **non-pros*, which is signed by the master of the King's bench: this last rule must be drawn up and served as other rules; but the first is never drawn up, but given in the manner as you give rules upon other writs of *scire facias*.

That being done, if the defendant in error assigns the general errors, and the plaintiff's attorney is well satisfied that the writ of error is merely for delay; and there is nothing wanting to complete the judgment, he is to deliver to the plaintiff's attorney in error a plea of *in nullo est erratum*.

When

On Actions of Debt.

When the defendant's attorney hath joined in error, he must move the court by counsel, that the cause may be made a *concilium*; which is no more than a prayer that the court will advise themselves concerning this cause, and appoint a day for the parties to hear judgment.

This rule for a *concilium* is to be drawn up with the clerk of the rules, for which you pay him three shillings, and heretofore it used to be served upon the attorney or agent for the plaintiff in error; but now the common practice is not to serve it, but the plaintiff in error must watch it himself; for, in truth, it is his business to prosecute his own writ; but only the defendant in error does it that there may be no affected delay.

When the rule is drawn up, then the defendant in error is to enter the cause in the paper of causes, with one of the clerks of the papers, viz. with him to whom it properly belongs; for one of the clerks of the papers, viz. Mr. Bonton, enters all causes whose plaintiff's initial letter of his name begins with any letter of the alphabet to M. inclusive; and the other, viz. Mr. New, enters all causes whose plaintiff's name hath any of the other letters of the alphabet for the initial letter; and you pay, for setting down the cause for argument, one shilling.

When you have drawn up the rule for a *concilium*, and set the cause down for argument in the paper of causes, the attorney or agent for the defendant in error, whose business it is to speed the cause, must get one paper-book engrossed for his counsel to argue from; so likewise the attorney or agent for the plaintiff in error; and he is to leave two copies thereof with the two senior judges; and the defendant's attorney two with the two puisne judges of the court, two days before the day of argument; but, lest the plaintiff's attorney in error, whose business it is to delay the cause, neglects to leave two books, one with the chief justice, the other with the senior judge; it will be discretion in the attorney for the defendant in error to get two more copies ready for him to leave with the chief judge and the senior judge; which he may do, if the plaintiff in error neglects to do it, two days before the argument; and then the plaintiff in error cannot be heard: This now is said to be the practice, though heretofore it has been usual for the defendant in error to leave the four paper books with the judges; and if judgment was affirmed, the defendant used to be allowed them in costs; the parties pay with each paper-book to the judge's clerk two shillings.

The defendant having proceeded thus far, must be ready with his counsel at the day for which the cause is appointed to be heard, to pray that the judgment be affirmed, or argue the errors, if it is a matter that will bear litigation; and the defendant's

Readings and Observations

pendant's attorney must take care to have the roll filed, and the file of rolls brought into court, and not to have the roll in his pocket, if it be of the second or third term after the joining in error; for if in that case it be thus produced without being filed when the rolls are filed, it is not deemed by the court a record, and shall not have that sanction and respect that is paid to records; and several causes have gone over to another term, by the neglect of filing the roll, before the cause came on in the paper; but otherwise where the records of the court are not filed and bundled up, as they are not in the same term that the errors are joined of; and there the roll being produced, I apprehend 'tis sufficient.

Of the Assignment of Errors alledging Diminution, and praying a Certiorari.

In assigning Errors, these Rules must be observed.

1. That a man cannot assign that for error which is contrary to the record. 2 Bulstr. 243, 244. Cro. Jac. 359, 597. 1 Lev. 76. 1 Roll's Rep. 53. Cro. Eliz. 677. Yelv. 33, 34. a matter which might have been pleaded to the *scire facias*, shall not be assigned for error in the judgment had thereupon. 1 Salk. 262. Lampton v. Collingwood. The same point adjudged in the case of Wickett and others against Creamer, 1 Salk. 264.
2. A matter against the certificate of the justices of record cannot be assigned. 1 Roll's Abr. 757. pl. 1.
3. Nothing can be assigned for error which is not in the court where the writ of error is brought. 11 Hen. 4. 47. b. Fitzh. Error 63. Br. Error 46. S. C. 1 Roll's Abr. 760. Letter A. pl. 1.
4. As if a man recovers, and hath judgment in a *scire facias* upon the first judgment, if a writ of error be brought upon the judgment on the *scire facias* only, he cannot assign error in the first judgment; for that was not before the court. 1 Roll's Abr. 760. Letter A. pl. 2.
5. It is generally true, that a man shall not assign any matter for error that was to his advantage, 5 Co. 39. but if the error arises by the default of the court, he may assign matter for error that was an advantage to him. Mich. 15 Jac. B. R. between Holmes and Twiste, per cur. 8 Co. 59. Beecher's case, 1 Roll's Abr. 759. Letter Y. pl. 1, 2, 3, 4, 5, 6.
6. But a man cannot assign any error in process or delay which turned to his advantage. 1 Roll's Abr. 760. pl. 7. 8 Co. 59.

On Actions of Debt.

7. If a judgment wants somewhat to make it a compleat judgment, as the want of the warrant for his own attorney to defend; though it be his own default, he may assign it for error. 1 Roll's Abr. 760. Letter Z. Br. Assize 56. Fitzh. Judgment 71. S. C. 1 Roll's Abr. 758. Letter X. pl. 1.

8. 'Tis said in 1 Roll's Abr. 762. Letter F, pl. 1. that after a *scire facias* awarded against the defendant, he cannot assign any error in fact. 22 Ed. 4. 45. b. Fitz. N. B. 20 E. 8. H. 4. 23. and time was denied *per curiam* to assign errors after the time to assign errors upon the *scire facias* was expired; for the writ of error is delay enough. Stiles 208. Hudson's case.

9. A man may assign error in law upon a judgment by default; so he may assign an error in fact in that case. 1 Roll's Abr. 756. Letter S. pl. 6. But a man cannot assign error in law, as the general errors, and error in fact likewise. 1 Roll's Abr. 761. Letter E. pl. 1. But though the party may demur to it, yet the assignment of the error in fact, is no waiver of the error in law. 1 Sid. 147. 1 Leon 105.

10. But if a man pleads *in nullo est erratum*, it is a confession of the matter of fact; and if the fact assigned for error, supposing it to be true, (which is made so by pleading *in nullo est erratum*) is a bar to the plaintiff's action, the judgment shall be reversed: as where a man, plaintiff in error, assigns the general errors, and further assigns that the defendant in error being an infant, appeared in the court below by attorney, when he was an infant; and the defendant in error pleads to the assignment of errors *in nullo est erratum*; the defendant in error shall *not have any advantage of the assignment of errors being double, inasmuch as he acknowledges himself to be within age, which is a matter of fact. Mich. 11 Car. B. R. between Mayhew and Basnet adjudged, and a judgment given in the inferior court reversed accordingly. 1 Roll's Abr. 761. pl. 2. [P* 376]

11. If the plaintiff in the writ of error assigns an error in fact, if the defendant will put the truth of the fact in issue, he ought to rejoin by a denial of the fact, and so join issue thereupon; and ought not to plead *in nullo est erratum*; for he thereby acknowledges the fact alledged to be true. Dyer. 3 E. 6. 8. 7 E. 4. 16. and 9 E. 4. 32. b.

12. So that in some cases the plea of *in nullo est erratum* is in construction a plea, and in some a demurrer. Cro. Jac. 29. Cro. Car. 53. 1 Lev. 311.

13. *In nullo est erratum* is a confession of a fact well assigned; but not of a matter assigned contrary to the record. Cro. Jac. 12. 511. Raym. 231. 1 Lev. 274. Bro. Error 165. Fitzh. Error 43. S. C.

14. When

Readings and Observations

14. When an error in fact is assigned, if the defendant will acknowledge the fact to be as alledged, and yet that by law it is not error, he ought to rejoin *in nullo est erratum*; for by this he acknowledges the fact, but that by law it is not error. Dyer. 3 E. 6. pl. 7. 1 Roll's Abr. 763. pl. 3.

15. If error be alledged in the body of the record *in nullo est erratum*, is a good rejoinder; for this puts the matter in the judgment of the court, the record being agreed to be so. 9 E. 4. 32. b. Bro. Title Error 93. S. C. 1 Roll's Abr. 763. pl. 4.

16. So if error be alledged in a matter of record which is not in the body of the record, but in a collateral matter, *in nullo est erratum* is a good rejoinder; for if the plaintiff in error does not alledge diminution, and pray a *certiorari*, and get it returned that such a thing is wanting before the rejoinder of *in nullo est erratum* is entered; the assignment of such defect is of no force, but void, as this is to be tried by the record itself, and no diminution can be alledged after such rejoinder entered, 9 E. 4. 32. b. 7 E. 4. 16. For if the defendant will confess the error, yet the court ought not to reverse the judgment till they are ascertained of the error by the record itself. 1 Roll's Abr. 764. Letter K. pl. 5. Fitzh. Tit. Error 43, 45. Bro. Tit. Error 93, 165. 1 Leon. 22.

Of alledging Diminution, and praying a *Certiorari*.

17. A man cannot alledge diminution contrary to the record which is certified. Pasch. 4 Eliz. B. R. 1 Roll's Abr. 764. Letter L. pl. 1.

18. No diminution can be alledged of records out of inferior courts, but the court must take them as they find them. 1 Salk. 266. Hale v. Clare. Vide 1 Ven. 6. 2 Cro. 108, 109. Jones 304. Cro. Eliz. 282. Hob. 134, 264, 282. 1 Sid. 40. Godb. 267. But diminution may be alledged upon a writ of error upon a judgment in Wales and counties palatine. 1 Sid. 147, 374. So it may upon a writ of error on a judgment before justices of Oyer and Terminer. 1 Sid. 40.

19. After *in nullo est erratum* pleaded, the court to inform their consciences may award a *certiorari* to amend the record. Pasch. 11 Jac. Co. 5. Bishop 37. 1 Roll's Abr. 764. Letter M. pl. 1. Far. 104, 124. Wood v. Branford, the same point 6 Mod. 113, 114, 206. 1 Lev. 9. 1 Jones 177. 1 Sid. 37.

On Actions of Debt.

20. So after *in nullo est erratum* pleaded, the court may (as it is said) award a *certiorari* to reverse the judgment. Pasch. 1 Jac. B. R. between Hunsley and Osborn. Adjudged Co. Lib. 6. Entries fol. 267, 268. Boswell's Case; and fol. 242. Downal's Case, fol. 266. Lancast and Loa. Mich. 2 Car. between Weaver and Felton adjudged. Intratur Hill. 1 Car. Rot. 467. B. R. 1 Roll's Abr. ibid. pl. 2. Cro. Eliz. 155. 281, 836, 837. 2 Leon. 3. Cro. Jac. 6, 92, 93, 141, 445, 446.

21. If after *in nullo est erratum* pleaded, another part of the record is brought in by *certiorari*, and made of record; there the court ought to reverse the judgment if the matter so requires. Co. 5. Bishop. 37. b. Roll's Rep. 413. 14 Jac. between the bishop of Rochester and Long adjudged; which Intratur Pasch. 33 Eliz. Rot. 361. 3 Bulstr. 224.

22. After *in nullo est erratum* pleaded, if one party alledges upon record a diminution of the record to reverse it, and prays a *certiorari* to certify it; and thereupon a writ of *certiorari* is sued out, and the record thereupon is certified; but before it is entered of record, the court is informed of this matter; this shall not be received, because it comes in by the prayer of the party after *in nullo est erratum* pleaded, which is not to be allowed; but upon information to the court, the court may grant it. Mich. 2 Car. between Weaver and Felton B. R. adjudged, and such certificate disallowed, and a new writ of *certiorari* granted by the court; which Intratur Hill. 1 Car. Roll 647. and then the record of the bishop's case was shewn to the court, where the defendant did not plead *in nullo est erratum*, as the book is, Co. 5. 37. b. but it passed against the defendant by *nil dicit*; and after diminution alledged, as it is in the book. 1 Roll's Abr. 765. pl. 4. Jones 139, 140. S. C. And there said that the record of Bishop's case does not agree with the record, for that the defendant had not pleaded *in nullo est erratum*.

23. By the defendant in error's pleading *in nullo est erratum*, he admits the record perfect; for the effect of the plea is, that the record as it is, is without error, therefore he cannot come and alledge diminution afresh; but where the court by the inspection of the record may affirm the judgment, they are not foreclosed as to any part of it; but may award a *certiorari* to inform the conscience of the court, notwithstanding the party himself cannot pray a *certiorari*. 1 Salk. 270. Meredith v. Davis; and a case was cited of Carlton and Mortagh in 1 Salk. 268. where the defendant in error pleaded a release before a *certiorari* returned, and mispleaded it; so that it was a full confession of the party that there was no original; yet the court awarded a *certiorari*, which they will do to inform the conscience of the court; but

Readings and Observations

but it is said that it had been otherwise if infancy had been assigned for error, or a matter of fact, which did not appear on the face of the record; for there the court must go on to determine the writ, and whether there be error in the record or not: But Holt Chief Justice was of opinion that the court could not award a *certiorari*, because the question was not whether error or not, but whether barred or not by the release, and that the want of an original was certainly error in this case, which the defendant had confessed, by coming in *gratis*, he had prevented the plaintiff, and hindered him from completing his error by taking out a *certiorari*; and therefore the court must take it to be as the plaintiff had admitted; and also that the court is not at liberty to depart from the point referred to their judgment; for at that rate they strike out the plea in bar and the demurrer, and give judgment on the *certiorari*.

24. In trespass in B. R. judgment was given for the plaintiff by default, and a writ of error brought *in camera scaccarii*, and there assigned for error that there was not any writ of inquiry of damages filed; upon a writ of *certiorari* it was certified that there was not any such writ; yet after another *certiorari* was granted; and upon this the writ of enquiry was certified; and upon this the judgment was affirmed. Hill. 5 Car. between Roror and Escourt adjudged. 1 Roll's Abr. 765. pl. 5. Note, in Mich. 4 Geo. 2. B. R. in the case of Mallory and Jennings the want of a writ of inquiry was adjudged no error. Fitz. 162.

[P* 377] *25. After judgment in B. R. a writ of error was brought *in camera scaccarii*, and the want of continuances were assigned for error; and upon a *certiorari* the want of continuances were certified; and upon this the judgment was affirmed. Hill. 5 Car. between Waterhouse and Coply adjudged; and a like case between Travis and Scott. 1 Roll's Abr. *ibid.* pl. 6.

26. So in a writ of error, if error be assigned in the original, and upon a *certiorari* granted, an erroneous original is returned, and upon this in *nullo est erratum* is pleaded; and after the court *ad informandam conscientiam* grant another *certiorari* for another original, and upon this a good original is certified; the court ought to intend that this is the original upon which the judgment was given. in favour of judgments, which ought to be intended to be good. Mich. 1649. between Kerton and Avery, and the judgment *in banco* affirmed accordingly. *Intra tur* Mich. 23 Car. Rot. 239. 1 Roll's Abr. 765. pl. 9. Stiles 175, 176.

27. So where a writ of error was brought on a judgment in C. B. and the want of an original was assigned for error; the defendant in error came in *gratis*, and prayed a *certiorari*; and thereupon a variant original was certified; Upon this he came

On Actions of Debt.

again at the day given, and suggested another original of such a term, and prayed another *certiorari*; this appearing on the master's report, the question was whether it was regular: *Et per* Holt Chief Justice, if a record below be of Easter-term, and the want of original be assigned for error, the defendant may alledge diminution, and then a *certiorari* goes to the *custos brevium* only, to certify an original of Easter-term, that being the term of which the *placita* is; if then, the *custos brevium* certifies a wrong original, or that there is no original; then the defendant may come and suggest before *in nullo est erratum* pleaded, that there is an original of another term, viz. Hillary or Michaelmas, and then there must go a *certiorari* to the *custos brevium*, to certify that, and another to the Chief Justice of the Common Pleas, to certify the continuances; also if the *custos brevium* certifies a wrong original of the same term the *placita* is of, it has been held, that the defendant may suggest there is a right original even of that very term; and when both are before the court, the court will apply the record to that which is a good original. 1 Salk. 266, 227. 2 Cro. 279. for they ought to intend more favourably for the judgment. 1 Roll's Abr. 765. pl. 8. the same point Cro. Car. 91. S. P. Godb. 407. 2 Roll's Rep. 352, 353.

28. In a writ of error of a judgment in C. B. after a verdict, the plaintiff in error assigned for error the want of an original, but did not take out a *certiorari* as the course is; the defendant in error pleaded *in nullo est erratum*; and when the cause came on, in the paper, it was objected that there ought to have been a *certiorari* taken out, and a return of the want of an original upon that; for there might be an ill original which is not aided by a verdict, though the want of an original is: *Et per* Holt Chief Justice, if the want of an original be assigned for error, and the plaintiff in error does not sue out a *certiorari*, the course is for the defendant in error to go to the master of the office, and get a rule for the plaintiff in error to return his *certiorari*; and in case he does not get it done accordingly, the assignment of error signifies nothing; but if the defendant in error will come *gratis* and confess the error, there need be no *certiorari* returned; and as to the objection that there may be a bad original in this case, that is another kind of error; for when the want of original is assigned for error, the court will never intend a bad original; the judgment was affirmed. 1 Salk. 267. Smith v. Stoneard.

29. If a writ of error be brought upon a judgment in B. R. in Ireland, in a writ of false judgment upon a judgment in the Tholsel, (which is the court of the Mayor and Aldermen of Dublin) and it is assigned for error, that there was no plaintiff entered in the Tholsel, and that these words *per quod actio accrevit*

Readings and Observations

writ were omitted in the conclusion of the declaration; if the defendant alleges diminution, yet he shall not have a *certiorari* to the Chief Justice *de B. R.* in Ireland, to certify the residue of the record, &c. and that if any part of the record be not before him, that he should write to the Mayor and Aldermen to certify it, and that he should certify it to this court; for by his plea of *in nullo est erratum* in *B. R.* in Ireland, he hath admitted the record well certified by the Mayor and Aldermen; and this court hath no authority to require the court *de B. R.* in Ireland to write to the Mayor, &c. and the judgment in *B. R.* in Ireland, is only here in question. Pasch. 20 Jac. between Bannister and Kennedy, Palmer 285. Such writ being issued, a *superfedeas* was granted to the whole, tho' it was prayed that the *superfedeas* should be as to the inferior court only; but at another day, it being moved that there might be a *certiorari* as to the words *per quod*, &c. it was granted.

30. In a writ of error in the Exchequer-Chamber upon a judgment in *B. R.* it was assigned for error, that in the bill the plaintiff declared on a lease for three years upon the plea-roll; upon which the issue was joined, and in the record of *nisi prius*, it was upon a lease for five years; so that the bill and declaration vary, and diminution being alleged by the plaintiff, a bill was certified, in which it was only for three years; upon which the defendant had another *certiorari*; and thereupon a bill was certified, wherein he declared upon a lease for five years; which warranted the declaration upon the roll and the *nisi prius*, Trin. 1 Car. between Howell John and Thomas, Cro. Car. 91. It was held by all the justices and barons that the second certificate upon diminution alleged by the defendant should be received; for that warranting the roll and the record of *nisi prius*, shall be intended the true bill, and the other a fictitious one.

31. Where the want of a bill is assigned for error, the court may indulge the plaintiff so far as to give him leave to file one; but never after the Chief Justice has certified the want of a bill in that term. Trin. 10 Geo. Modern Cases in Law and Equity. 284, 285.

32. Where the defendant in the original action in the King's Bench brings a writ of error in the Exchequer-Chamber, there is no *scire facias* to be sued out and served as in the King's Bench upon a judgment in the Common Pleas; but when the writ of error is sealed, the defendant (who then becomes plaintiff in error) is to get his writ allowed with the clerk of the errors in the King's Bench, which is now Mr. Robert Salkeld, who, or his deputy, generally attends at the King's Bench Office) and having paid for the allowance, the defendant in error must give a rule with the clerk of the errors in the King's

On Actions of Debt.

King's Bench to transcribe the record; and when that is done, the plaintiff's attorney in error must leave money with the clerk of the errors in the King's Bench to transcribe according to the length of the record; and then he sets about transcribing the record, which he generally takes a term to do: When the record is transcribed, the clerk of the errors of the King's Bench sends to the plaintiff's attorney in error, to come and pay him the rest of the money due for transcribing the record; which, if he does not, the clerk of the errors will then sign a *non-pros*, whereby the defendant in error is at liberty to take out execution; but if he does pay for the transcript, then the clerk of the errors in the King's Bench delivers over the transcript to the clerk of the errors in the Exchequer-Chamber, and he gives a rule of that term that the transcript *comes in to [P* 378] alledge diminution; and in the next term he gives a rule to assign errors; neither of which rules need be served; if no errors are assigned, the clerk of the errors in the Exchequer chamber signs a *non-pros*, if any special errors are assigned, and the plaintiff in error intends to argue those errors, he must give ten days notice to the clerk of the errors in the Exchequer-chamber that he intends so to do; and the Chief Justice of the Common Pleas is then to be waited on by the clerk of the errors to know what day he will please to appoint to argue the errors; and the Chief Justice having appointed a day, the clerk of the errors gives notice to the Barons of the Exchequer of the day and place, which is generally at Serjeant's-Inn Hall, if the Chief Justice's Chambers are there; and then the errors are argued upon the day appointed, before the Barons of the Exchequer and two of the Judges of the Common Pleas; or if all the Barons of the Exchequer are not there, then two or three, or all of the Judges of the Common Pleas must sit with the Chief Baron or Barons, so as to make up six of the Judges and Barons of the degree of the Coif, that number being appointed by the statute to hear errors in the Exchequer-chamber; and afterwards the defendant in error gets the clerk of the errors to set down the cause in the paper of errors, and upon the paper day, the court of Exchequer, and the Judges, who sat upon the errors, confirm or reverse the judgment; and then the attorney for the defendant, or plaintiff in error, according as the judgment is either affirmed or reversed, gets the clerk of the errors to enter up the *assimetur* or reversal, and then he remits it back to the clerk of the errors in the King's Bench to award execution or restitution, as the case is.

Note; There are but two days in every term on which writs of error are returnable in the Exchequer-chamber; one whereof is towards the beginning, and the other towards the end of the term, and are appointed by the Barons; and those days are generally

Readings and Observations

generally appointed the paper-days for the Barons and the Judges, &c. to confirm or reverse judgments brought before them.

Note; The plaintiff in error generally brings the writ for delay, or if not, yet as he is to have no costs upon the reversal of a judgment, he cares not how long the decision is procrastinated; so that it is the defendant's business to spur him on by the before-mentioned method of suing out a *scire facias* to shew cause, *Quare executio non*, which cause, is sufficient by assigning errors; but if the defendant in error brings his writ for a real error, and thinks that the merits upon a writ of error are for him; his method to have the judgment reversed, is by suing out a *scire facias ad audiendum errores*, which must be made out and signed by the clerk of the King's Bench Office; for signing which you pay him one shilling and eight pence, and leave a *præcipe* with him, and then you get it served upon the defendant in error, and enter a rule thereupon with the clerk of the rules, and make an entry thereof upon the roll, and of the plaintiff's default, and move to make it a *concilium*, and reverse the judgment of course.

Fifthly, What is to be done after the Judgment is reversed or affirmed.

1. When the judgment is affirmed, the defendant in error must draw up the rule of court to affirm the judgment, and may proceed against the defendant by taking out an execution on the *affirmetur*, or bringing an action of debt upon the judgment, or may proceed against the bail by a *scire facias* upon the recognizance: To which *scire facias* the bail cannot plead that the defendant in the original action rendered himself, because the tenor of the recognizance is not that he shall render himself; but that he shall prosecute the writ of error with effect, and pay the condemnation-money, if judgment be affirmed. 3 Bulstr. 191. 2 Cro. 402. 1 Roll's Abr. 334. 3 Mod. 87.

2. It is said that no *capias* lies against the bail upon a recognizance acknowledged by the bail in B. R. for they only bind their goods and chattels. 1 Roll's Abr. 898.

3. If to a *scire facias* against bail on 3 Jac. 2. c. 8. in a writ of error, the bail plead that the principal defendant did prosecute his writ of error with effect, and that the judgment was reversed; they ought to plead *prout patet per recordum* of the reversal. 1 Keb. 185.

On Actions of Debt.

4. And to a *scire facias* upon the affirmance of a judgment in the Exchequer-chamber, it is no plea to say that the judgment was not affirmed *prout patet per recordum* in the Exchequer-Chamber; for they are estopped by the record. 3 Keb. 362. Roberts v. Reeve.

5. Where the bail to the *scire facias* pleaded a release to the principal, and bail of debts, judgments and executions made after the first judgment, and the writ of error brought, and bail entered, and before the affirmance of a judgment; upon a demurrer this was adjudged a good bar in this suit; for notwithstanding the principal party is out of prison, he may yet satisfy the condemnation, and the surety is not liable to satisfy but in his default of payment; and therefore a release to him is good enough; and in this case it is a good release to the bail, for the sum which they are to satisfy is certain, by the first judgment; and therefore not like to the case of Hoe and Marshall in 5 Co. 70. where a release to one of the bail in B. R. before the judgment was adjudged void; for then at the time of the release there was not any just cause of action; nor was there any duty due by the bail, until the principal is condemned, and made default of payment. Cro. Jac. 401. Harrison v. Huxley & al.

6. There is this difference taken where a writ of error is brought by the plaintiffs in the original action, and when by the defendants; for if two plaintiffs are barred by an erroneous judgment, and afterwards they bring a writ of error, the release of one shall be a bar to the other, because they are both actors in a personal thing to charge another; and it shall be presumed a folly in him to join with another, who might release all.

7. But where the defendants bring a writ of error 'tis otherwise; for it being brought to discharge themselves of a judgment, the release of one cannot be a bar to the other, because they have not a joint burthen, and by law are compellable to join in errors. 3 Mod. 135. Vide Cro. Eliz. 648. Cro. Jac. 116.

8. The principal and bail are not to join in a writ of error in this action. 1 Bulstr. 125. Hooker v. Robinson.

9. Where pending a writ of error one dies, whereby the writ is abated, the party may take out execution, and there needs no *scire facias* but only a suggestion upon the roll, with *quod non dedicit*, or *quia apparet curiae super examinationem*, that he is dead. Comb. 441, 442.

10. But where a writ of error abates by motion, the defendant in error must move for leave to take out execution; but where, by reason of variance, the record is not removed, he need not move the court to have execution. 1 Salk. 264, 265.

Sixthly,

Readings and Observations

[P* 379] * Sixthly, Where the parties are entitled to have or pay Costs.

1. Costs by the statute of 3 Hen. 7. are given to the defendant in error, in case his judgment be affirmed upon a writ of error brought *in dilacione Executionis*; and therefore if a writ of error is brought after the execution executed to have restitution, the defendant in error is not entitled to costs; because the writ in that case cannot be said to be *in dilacione Executionis*. Cro. Jac. 636. Eardley v. Turnoch. Raym. 134. 2 Keb. 673.

2. Before the statute of 8 & 9 W. 3. cap. 11. if the defendant had judgment in the Common Pleas, and the plaintiff in that action brought a writ of error; and the judgment for the defendant was affirmed; he could have no costs, because the writ of error could not be said to be brought *in dilacione Executionis*. Cro. Car. 363, 401. *Bogton v. Nicholls*.

But by that statute, "If any person shall commence in any court of record any action or suit, wherein upon a demurrer judgment shall be given against the plaintiff or defendant; or if at any time after judgment given for the defendant, the plaintiff shall sue a writ of error, and the said judgment shall be affirmed, or the said writ be discontinued, or the plaintiff nonsuit therein; the defendant shall have judgment to recover his costs against such plaintiff, and execution by *Capias ad satisfaciendum*, *Fieri facias*, or *Execution*." *git.*

Note; No costs are to be assesse'd where the defendant in error does not appear to the *Scire facias*, but is *non-pross'd* for not appearing.

3. If a writ of error is brought in Parliament for delay, and the plaintiff in error there assigns error, and the judgment is reversed; and it appears that the plaintiff in error brought his writ only to delay the plaintiff in the original action; the Parliament gives the defendant such costs as shall be deemed a punishment for troubling that supreme court in that manner only to procrastinate the payment of a just debt; and are therefore called exemplary costs, amounting sometimes to one hundred pounds, sometimes to two hundred pounds, or more at the discretion of the Lords.

4. Costs were denied to be given to the defendant in error where there were no costs in the original action. 1 Lev. 136. 146. b.

On Actions of Debt.

146. but Cro. Eliz. 617, 658. to the contrary; and that costs are to be given always where there is a delay of execution.

5. If a man is bail for B. in the King's Bench, and judgment is there given against B. and B. sues out a writ of error returnable in Exchequer-Chamber, and judgment is there affirmed, and costs assessed; the bail are chargeable with the money recovered by the judgment only, and not with the costs upon the writ of error. Noy 18. Cro. Eliz. 587, 588.

Seventhly, Of the effect of a Judgment, and to what time it shall relate.

1. Lands are bound as to Purchasers from the time of signing the judgment. 3 Salk. 159.

2. The bringing an action of debt upon a judgment is no waiver of the Lien of the judgment. 1 Salk. 80.

3. By the statute of frauds and perjuries 29 Car. 2. Cap. 3. Lands are bound by judgments but from the very day whereon judgment is signed by the judge, or master of the office; and the day of signing is to be enter'd on the margin of the roll whereon the judgment is enter'd.

4. By the act of 4 & 5 W. & M. cap. 20. all judgments were to be docketted, and no judgment undocketted to affect a purchaser or a mortgagee, or to have any preference against heirs, executors or administrators, in their administration of their ancestors, testators, or intestate's estates: This was at first but a temporary act, but made perpetual by an act of 7 & 8 W. 3. c. 26.

5. A judgment to bind the goods may be signed after the defendant's death, notwithstanding the statute of frauds and perjuries; and the court declared they would not make any use of the day of signing the judgment, but only for the relief of purchasers, as the statute intended. Hill. 2 & 3 Jac. 2 *Stamper v. Kinsey*, Faresley 39. Duke of Norfolk's case, the same point adjudged; and in the case of Oades and Woodward reported in Faresley 93. and in 1 Salk. 87. W. had given a warrant of attorney to enter up a judgment against him as of Michaelmas, or any other subsequent term; and before judgment enter'd he dy'd; and after the attorney enter'd up the judgment, as of a term when the party was alive, notwithstanding an objection that this was a kind of fraud, and that a letter of attorney was revocable, and that the death was an actual revocation; and that therefore the attorney had no authority to con-

Readings and Observations

self the judgment, and that the statute of frauds and perjuries had made a difference in the case; for before that statute a judgment related to the first day of the term of which it was entered; but since that statute it relates only to the time of actual signing it: But, per Holt chief justice, if this be a fraud, it is a *Pia fraud* to get a just debt by a due course of law; and he agreed that a warrant of attorney was revocable in its nature; but if there be a warrant of attorney to confess a judgment, and after the defendant comes and revokes it before it is enter'd; yet the attorney shall enter it notwithstanding the revocation: If a judgment be enter'd in the vacation, and a writ is taken out against the party's goods, as of the term before, yet the writ shall levy the money in the hands of his executors; and held, that the statute of frauds, &c. makes no alteration as to goods, but binds them only from the delivery of the writ to the Sheriff.

But if a feme sole gives a warrant of attorney, and afterwards marries; that is a revocation of the warrant of attorney, and judgment cannot be enter'd up thereon, as reported in Salk. 399.

6. A judgment when signed shall relate to the first day of the term precedent. Mod. Cases in law and equity 189, 190, 310.

7. A judgment in the Common Pleas relates to the Effoin-day of the term, and shall be a judgment from that time; but a judgment in the King's Bench carries its relation to the first day of the term only. Cro. Car. 102. pl. 2. *Stamford v Cooper*: *Quære, Whether that must not be meant where the proceedings are by bill only, in which case the returns of the process, and the continuances are to the Quarto die post; but their proceedings by original are returnable, and continued in the same manner as in the Common Pleas.*

8. If one will enter a judgment as of such a term, he must actually enter it before the Effoin-Day of the succeeding term; otherwise it shall only relate to the term of which he enters it; and if a judgment be signed in Hillary-term, and in the subsequent vacation the defendant sells lands, and before the Effoin-day of Easter-term the plaintiff enters his judgment, it shall affect the lands in the hands of the purchaser; and if one enters up a judgment thus in the vacation, when indeed the party is dead; if he was living in the precedent term, the judgment is good by relation: Per Holt Chief Justice, 6 Mod. 191.

[P* 380]

* Eighthly, Of judgments by Confession.

1. A Warrant of Attorney to confess judgment may be given by one in custody, if an Attorney be present; and the man may be arrested by process from the Court of Common Pleas.

On Actions of Debt.

and gives a warrant of Attorney to confess a judgment in the court of King's Bench, and no Attorney is present, the court of King's Bench, may set aside that judgment; but not if the warrant of Attorney be to confess a judgment in an inferiour court. Salk. 402.

2. If a warrant of Attorney be executed by a Feme Covert to confess a judgment, the court will not set aside that judgment upon a motion; but she must reverse it by a writ of error. Salk. 400.

3. If a judgment is confessed upon terms, that being in effect but a conditional judgment, the court will lay their hands upon it, and see the terms perform'd; but if the judgment be confessed absolutely, and afterwards there is an agreement; this does not affect the judgment, and ('tis said) the court will take no notice of it; but put the party to his action upon the agreement. Salk. 400.

4. If a Feme Sole gives a warrant to confess a judgment, and marries before it be enter'd; this is a countermand in law of the warrant, and judgment shall not be enter'd, for that would charge the husband. Salk. 399.

5. If a warrant of Attorney to confess a judgment be made without mention of any term when the judgment should be, it may be enter'd within a year after the date of it; but if it be more than a year, it cannot be enter'd without an affidavit that the parties are living, and the money not paid; and upon this affidavit there must be a motion for a rule of court for it.

6. And if a warrant of Attorney to confess a judgment be made without mention of any term when the judgment should be, it shall be intended the next term after the date of it. Hill. 16 Car. 2. B. R. New Lill. Pract. Reg. 133. Letters B. D.

7. If a warrant of Attorney be given to confess a judgment with a *Cesset Executio*, for one year; *Quare*, how the year shall be reckoned, whether from the date of the warrant of Attorney, or from the day to which the judgment relates. 6 Mod. 14.

8. If an able and responsible Attorney appears for another, without a warrant, and judgment be signed against the party, such judgment shall stand, and the Attorney shall be put to his action against the Attorney; but if the Attorney be poor, or in a suspicious condition, the court will set it aside upon a motion. 6 Mod. 16.

Of Judgments against an Heir.

1. In an action of debt against an Heir, if the defendant acknowledges the action, and shews the certainty of the assets which he hath by descent; neither his body, or any

Readings and Observations

of his goods or lands, shall be chargeable with the debt, but only those which he hath by descent; and the judgment shall be to recover the debt to be levied of the lands descended.

2 Roll's Abr. 70. Letter 3. pl. 1.

2. Where the ancestor bound himself and his heirs in a bond, who after a recovery thereupon dy'd, and a *Scire facias* issued against the Heir, who pleaded nothing by descent; and it was found that he had certain lands there; it was adjudged that the judgment shall be special, that is, of those lands only; but otherwise where the action is brought against the Heir on the bond of the Ancestor, in which he bound himself and his heirs; for there he is charged as Heir, but here only as tertenant. Palmer 419. Bower v. Rewett, W. Jones 87. the same point adjudged in Mich. 1 W. & M. Carthew 3. in the case of Braudlin and Milbank: And this distinction there made between a *Sci. fac.* against an heir, upon a judgment obtained against his Ancestor, and judgment upon that *Scire facias*; and a judgment in an action of debt against the heir, where a man bound his heirs; for upon a false plea to the *Scire facias*, the judgment shall be of lands descended; because the *Scire facias* does not alter or enlarge the first judgment.

3. If an action of debt be brought against an heir, and he pleads no Affets by descent, and it be found against him, the judgment shall be general; that is, to recover the debt, and not special; that is, of the lands descended for his false plea. 2 Roll's Abr. 70. Letter C. pl. 2.

4. But if an action be brought for an annuity granted by deed, and the defendant pleads *Non est factum patris sui*, and it be found against him, the judgment shall be special, to wit, of the lands descended; for tho' the denying of the deed of his Father be false, yet it is not in his own cognizance; and being charged in respect of his Ancestor's deed, the land of his Ancestor only shall be taken in execution. Cro. Car. 436. Clothworthy v. Clothworthy.

5. If an action be brought against the heir, and he confesses the action, the judgment shall be generally against him; because the action is in the *debet*, and shall be presumed that he hath affets. 2 Roll's Abr. 70. Letter C. pl. 3. and that whether the judgment be by *Nil dicit* or *non sum Informatus*. *Ibid.* pl. 4, 5.

6. It is said, that if the profits descend from the death of the Ancestor to the time of the writ, amounting to enough to satisfy the plaintiff, and he will show that in his declaration against the heir; and the defendant doth not deny it, the plaintiff shall have a general judgment, and execution immediately. *Ibid.* pl. 6.

On Actions of Debt.

7. If an action be brought for an annuity against the heir upon the deed of his ancestor, and it be found against him upon *Non est factum*; and the plaintiff takes a special judgment, that is, for a moiety of the lands descended, the defendant cannot assign it for error, because it is for his advantage. *Frank v. Tookley*, *ibid.* pl. 7. and see the before mentioned case of *Clothworthy and Clothworthy*.

8. If an action of debt be brought against an heir, and he pleads no assets by descent; and it be found for the plaintiff, and a judgment be enter'd thereupon, that the plaintiff recover the debt, damages and costs of the land descended; and it is further enter'd, *and because it is unknown what lands are descended, an enquiry is awarded to enquire thereof*; that judgment is erroneous, for by law that judgment ought to be general, which cannot be alter'd without the consent of the plaintiff; and here no such consent appears. *Allen v. Holden*. 2 Roll's Abr. 71. pl. 8. *Stiles* 287. *Jones* 87.

9. So if an action of debt be brought against an heir, and he pleads no assets by descent, and it be found by a jury against him, and they find he hath such lands by descent; and thereupon judgment is given that the plaintiff recover his debt, damages and costs of the lands descended; that is an erroneous judgment; for, as it is said before, the judgment by law ought to be general; which cannot be alter'd without the plaintiff's consent; and it seems also that the jury cannot upon that writ enquire what was the assets. *Snellgrave v. Bolville*. 2 Roll's Abr. 71. pl. 9. *Stiles* 327.

10. Whether an heir may bring a writ of error to reverse a judgment against his ancestor. See *Stiles* 28. *White v. Thomas*.

11. Error of a judgment in the King's Bench, in debt on a bond against an heir, who pleaded payment by his ancestor; and judgment given against him: But *Dolbin* was strongly of opinion that there is no reason * why an heir should be more charged upon such a plea than an executor: But by *Holt*, an heir is bound expressly by name, and an executor only represents the person of the testator; and judgment was affirmed. 1 Show. 88. *Braudling v. Milbanck*.

| P*

Of Judgments against Executors.

1. Where there are three executors, and one pleads a recovery in a former action, and the other two *Plene administravit*; and against the first plea the plaintiff replies *covin*, and upon the second, they are at issue; and the first issue is found for the

the

Readings and Observations

the plaintiff; and upon the other it is found that they have thirty pounds of the goods of the testator unadministered; Quære, how the judgment shall be entered? The prothonotaries, upon being asked the question by the lord Anderson, reported, that their entry is *quod querens recuperet* that which is expressly found by the verdict, and nothing as to the residue; and the court seemed to be of opinion, that where the plea is, that they have nothing remaining in their hands, and it is found that part of the debt is in their hands; there the plaintiff, upon a surmise of goods come to their hands, shall have a *scire facias*; but otherwise if, upon such issue, it is found for the defendants that they have nothing in their hands. 1 Leon. 67, 68. Bracebuge v. Baskervill.

2. In the case of Hargthorpe v. Milforth & al' upon plene administravit, it was found that one of the executors had wasted goods to the value of six hundred pounds, and the other defendants had goods to the value of sixteen pounds; and the question was whether one executor shall be charged by the *devastavit* of his companion; and it was held that he should not, any further than the goods of the testator in his hands, but not to charge him of his own goods; and the next question was how the judgment should be entered, whether of the entire debt, or for so much as was found in their hands; the prothonotaries there likewise certified that the course was to enter up judgment only for so much as was found in their hands; but the court were clearly of opinion that judgment should be for the whole debt. Cro. Eliz. 318.

3. In the case of Dorchester and Webb in 3 Cro. 372. the court held, that if upon plene administravit pleaded, it be found against the defendant, that he hath some assets, judgment shall be entered for the entire debt; but the plaintiff shall have execution only for so much as are found; and after that a *scire facias*, when more assets come to the executor's hands; but if it be found against the plaintiff that the defendant hath fully administered, then judgment shall be against the plaintiff.

4. In the above case of Dorchester and Webb, the court resolved that if an executor pleads *plene administravit*, the plaintiff cannot pray judgment for assets *in futuro*; but the plaintiff is to be barred if he confesses it; and they denied the case of Shipley in 8 Co. 134. to be law; and they further held, that if the plaintiff denies that the defendant fully administered, and it be found against the plaintiff, he shall pay costs.

5. But this case, as to taking judgment of assets *in futuro*, has been adjudged otherwise in the case of Noel and others executors of Noel v. Nelson, reported in 2 Saund. 226. and in 1 Sid. 448. 1 Ven. 74. 1 Lev. 286. Though it seems Twifden was much against it upon the authority of the above case

On Actions of Debt.

of Dorchester and Webb; but afterwards, as reported by Ventris, he consented to the judgment.

6. If an executor pleads that he never was executor, and it be found against him, the judgment shall be of the testator's goods, if he hath so much in his hands, before he shall be charged of his own goods. 1 Saund. 217.

7. Where an action of debt is brought against two administrators, and upon *plene administravit* pleaded it be found for one of the defendants; Quære, whether the plaintiff can have judgment against one, and enter *nil capiat per billam* as to the other. Stiles 148. *Gile v. Croffe*.

8. Whether an administrator shall pay costs upon pleading payment, and a verdict found for the plaintiff. *Jeuter v. Saunders*. 2 Keb. 679.

9. Where an action is brought against two executors, and one of them only appears and confesses the action, the judgment shall be against them both of the testator's goods, in the hands of all the executors; and the damages of him only that appeared. 1 Brownl. 53.

10. In an action of debt brought upon a bond against Johns and his wife as administratrix; the defendant pleaded payment by the wife after the death of the intestate, according to the condition of the bond; and after issue joined, the judgment was entered *quod recuperet debitum* against them *de bonis testatoris*, & *si non*, then the damages *de bonis propriis*; whereas it being a false plea, and in their own knowledge, the counsel for the defendant would have it the judgment ought to be *de bonis propriis*; and as the wife, while under coverture, can have no goods, the judgment ought to have been of the goods of the husband only; as to the first it was held that the judgment should be *de bonis testatoris*, and as the husband is chargeable in respect of his wife being administratrix, the judgment against both is good. 2 Cro. 191. *John v. Adams*.

11. To an action of debt brought against an executor upon a penal bill, the defendant pleaded per minas, and afterwards relinquished his plea, and confessed the action; and the confession was entered that he could not deny but that the bill was his deed, nor but that he owed to the testator one hundred pounds *modo & forma, &c.* and thereupon the judgment was that the plaintiff recover against the defendant the said debt, &c. and upon a writ of error two errors were assigned; one was, because the declaration was that the defendant owed the testator, and detained from the executors, as it ought to be; but the confession was entered that he owed only to the testator; and the other error was, that the judgment was, that Humphry Joyner recover the debt and damages awarded to the said Humphry

Readings and Observations

phry Skinner; whereas it ought to have been Joyner; but notwithstanding the said two errors, judgment was affirmed, Moor 697. Joyner v. Ognell.

12. After you have judgment by default or confession against an executor or administrator, you can have no *feri facias de bonis propriis*, nor execution of their body; nor can you have either, upon a judgment obtained by verdict and assents found upon *plene administravit* pleaded; but you must proceed one of the following ways: first, either by a *feri facias de bonis testatoris*, on which the sheriff will return *nulla bona*; after which there must go a *scire fieri inquir'*, the tenor of which recites that there had been a *fi. fa.* issued, returned by the sheriff *nulla bona, quodque testatum existit in cur' n'ra*, that the executor had sold and wasted the testator's goods; and that the King, willing that justice should be done, commands to levy the goods if the sheriff can; and if he cannot, then to enquire by the oaths of good men whether, &c. and if it appears to him that the executor hath elained the goods of the testator, then to warn the defendant to shew cause why execution should not go against his own goods; to which *sci. fac.* the defendant may appear and plead *plene administravit*, and traverse the *devastavit*. Secondly, or else the plaintiff must sue out a *fi. fa.* and give the sheriff security, and he will return a *devastavit*, which the defendant cannot traverse; and the reason is, if the sheriff returns a *devastavit* found by the jury, the defendant cannot have any action for such return; but if the sheriff returns of his own head a *devastavit*, the party hath a remedy to be repaired in damages, by an action for a false return; and it is said that upon *plene administravit* pleaded, and assents found upon view of the verdict shewn him by the plaintiff, the sheriff must return a *fi. fa.* with a *devastavit*; and if he does not upon motion, the court will order it. The third way upon this return is to sue out a *scire fac.* reciting the former *fi. fa.* and return of a *devastavit*; but the best and most expeditious way is to sue by an action of debt upon the judgment, and declare, suggesting a *devastavit*, a precedent which you have in 1 Saund. fol. 216. and in Lut. 674. But it is held in Lut. that an executor of an executor shall not be charged with this action after his decease; for this action is grounded upon a *tort*, which is *personalis actio & moritur cum persona*.

13. In the case in Lut. 'tis said, that if a feme lessee for life, rendering rent, takes husband and dies, the husband shall not be chargeable with the arrearages of rent incurred in the life-time of the wife, Lut. 673.

On Actions of Debt.

14. If a feme covert executrix marries and commits a *devastavit*, it shall be called her *devastavit*, though it may be the husband esloyned, for it was her fault that she married one that would waste the testator's goods; and the executors upon a *fi. fa.* returned, shall be charged *de bonis propriis* of husband and wife, for the husband shall be answerable for the tort of his wife; so it is in trover by a feme *dum sola*. Cro. Car. 374, 184, 355.

15. On a *sci. fa.* against executors suggesting a *devastavit* & *quod in usum suum propr' convertit & disposuit*, to traverse the *venditit & elengavit* is not sufficient without answering to the conversion; for it may be that the executors *secrete* the goods, &c. 2 Saund. 403.

16. If an executor recovers by default, and dies intestate, the administrator cannot sue out execution, but must bring a fresh action; for he can have no *sci. fac.* Cro. Jac. 394. Otherwise if the recovery be by a verdict by the statute of 17 Car. 2. c. 8.

17. If the husband of a feme covert executrix convert goods or money, they become his, and 'tis a *devastavit*. Salk. 306.

18. Where a judgment is had against an executor by confession or default, it is an admission of assets, and he is estopped to say the contrary on a *devastavit* returned; and so is a jury. Salk. 310.

19. An action of debt on a *devastavit* lies for the executors of him to whom the wrong was done, though not against the executors of him that did it. Salk. 514.

20. To a *sci. fac.* upon an interlocutory judgment against an executor, the defendant cannot plead a judgment in bar. Salk. 315.

21. Where an action is brought within six years, and the plaintiff dies before judgment; and after the six years lapse, the executors may pursue it. Salk. 425.

22. If a judgment be recovered in an action of debt against executors suggesting a *devastavit*; Quære. whether that action shall be construed an action of debt upon a judgment, or upon a *devastavit*. 1 Saund. 218.

23. If an executor brings an action, and *non est factum* is pleaded, and it be found against the plaintiff, he shall not pay costs. 2 Cro. 229. Hayworth v. David.

Exceptions

Readings and Observations

Exceptions to Judgments.

1. Where an action of debt is brought upon an award-bond, and a breach is assigned in a matter not in the submission, by which the plaintiff becomes non-suited, if after the judgment be reversed; yet the costs shall not be restored. Moor 625. *Lad v. Wright*.
2. Exceptions to a judgment for a fine in a court-leet. Stiles 137.
3. To a judgment in debt upon a recognizance taken in London. Cro. Eliz. 186. *Chamberlain v. Thorpe*.
4. To a judgment upon a *concessit solvere*. Stiles 145. *Twigg v. Roberts*.
5. To a judgment for the arrearages of an annuity. Stiles 162. *Tyndall & al' v. Harrington*.
6. To a judgment in debt upon an *emisset*. Cro. Eliz. 837. *Middleton v. Trott*. 2 Cro. 88. *Draper v. Rastall*.
7. To a judgment upon an outlawry in debt. Cro. Eliz. 104. *Elred v. Wafs* 611. *Wade & Ux' v. Smith*. Cro. Eliz. 368. *Ive v. Awbrey*.
8. To a judgment against an infant. Cro. Eliz. 569. *Shedborough v. Raunt*.
9. To an action of debt upon the statute of 1 & 2 P. & M. for taking ten-pence for a distress. 3 Cro. 559. *North v. Wingate*.
10. To a judgment in debt upon the statute of Usury. 2 Cro. 104. *Woody v. —*
11. To a judgment upon a penal bill. Stiles 25.
12. To a judgment upon a bond for the performance of covenants. Stiles 38. *Jones v. Stanley*.
13. To a judgment in debt for rent. 3 Cro. 143. *Long v. Nethercote*. 3 Cro. 338. *Elliot v. Skip*.
14. To a judgment in debt upon the arrearages of an account. Stiles 119. *Raw v. Raw*.
15. To a judgment in debt upon a simple contract. Stiles 6. *Ward v. Coggin*.
16. Where a writ of error in fact was held to lie for an infant in an action of debt, and he may thereupon be brought up and inspected; and the judgment will be thereon reversed. Bulstr. 236. *Butts v. Jennings*.
17. How to proceed where after a plea of *plene administrata* and it is found for the plaintiff, the judgment is assigned to the King. 2 Leon. 67. *Newen's case*.

On Actions of Debt.

18. If an action of debt be brought against four coheirs, and several issues are joined on *riens per descent*, and *assets* are found as to one, and as to the rest that they had nothing, having aliened before the writ; whereupon judgment is against her that had assets, *quod* the plaintiff *recuperet debitum ei dampna sua* generally *de bonis propriis*; and it was held to be right. 2 Keb. 588. Cary v. Rooby.

19. The want of a writ of inquiry was held to be aided by the statute of jeofails. Fitz-Gib. 162.

20. The discontinuance of the original, and a variance between it, and the declaration in this, that the declaration was in trespass in the late King's time, with a *continando* to the present King's time, when the original was brought, and concluded *& contra pacem nostram*; and both adjudged to be aided. Mich. 3 Geo. 2. B. R. Fitz-Gib. 97.

21. What aided by the statute of jeofails. 1 Brownl. 81. Wilks v. Wright. Cro. Eliz. 259. Gurney & Ux' v. Clear.

Exceptions to Judgments in inferior Courts.

1. In an inferior court upon a demurrer to a plea, it must appear to the superior court that the court below have determined the matter of law, that the plea was insufficient; and it is enough for them to say that; therefore it is adjudged the plaintiff do recover; and for this error the judgment was reversed. Salk. 402. Atwood v. Burt.

2. In an action of debt in an inferior court the plaint was for seven pounds, the declaration was upon two contracts, one for four pounds, and the other for three pounds ten shillings; the defendant pleads as to *the seven pounds *nil debet*; and after a verdict for the plaintiff, and a judgment for the plaintiff to recover *prout narravit*; it was held to be error, because he recovers more than his plaint was for. Yelv. 5. [P* 383]

3. If a judgment be in an inferior court, they ought to say *consideratum est per curiam palatii*, or whatever the court be; but where it was a judgment in the county palatine of Durham, the judgment was held good, tho' the words *per curiam palatin'*, &c. were omitted; but it was there said it would be ill in an inferior court, and they considered the court of the county palatine as an original superior court. 1 Saund. 75. Peacock v. Bell & al'.

Other

Readings and Observations

Other Cases concerning Judgments in an inferior Court.

- | | |
|--|---|
| <p>1 <i>Ven. 5. Baines v. Biggersdale.</i>
 6. <i>Billingham v. Vava-</i>
 <i>four,</i>
 <i>Stiles 2. Masterman's case.</i>
 88. <i>Hobson v. Heywood.</i>
 97. <i>Pay v. Paxted.</i>
 111. 115. <i>Brereton v. Mon-</i>
 <i>nington.</i>
 13L. <i>Tomkins v. Jordan.</i>
 154. —————
 165. <i>Stubbs v. Manklyn.</i>
 187. <i>Jenkinson v. Potter.</i>
 198. <i>Pascall v. Sparing.</i>
 200. <i>Wyatt v. Harbye.</i>
 225. <i>Dudeny v. Collier.</i>
 1 <i>Leon. 185, 302. Knight v.</i>
 <i>Savage.</i>
 4 <i>Leon. 78.</i>
 W. <i>Jones 448. Thurston v. Vin-</i>
 <i>cent.</i>
 1 <i>Bulstr. 65. Tittle y v. Adams.</i></p> | <p><i>Cro. Eliz. 544. Gadley v. White-</i>
 <i>col.</i>
 <i>Cro. Eliz. 105. New's case.</i>
 152. <i>Besomme v. Crooke.</i>
 256. <i>Pendrid v. Chambers.</i>
 257. <i>Savory v. Tey.</i>
 894. <i>Grice v. Chambers.</i>
 2 <i>Cro. 108. Pratt v. Dixon.</i>
 261. <i>Ellis v. Johnson.</i>
 3 <i>Cro. 315. Goodson v. Duffield.</i>
 316. <i>Parker v. Taylor.</i>
 1 <i>Bulstr. 67. } Lymbery v.</i>
 <i>Woodhouse.</i>
 <i>Denton v. Stoke</i>
 115 <i>Stubbs v. Flower.</i>
 3 <i>Bulstr. 92. Robins v. Sambel.</i>
 295. <i>Reade v. Holmes.</i>
 6 <i>Mod. 61. Evans v. Roberts.</i>
 302. <i>Williams v. Cary.</i>
 1 <i>Keb. 378. Annison v. Perkins.</i>
 3 <i>Keb. 677. Harvey v. Holland.</i></p> |
|--|---|

Exceptions to Judgments in Debt upon a Bond.

- | | |
|---|---|
| <p><i>Cro. Eliz. 144. Long v. Wood-</i>
 <i>liffe.</i>
 2 <i>Cro. 64. Davis v. Clarke.</i>
 85. <i>Blunden v. Wood.</i>
 185. <i>Harrison executor, &c.</i>
 <i>v. Fulstowe.</i>
 211. <i>Beecher v. Shirley.</i>
 221. <i>Barrett v. Fletcher.</i>
 3 <i>Cro. 209. Courtney v. Green-</i>
 <i>ville.</i>
 219. <i>Marriott v. Kinsman.</i></p> | <p>3 <i>Cro. 534. Pelham v. Heming-</i>
 153. <i>Lee v. Scarroton.</i>
 2 <i>Show. 504. Ifsted v. Clarke.</i>
 1 <i>Show. 8. ————</i>
 1 <i>Leon. 33. Taylor v. Moor.</i>
 300. <i>Lee v. Skureton.</i>
 1 <i>Bulstr. 206. Saxey v. Whamp-</i>
 <i>son.</i>
 2 <i>Bulstr. 230. Jones v. Cris-</i>
 241. <i>Marshall v. Jolly.</i></p> |
|---|---|

To Judgments on an Escape.

- | | |
|---|--|
| <p><i>Cro. Eliz. 706. Leighton v.</i>
 <i>Garnus.</i></p> | <p><i>Cro. Eliz. 767. Dalston</i>
 <i>Thorp.</i></p> |
|---|--|

On Actions of Debt.

To Judgments in Debt for not setting out Tithes.

2 Cro. 57. *Cornwallis v. Spurling.* | 2 Cro. 70. *Dagge & al' v. Penkeven.*

To other Judgments in Debt.

2 Cro. Eliz. 284. <i>Boyer v. Jennings.</i> 434. <i>Staughton v. Newcomb.</i> 844. <i>Walker v. Hancock.</i> 2 Cro. 255. <i>Gybson v. Harbottle.</i> 272. <i>Hampton v. Courtney.</i>	3 Cro. 59. <i>Mildmay's case.</i> 2 Cro. 284. <i>Levell v. Hall.</i> <i>Yelv. 5. Crumpton v. Smith.</i> 1 Leon. 30. <i>Watts v. Jordan.</i> 1 Leon. 41. <i>Willshaldge v. Davidge.</i> 6 Mod. 206. <i>Carleton v. Mortagh.</i>
--	--

Of the Execution.

In treating of executions, the cases in the books are placed under the following divisions:—

First, *What Courts are to award Executions.*

Secondly, *What Executions may, and when and how be granted.*

Thirdly, *For and against whom.*

Fourthly, *Of what an execution may be made.*

Fifthly, *When, where and how, to be executed.*

Sixthly, *How an Execution against one shall avail another.*

Seventhly, *How an Execution may be discharged.*

Eighthly, *Of charging a man in execution already in prison.*

First, What Courts are to award Execution.

1. If there be a recovery in a court-baron, they have no power to grant execution to the plaintiff of the defendant's goods; but they distrain the defendant, and keep the distress in their hands, as a pledge till he has satisfied the condemnation. 4 H. 6. 17. b. 1 Roll's Abr. 887. Letter L. pl. 1.

2. If a man recovers in the King's Bench, and thereupon an appeal is brought in the Common Pleas where the first verdict is affirmed, no execution can be awarded in the Common Pleas; because they have but the tenor of the record there.

Hill.

Readings and Observations

Hill. 37 Eliz. C. B. *per curiam*, between York and Allen, 1 Roll's Abr. 887. Letter L. pl. 2, 3. But in that case execution may be awarded in the King's Bench, for there the record itself continues. Ibid. pl. 3.

3. If a man recovers in an inferior court of record a debt or damages, and afterwards the record is removed into the King's Bench by a *certiorari*; it was doubted whether the court of King's Bench were bound to grant an execution upon that judgment. Mich. 11 Car. B. R. between Peache and Foster: The court appointed it to be argued, *i. e.* whether the court of King's Bench are bound by this means to aid inferior courts. Entered in Hill. 10 Car. Roil 74. 1 Roll's Abr. 887. Letter L. pl. 4.

4. If a record comes into the court of King's Bench, whether by writ of error or of false judgment, an execution may be sued there. 1 Roll's Abr. 884. Letter A. pl. 1, 2.

5. If judgment be obtained in the King's Bench, and upon a writ of error it be removed into the Exchequer-chamber, the court of King's Bench must award execution; and the party may have the same kind of execution there, as he might have had in the Common Pleas. 5 Co. 88.

6. If a judgment be had in the Common Pleas, and affirmed in the King's Bench by a writ of error, the court of King's Bench must award execution. Stiles's Reg. 139, 141.

7. In the case of *Risam v. Goodwin*, Mich. 5 Car. Roil. 2512. reported of Pasch. 7. Car. in Hutton 117. where a judgment upon a *scire facias* was removed from the grand sessions by *mittimus*, to the court of Common Pleas, after a *certiorari* issued from the court of Chancery: It was adjudged that the court of Common Pleas could not award execution upon these four reasons. 1. The court of grand sessions is an inferior court. 2. The record itself comes not into the Common Pleas, but the transcript. 3. The statute of 34 H. 8. hath appointed the execution, and that method must be pursued. 4. This

[P* 384] diversity was there taken, *that when a judgment in a peculiar inferior court comes into the King's bench, or into the Common Pleas by writ of error, and it is affirmed, then the superior court supplies and adds strength to the judgment; but when removed by a *certiorari*, and sent by *mittimus*, it shall not be executed there; but the plaintiff might bring an action of debt there; but to make the superior court an instrument to serve the inferior court, and extend their jurisdiction in this manner was not lawful. Hetly 24. the same point adjudged.

Secondly

On Actions of Debt.

Secondly, what Executions may, and when and how be granted.

The several executions to be had on judgments in personal actions, are, 1. against the body ; 2. the lands ; 3. the goods and chattels of the defendant.

1. The execution against the body is a *capias ad satisfaciendum*, which lay not at Common Law in this action, though it did in trespass *vi et armis*, where a *capias* lay in the process : But by the statute of *Marlbridge*, cap. 23. and Westm. 1. c. 11. a *capias* was given in account ; and afterwards by the statute of 25 Ed. 3. cap. 17. the like process was given in debt as in account. Vide Sir William Herbert's case, 3 Co. 11. 1 Inst. 290. b. 2 Inst. 394.

2. The execution against the lands was given by the statute of Westm. 2. cap. 18. for before that statute the creditor was not to take away the possession of the lands of the debtor, because it would hinder the following his husbandry and tillage, so greatly beneficial to the commonwealth ; and this statute gives the creditor an election to have the moiety only of his debtor's lands delivered to him, which he is to keep till he is satisfied of his debt and damages.

3. The execution against the goods and chattels is by a *fiat facias* which lay at common law, whereby the sheriff is to levy the money, and bring it into court at the day of the return of the writ, to be rendered to the plaintiff as a satisfaction for his debt and damages.

Upon these several executions the following points have been adjudged :—

4. When lands are once taken in execution, and the writ returned and filed, the plaintiff shall have no other writ of execution ; but where an action of debt was brought for one thousand pounds, and the defendant pleaded that the plaintiff had sued out three several elegits into three several counties ; upon one whereof the sheriff had returned that he had levied of the goods of the defendant five hundred pounds : Upon a demurrer three questions arose ; 1. Whether the suing of the writ of elegit be not an election of that writ, and a waiver of all others. 2. Whether the suing of an elegit be not an election of that execution, and no other. 3. Whether the suing out of three writs, and it not appearing what became of the other two, was not a bar to that action ; but the court held that the statute

Readings and Observations

statute intended to give a remedy for the debt beyond the remedy the party had at common law, and not to take away any remedy that was at common law before; and an action of debt would lie upon the judgment at common-law, after the year when no execution would lie; and it could not be the intention of the statute, by the nice construction of the word *elegit*, to say that it was an election of that writ; so that he could not have another afterwards, when it appears that the statute intended to give creditors a greater remedy than they had before; and the levying goods only for part upon the *elegit* will not hinder him from having another *elegit* to take the lands for the residue; and as to that, that it did not appear what became of the other writs of *elegit*; it shall not be intended that any lands were extended thereupon; but that must come upon the defendant's part to shew. 1 Lev. 92. *Glasscock v. Morgan*. 1 Sid. 184.

5. Though it be said by Cook chief justice, as reported in *Hob. 2.* that an *elegit* is of such a peremptory nature, that if it be sued out and entered upon record, though the plaintiff gets nothing by it, yet he shall never have another execution until somewhat be found; so in *Cro. Jac. 338.* in the case of *Crawley and Lydgate*, all the judges were of that opinion; and the reason made use of by them was, because upon the prayer of the party to have an *elegit*, it is entered upon the roll *elegit sibi executionem per medietatem terræ*; so here he is (say they) estopped to have another execution: but by opinion of *Hobart* in *Foster and Jackson's case*, fol. 57. that must be intended when the first is returned served, but not where a *nihil* is returned; for there the party may have an *elegit*, or any other execution, though the election be entered on record; and says *Hobart*, it seems that the conceit of the peremptory issuing of the election entered, hath been the cause that the entry of later times hath been forborn of record, till first it appears whether any thing can be had by the *elegit*, and then to enter such election upon the roll, when the *elegit* is returned executed; but indeed when execution is made out, it is fit it should be returned of record, and filed, and not kept in the attorney's pockets to hide and return, when they find their advantage in it: now for reason of law in this case, there is none why a man should be prejudiced by ignorance *alieni facti* or *casus*; and therefore, says he, if I plead joint-tenancy in myself, I must shew of whose feoffment; and so of joint-tenancy in a stranger next: it is a mistaken notion, if it be conceived that the election that is made and recorded, is to be taken an election of the very writ of *elegit*; for it is an election of the land, &c. of the defendant, *executionem de medietate terrarum*. *Hob. 58.* 59.

On Actions of Debt.

6. The plaintiff may sue out several *elegits* into different counties; but if he sues out a *testatum elegit* into one county, supposing an *elegit* had been sued out into another, and it appears that no *elegit* was sued out in the first county, that will be error. Cro. Jac. 146. Goodyere v. Ince. Yelv. 179. the same case, 2 Brownl. 208.

7. If restitution be awarded upon a reversal of an execution of *elegit*, the party shall be restored to the term taken by the *elegit*; and it is not like to a sale to a stranger upon a *fieri facias*, which gives an authority to the sheriff to sell and bring the money into court; for there if the term be sold to a stranger, and the execution be reversed, the party shall be restored only to the money arising by the sale. Cro. Jac. 246. Goodyere v. Ince.

8. If the party accepts lands from the sheriff upon an *elegit*, he cannot afterwards take another *elegit*; but upon a surmise that the party had other lands in the same county, he may have a new *elegit*; so if all the lands extended upon an *elegit* be devicted by a better title, the plaintiff may take out a new execution. 4 Rep. 66.

9. If a man sues out an *elegit*, and thereupon a *nihil* is returned, the plaintiff may sue out a *capias ad satisfaciendum* or a *fieri facias*. 1 Lev. 176.

10. If a man prays an *elegit*, and enters it upon record, it has been said he cannot afterwards resort to any other writ of execution, because he has made his election. 19 Hen. 4. 6. 15 Jac. B. R. between Andrews and Cope, *per curiam*; and by the clerks of C. B. and B. R. that it was always the course within a year after the prayer. *Contra* in Hob. Rep. in Foster and Jackson's case, 1 Roll's Abr. 904. Letter Y. pl. 1.

11. If a man recovers debt or damages in the Common Pleas, and prays an *elegit*, which is entered upon record; and afterwards the record is removed in the King's-bench by writ of error, where the judgment is affirmed within a year, the plaintiff may have an execution *in the King's Bench [P* 385] by a *capias* or *fieri facias*; because it is in another court than that in which he made his election before. Trin. 15 Jac. B. R. between Andrews and Cope; *per curiam*, except Dodderidge who was of the contrary opinion. 1 Roll's Abr. 903. pl. 2.

12. If a man sues an *elegit*, and it is returned *nihil* within the year, he shall have a *capias* or a *fieri facias* within a year afterwards. Trin. 15 Jac. B. R. between Andrews and Cope; agreed by the court, and the clerks of the King's Bench and Common Pleas, who said it is their common course to have it within the year after the prayer. Mich. 15 Jac. C. B. It was agreed by the court in the same case, Hob. Rep. 79. Ed. 3. execution 41. upon an *elegit* returned that he had but two

Readings and Observations

marks of the rent; and held that he might have the advantage which was at common law, which seems to be meant a *feri facias*, and it was likewise there held, that if he had no execution of the damages on the first writ, (*by which it seems to be intended that a nihil is returned*) he may have a new writ, *contra* 30 Ed. 3. 24. 1 Roll's Abr. 905. pl. 3.

13. If a man prays an *elegit*, and it is entered upon record in C. B. and sues out the writ, and before the return of it the record is removed in the King's Bench, where the judgment is affirmed within the year; and after it is affirmed to the court, that the sheriff hath returned his writ served in C. B. yet the plaintiff may have a *capias*, because that this allegation does not appear to the court of King's Bench; and it is then impossible it should be returned there; and therefore is more strong than if a *nihil* was returned. Trin. 15 Jac. B. R. between Andrews and Cope: Adjudged by the court, except Dodderidge, who seemed to be of a contrary opinion, by reason of the election upon the roll. 1 Roll's Abr. 905. pl. 4.

14. If a man sues an *elegit*, upon which goods are taken in execution, and sold for part of the debt, and that is returned, yet he may have a *capias* afterwards, for now it is in effect but a *feri facias*, no lands being extended; and so it is but a *nihil* as to any land. Hob. Rep. 81. 1 Roll's Abr. 905. pl. 5.

15. If a man sues out an *elegit* upon a recovery, and the sheriff returns that he hath made partition of the lands of the defendant by twelve jurors; but he cannot deliver a moiety to the party according to the writ, because all the lands are extended upon the statute; he may after have a *capias ad satisfaciendum*, for this return is all one in effect, as if a *nihil* is returned; for *non constat* by the return, how the plaintiff shall have execution; nor can the plaintiff have any benefit by his writ of *elegit*; for after the extent ended, he ought to have a new *elegit*, and not a *levari facias*. Mich. 31 & 32 Eliz. B. R. between Palmer and Knolles adjudged. 1 Roll's Abr. 905. pl. 6.

16. If a void *elegit* be filed, yet after the year he may have a new *elegit*. Mich. 10 Jac. B. R. 1 Roll's Abr. 905. pl. 7.

17. Two obligors are sued severally in two several courts, and the lands of one of them are extended upon an *elegit*, the other cannot be taken upon a *capias ad satisfaciendum*. Pasch. 12 Jac. B. R. Cowley v. Lydiat. 1 Roll's Rep. 8. Cro. 338.

18. If a man taken in execution by *capias* be put in prison and afterwards escape, and then the sheriff dies, a new *capias* lies against him, because otherwise the plaintiff would be without remedy. 41 Assize 15. Adjudged 1 Roll's Abr. 905. Letter U. pl. 4.

On Actions of Debt.

Note; This was before the Act of 8 & 9 W. 3. cap. 17. for now by that statute the plaintiff may have a new execution against the party for his escape in every case.

19. Before this statute, if a man in execution escaped, and the sheriff made fresh pursuit after him, and afterwards took him again, although it were a long time afterwards, yet he should be said to be in execution again; because he should not take advantage of his own wrong. 3 Co. 52. Ridgeway's case resolved: Doubted in 12 Hen. 7. Kelway 2 b. Popham 41. Moor 665. Cro. Eliz. 439. Goul. 180. the same case.

Note; By the 8 & 9. W. 3. cap. 27. §. 7. *No retaking shall be given in evidence in an action of escape, unless specially pleaded, and oath made by the keeper of the prison that such escape was without his consent: but if such affidavit proves false, such keeper shall forfeit five hundred pounds.*

20. If a man upon a *capias ad satisfaciendum* before that act had been taken in execution; and afterwards escaped, and was rescued from the sheriff and escaped, the plaintiff might have a new *capias*, and take him again; the first writ not being returned. Pasch. 8 Car. B. R. between Sir Robert Mounson and Clayton: Adjudged *per curiam* upon a *seire facias* after a year, because he should not take advantage of his own wrong. Intratur Trin. 7 Car. Rot. 1343. Pasch. 7 Jac. B. R. between Rodford and Hopkins, *per curiam*, agreed. 3 Co. Ridgwaie 52. b. *contra* 14 H. 7. 1. *per curiam*, *contra* 41 Aff. 15. 1 Roll's Abr. 901. Letter U. pl. 6.

21. So in the same case, if the sheriff had returned the writ and the rescue, the plaintiff might have a new *capias* against him for the reason aforesaid. Pasch. 8 Car. B. R. in the said case; *per curiam* agreed. 9 Roll's Abr. 901. Lett. U. pl. 7.

22. And if A. was in execution at the suit of B. and escaped with the consent of the sheriff, and afterwards the sheriff retook him and kept in prison; he should be in execution to B. because altho' B. might bring an action against the sheriff for his voluntary escape, yet that was at his election; for the party in execution should not put B. against his will to his action against the sheriff, for it might be that the sheriff might not be able to give him his recompence. Hill. 10. Car. C. B. between Trevillion and Lord Roberts, Roll 1622. Where an *audita querela* was brought upon that surmise, and issue taken upon the voluntary escape, and yet adjudged against the plaintiff in arrest of judgment. *Contra* Hob. Rep. 202. the sheriff of his case, *vide* Hob. 60.

3 Co. 52. b. held that where the defendant escaped by the consent of the gaoler, that he cannot be retaken; if he is, he may have an *audita querela*, 1 Cro. 44.

audita querela denied. The same point cited in Cro. Eliz. 102. Stubbs v. Right-
Stiles 117. Walker v. Alder, held it would lie where the party escaped by the consent of the plaintiff.

Readings and Observations

23. If a man in execution in the county of Devon escapes in the county of Somerset, where he is taken in execution; and after the sheriff of Devon, upon fresh pursuit, finds him in prison in Somerset: *Quære*, whether he may charge the sheriff of Somerset with the first execution, or may put the party in execution, inasmuch as he could not retake him. 1 Roll's Abr. 992. pl. 9.

24. If a man be in prison upon a *capiatur pro fine*, and afterwards there is an agreement between the prisoner and the plaintiff, and the plaintiff suffers him to go at large after the fine paid upon the recognizance made upon the duty to the plaintiff; if the defendant pays not the duty, the plaintiff may sue out an execution upon the condemnation, or upon the recognizance at his pleasure; for he was not in execution at his suit by his election. 21 Ed. 4. 67. b. 1 Roll's Abr. 902. pl. 10.

25. If a man recovers a debt against B. who is afterwards taken upon a *capias utlagatum* within the year, and put in prison; although he be in execution *prima facie*, yet the party may choose whether he shall be in execution thereby for him or no; and so may have a new execution by a *capias*, although the sheriff suffers him to escape upon the *capias utlagatum*; for he was never in execution thereby at the plaintiff's election. Mich. 43 & 44 Eliz. B. R. between Shaw and Cutters, contra Hill. 7 Jac. C. B. held by the court. 1 Roll's Abr. 902. pl. 11.

[P* 386] *26. In Pasch. 8 W. 3. Wolf v. Davison, where an action of debt was brought for an escape upon a *capias utlagatum* after judgment, and it was found by a special verdict that the plaintiff had outlawed one J. S. after judgment upon a *capias ad satisfaciendum* sued out within the year; and that two years after the outlawry, he was taken upon a *capias utlagatum*; and the sheriff suffered him to escape: Upon argument it was admitted, that if a *capias utlagatum* had been sued out within the year, no prayer had been necessary, because the plaintiff might have had a *ca. sa.* without a *scire facias*; but this being after the year, the question was, whether he could be said to be in execution for the plaintiff in the original action without prayer; and the court held that he was, though no prayer was entered, because he would have been so, if he had been within the year; and here is no difference; for the plaintiff was at the end of his process at the exigent, and no continuance nor *scire facias* lies after a *capias utlagatum*; and the very *capias utlagatum*, which is sued at his charge, imports an election of the body. *Vide* Cro. Eliz. 918, 850. 1 Roll 810. 1 Sid. 280. 5 Ed. 3. pl. 12. 5 Co. 89. 5 Mod. 200, & Salk. 319.

On Actions of Debt.

27. If a man in execution of the party sues a writ of error, and finds bail by recognizance to prosecute with effect; if the judgment be affirmed, the plaintiff shall not have another execution, because he had an execution before; but he ought to sue out an execution upon the recognizance. 21 E. 4. 67 b. 1 Roll's Abr. 902. pl. 12.

28. But where an execution was sued out after the year, and the plaintiff thereupon arrested; and upon a writ of error the judgment was affirmed, but the execution reversed; it was held otherwise, because he never was legally in execution; for the execution is reversed, and therefore he may be taken again. Palm. 448.

29. If a man in execution sues out a *scire facias* upon a deed, as suppose an acquittance, and the party lets him out by recognizance; if it be found not the deed of him that recovered, he cannot have an execution again but upon the recognizance, 21 Ed. 4. 67. b. 1 Roll's Abr. 902. pl. 13.

30. If a sheriff levies goods by virtue of a *fieri facias*, and does not deliver them to the party, nor return his writ, the plaintiff may have a new *fieri facias*; because a record shall not be avoided by a nude matter of fact. Pasch. 7. Jac. C. B. Warburton said it was adjudged Pasch. 1 Jac. C. B. *per curiam*. *Ibid*. pl. 14.

31. Where a *capias ad satisfaciendum* is delivered to the sheriff, and he makes a warrant as upon a *capias ad respondendum*; though the sheriff by his return has charged himself to the plaintiff, yet the plaintiff may have a new execution against the defendant. Yelv. 52. Wood v. Harburne.

32. If a man before he is in execution finds bail upon a writ of error, and afterwards the judgment is affirmed, the plaintiff may have an action upon the recognizance, or an execution upon the record. 21 Ed. 4. 67. b. 1 Roll's Abr. 902. pl. 15.

33. If a man upon a statute staple or merchant sues an *audita querela*, and is thereupon bailed, and afterwards does not prosecute it, or it is adjudged against him; it seems that by the statute of 11 H. cap. 5. that he may be taken in execution again. 1 Roll's Abr. 902. pl. 16.

34. If a man in execution be bailed by the court, yet he may be afterwards taken in execution again. Pasch. 13 Jac. B. R. *per Coke*.

35. If A. recovers against B. an execution *de bonis testatoris si, &c. Et si non de bonis propriis*; and the sheriff upon a *fi. fa.* levies the money, and afterwards upon another *fieri facias* directed to him, returns a *devastavit*; and thereupon a *scire facias* issued against B. to shew cause, &c. B. may discharge himself of this *devastavit*, by pleading that the sheriff levied the money upon the first *fieri facias*. Trin. 11 Car. B. R. between Middleton and Powell, *per curiam*. 1 Roll's 903. pl. 18.

36. If

Readings and Observations

36. If a man sues out a *capias ad satisfaciendum*, which is returned *non est inventus*, and thereupon a *testatum* into another county, and that he also returned *non est inventus*; the plaintiff, (as it is said) cannot sue out an *exigi facias* immediately, without resorting once more to the county where the original was returnable by an *alias capias* there; and such *exigi facias* without it was adjudged erroneous. New Dyer 295. b. pl. 18. So where a judgment was had in London against executors *de bonis testatoris*, and upon a *feri facias* and *nihil* returned upon a *testatum* in Buckinghamshire, a *devastavit* returned, and upon that another *feri facias de bonis propriis* in Buckinghamshire; this is error, for it ought first to be in London. See the margin of the above case in New Dyer.

37. If the plaintiff sues out an *elegit* into another county than where the action is laid, (*i. e. testatum elegit*) supposing one to have been sued out and returned, if in truth no such execution was sued out and filed, the execution will be erroneous; and in such case the defendant was restored to his term extended upon such a *testatum elegit*. Yelv. 179. Goodyer v. Ince.

38. An execution levied before the judgment was signed was irregular. 2 Show 494. Stampe v. Kinley.

39. If a man recovers against three jointly, the execution ought to be joint against all alike, and not against one only. Trin. 39 El. B. R. in Adams and Dixon's case, Hill. 41 Eliz. B. R. between Beverley and Beverley; adjudged in a writ of error. Trin. 8. Jac. C. B. *per curiam*, a man cannot have an *elegit* against one and a *capias* against the other, but he ought to have the same process against both. 1 Roll's Abr. 888. Lett. N. pl. 2, 3. Hob. Rep. 59. Vide 1 Leon. 288.

40. Where an execution was illegally sued out, the plaintiff's administration being revoked. Brownl. 91. Barnehurst v. Yelverton.

41. If two in an action against J. S. become bail for him, and afterwards the plaintiff recovers; and afterwards the proceedings are continued till judgment be given against the bail; the execution may be against either of the bail without naming the other, for each of the bail is bound severally. Trin. 39 Eliz. B. R. between Dixon and Adams, 1 Roll's Abr. 888. Lett. N. pl. 4.

42. If a man recovers against two, and takes one of them in execution, who dies therein, he may afterwards take the other in execution; for he might before the death have taken him in execution, and the death doth not alter his case. Mich. 4 Jac. B. R. between Williams and Curteis, by Fenner and Tanfield, Co. 5, 87. pl. 24. between Jones and Williams: adjudged pl. 25 Eliz. B. R. Rot. 429: between Hawkyn and Ardyn. If one be taken in execution, and afterwards the other

On Actions of Debt.

other is sued upon the same bond, and he pleads it in bar, it was adjudged upon a demurrer no plea, viz. that the death in execution of the other is no satisfaction: Mr. Hodgson, one of the attornies of B. R. related it to Roll, and gave him the number Rol. 1 Roll's Abr. 903. pl. 21.

By the statute of 21 Jac. 1. cap. 24. *The party or parties at whose suit, or to whom any person shall stand charged in execution for any debt or damages recovered, his or their executors or administrators may after the death of the said person so charged, and dying in execution lawfully sue forth and have a new execution against the lands and tenements, goods and chattels, or any of them, or the person so deceased in such manner, &c. as if he had never been taken or charged in execution: proviso, That the act shall not extend to lands sold after the judgment bona fide for the payment of debts.*

43. But before this act of parliament, if a man recovered against J. S. and had taken him in execution by a *capias*, and afterwards J. S. had died in execution; no new execution could be against his executors or administrators. 33 Hen. 6.

48. 7 Hen. 6. 7. Trin. 13 Jac. C. B. between Foster and Jackson; *per curiam*, upon a solemn argument, *vide* the same case in Hobart's reports 82. and also cited in 85. between Williams and Curtoyes: adjudged Mich. 43 Eliz. B. R. between Shaw and Cutters, *per curiam, contra Co.* 5. Blumfield 86. b. Resolved 47 E. 3. Execution 41. [P* 387]

44. If a man recovers in debt against J. S. and afterwards outlaws him upon the judgment; and afterwards J. S. within the year, is taken by a *capias utlagatum*; and afterwards J. S. dies in prison before any prayer made by the recoveror, that he shall be in execution in his suit; yet that is no satisfaction of the debt, but his executors or administrators may be charged for it; for though he was in execution by the taking upon the *capias utlagatum*, for the party *prima facie* at his election; yet it is only at his election. Mich. 43 & 44 Eliz. B. R. between Shaw and Cutters *per Cur.* 1 Roll's Abr. 903. pl. 23.

45. If on a *feri facias* all the money is not levied, the writ must be returned before a second execution can be taken out; for that must be grounded upon the first writ, and recite that all the money was levied upon the first; but if upon the first all the money was levied, the writ need not be returned; for no further process was necessary. 1 Salk. 318. Oveat v. Vyner.

46. Where a judgment was had against three defendants, and two of them bring a writ of error in parliament, though the record be not well removed, by Roll chief justice: I doubt you cannot have execution, but the writ of error must be abated in parliament, and then you may move the court of King's bench for execution. Stiles 84.

Readings and Observations

47. A *capias* issued against the principal upon a judgment obtained against him, and afterwards a *scire facias* against the bail, and a judgment thereupon; and afterwards the plaintiff takes out a *feri facias* against the principal and bail, on both the judgments; this was held to be bad, for the judgments are several, and so ought to be the executions. Stiles 290. Newton v. Goddard.

48. There ought to be eight days between the *teste* of a *ca. sa.* and the return, to charge bail. Salk. 600. and it must lie four days in the sheriff's office exclusive. Salk 599.

Scire Facias.

In some cases executions are not to be granted without a *scire facias*.

1. There are several writs of *scire facias* which do not relate immediately to debts recovered by judgments in an adversary manner, or debts acknowledged by recognizances, &c. of which we shall omit saying any thing, and only treat of writs of *scire facias*, which are sued in order to have an execution upon a judgment recovered, or recognizances, &c.

And to understand well the nature of writs of *scire facias* to be sued out upon judgments recovered, it is necessary to observe that there are two sorts of writs of *scire facias* to procure execution upon a judgment: one, where the same parties to the judgment, are parties to the *scire facias*; but the time is lapsed since the recovery, so that the party cannot have an execution till he has revived his judgment by *scire facias*; and this writ is given by the statute of Westm. 2. to the plaintiff, who, at common law, if he had omitted to sue out a *feri facias*, or *levari facias*, for the space of a year and day, was driven to his new original.

Coke in his comment upon the statute of W. 2. 2 Inst. 469. says, that there had been a diversity of opinion whether there was a *scire facias* at the common law before this act; and the doubt grew for want of distinguishing between personal action and real actions; for true it is that, in personal actions, if the plaintiff after judgment given, or recognizance acknowledged, sued out no process of execution within the year, he could have no *scire facias*; but the plaintiff, or consuee, was driven to his original, which is to be intended upon the judgment or recognizance, as in actions of debt, writs of annuity, &c.

On Actions of Debt.

or other personal actions, wherein debts or damages were recovered, or upon recognizances.

But the late lord chief justice Holt, in the case of Withers and Harris said, he was not satisfied with the opinion of Coke on the statute of Westm. 2. that at common law no *scire facias* lay in a personal action till that statute; for says he, 'tis plain it lay on a judgment in annuity. 2 Salk. 600. But whether in some personal or mixed actions it lay at common law or not, or was entirely given by the statute, is not material.

2. This writ is for the sheriff to summon the defendant to shew cause, if he has or knows of any, why an execution ought not to be awarded upon the judgment therein mentioned. Co. Lit. 290. b.

3. The other species of this writ is where they are not the same identical parties to the record, but when there is a necessary privity and interest in the parties; and yet there wants some legal instrument to make them parties to the record: as where a woman recovers a judgment, and marries, and afterwards dies; by the marriage here is sufficient privity and interest, and therefore in order to make the husband, who is entitled to the money, a party to the record, he may have this writ of *scire facias*; which, when sued out and returned, if there is no defence, he is immediately entitled to an execution. 3 Cro. 208.

4. But where an husband and wife (she being administratrix to her former husband) recover a debt due to the intestate, and costs and damages; and the wife dies: this *scire facias* does not lie for the husband, because the recovery did not turn it to be the husband's proper debt, as it would where the husband and wife recover a debt due to the wife; for there, by the wife's dying, it is become the husband's debt by survivorship; but here it still remains a debt to the intestate, and belongs to him who is administrator *de bonis non*, &c. for the recovery by the husband was in *auter droit*, and not to his own use; and therefore the husband has not any interest in it after the wife's death; and although he has a privity, yet as the duty recovered is not his property, he shall not have a *scire facias*. W. Jones 248. Beamont v. Long. 3 Cro. 208, 227. Reported by the name of Bevan v. Long: But in this case, Quære, whether the husband cannot have a *scire facias* for the costs. 3 Cro. 227. Vide Moor 680. Yate v. Garth.

5. But where a judgment is had against an executor, and he dies intestate, and administration *de bonis non* is granted to the executor of the defendant; there it seems a *scire facias* will lie, by the opinion of Jones and Whitlock *contra* Crooke. W. Jones 214. Norgate v. Snape.

6. So

Readings and Observations

6. So on the other hand 'tis not only necessary that the party to be entitled to this *scire facias* must have a property and interest in the thing recovered, but it is also necessary that he have a privity; otherwise he shall not have a *scire facias*; as if an administrator obtains a judgment by default or confession, and dies intestate, and letters of administration are granted to one *de bonis non*, &c. of him that first died intestate; this administrator cannot revive this judgment by *scire facias*, but he must bring a new action to recover the debt; for he is no ways party or privy to the first judgment, but a mere stranger; but if the recovery were by verdict, he may now have a *scire facias* by the statute of 17 Car. 2. c. 8.

[P* 388] 7. If the judgment be had against two, and one dies, and the plaintiff brings a *scire facias* against the survivor, suggesting the death of the other, and prays execution against the survivor; such *scire facias* *will well lie, and it is no plea to say that he which died has an heir alive, because the charge survives. Raym. 26.

8. Where administrators, during the minority of an executor, recover a judgment, and before execution sued out, the executor arrives at the age of seventeen, which is the time when he may take the administration upon him; this executrix must sue out a *scire facias*, setting forth this special matter. 27 H. 8. 7. a. 2 Brownl. 83.

9. If C. be ordained executrix till A. and B. arrive to their full age, or are married, and the executrix recovers a judgment, and before execution A. and B. marry respectively; they and their husbands shall have a *scire facias*. 2 Brownl. 444.

10. Where a judgment is had against a testator, there must issue out a *scire facias* against the executor, though within the year, to shew cause why execution should not be awarded for the plaintiff against the defendant: so against the administrator of an intestate; and the like on the plaintiff's part, wherever there is an alteration of the person interested in the judgment, or of him who is liable to the charge: as if one recovers a judgment against a feme sole, and she marries within the year and day; yet a *scire facias* must go against the husband. Co. Lit. 290. b. 2 Inst. 395, 471. Finch 469, 477. 1 Roll's Abr. 900. Letter P.

11. Where an execution was irregularly sued out by three women, after the death of the husband of one of them, without a *scire facias*. Moor 367. Itham's Case.

12. If a *feri facias*, or an *elegit*, be sued out within the year, after that a new *feri facias* may be well sued out without a *scire facias*, if the *feri facias* be continued down upon the roll. 1 Sid. 59. 4 Leon. 44. Waller's case.

On Actions of Debt.

13. There is a case in Mich. 5 W. & M. in B. R. where the plaintiff having obtained a judgment, sued out a writ of *elegit* after the year and day, without having actually made out any *elegit*, or any *Sci. fa.* to revive the judgment; and upon examination of several of the ancient practisers of the court, it appeared that it had been the constant practice amongst them for many years, only to award an *elegit*, with continuances on the roll, and to take out that writ at any time afterwards without any *Sci. fa.* therefore the court considering the inconvenience of opening a gap to destroy so many executors for this irregularity; and because the practice had prevailed so long, that it was now become the law of the court: ordered that the execution should stand good. Carthew 284.

14. So if a judgment be recovered, and a year after the defendant brings a writ of error, and the judgment is affirmed, or the plaintiff in error be nonsuited or discontinued; the recoveror may sue out execution without a *Sci. fa.* Moor 307. Carthew 236.

15. To revive an old judgment of seven years standing, and within ten years, upon which no execution hath been sued out, returned and continued, one may make out a *Sci. fa.* of course, without applying to the court; but if it be above ten years, then you must apply to the court for a rule to make out such *Sci. fa.* which the court will grant of course. 2 Salk. 598. Hill. 7 W. 3. B. R. Hardisty v. Barny: This case is reported in Skinner 633. but the same point does not appear; but the question there was, whether the two writs of *Sci. fa.* could be made out at the same time; and it is there reported that they seemed to allow it, it having been the constant practice.

16. Upon a judgment in the Common Pleas, recovered by a feme sole who marries, and she and her husband join in a *Sci. fa.* to have execution, and have judgment upon the *Sci. fa.* the wife dies, the husband sues out execution without taking out letters of administration; and it was ruled upon a writ of error in the King's bench brought upon the judgment upon the *Sci. fa.* that the judgment on the *Sci. fa.* attached a joint interest in the husband and wife; and if the husband died, it would have survived to the wife, and so vice versa; for tho' the judgment in the *Sci. fa.* does not alter the nature of the debt, yet it changes the property, and an action of debt may be brought upon the award of execution. Skinner 683. Woodyer v. Gresham. Mich. 7 W. 3. B. R.

17. So if a judgment be obtained against a feme sole, and she marries, and afterwards a *Sci. fa.* issues against the husband and wife; and the plaintiff obtains judgment upon that *Sci. fa.* and she dies; a *Sci. fa.* will lie against the husband to have execution against him; for the statute of Westm. 2. which gives a *Sci.*

Readings and Observations

a *Sci. fa.* in lieu of an action of debt, was intended for the advantage of the party; which would not be so, if the husband would not be chargeable. When a judgment is had against him upon the *Sci. fa.* the award of execution against husband and wife is a joint recovery, and now becomes a joint debt. *Obrian v. Ram*, Pasch. 1 W. & M. B. R. Comb. 103.

18. If a man recovers debt or damages, and the judgment is affirmed upon a writ of error in another court within the year; yet he shall not have an execution there without a *Sci. fa.* because that the court is changed. 20 Ed. 2. Execution 133. *Quære*, whether this differs from the Exchequer-Chamber. 15 Hen. 7. 16. b. 1 Roll's Abr. 899. Lett. N. pl. 1.

19. If a man recover debt or damages in the King's Bench, and afterwards within the year the defendant brings a writ of error in the Exchequer-Chamber, where the first judgment is affirmed after the year expires; yet the party recovering may have an execution by *Capias*, or a *Fi. fa.* within the year after the affirmance without a *Sci. fa.* for the affirmance is a new judgment. Mich. 5 Jac. in the Exchequer, *per cur.* 1 Roll's Abr. 899. Lett. N. pl. 2. See Palmer 448. the case of Fish and Wiseman, reported likewise in Latch 191.

20. So if the year after the judgment, the defendant brings a writ of error, and the judgment is affirmed, although before the writ of error brought the party recovering was put to his *Sci. fa.* yet this affirmance is a new judgment, and the party recovering may within the year after the affirmance have a *Fi. fa.* or a *Ca. fa.* without a *Sci. fa.* Mich. 5 Jac. B. R. 1 Roll's Abr. 899. Lett. N. pl. 3. Vide Palmer 448. as to this point, *Dubitatur*.

21. So if the party be nonsuited in the writ of error, or the writ of error be discontinued there; although there is not any new judgment given in affirmance of the former, yet the writ of error has revived it. Mich. 12 Jac. B. R. between Sir Henry Bellows and Handford. 1 Rol. 899. Lett. N. pl. 4, 5. 1 Roll's Rep. 104. S. C. Cro. Jac. 364. 8. C.

22. If A. recovers against B. in the King's Bench damages and costs, and thereupon have judgment against the bail after a *Sci. fa.* &c. and afterwards B. and the bail join in a writ of error; and afterwards a year and a day pass; in this case, notwithstanding this writ of error, the court of King's Bench may grant execution; for this is a void writ of error, and it is if no writ of error had been brought; and therefore shall not be any continuance of the first judgment; but the year and day being passed, they cannot have an execution without a *Sci. fa.* although the year is passed after the writ of error brought. Trin. 9 Car. B. R. between Barnes and Hill, adjudged by the whole court; 1 Roll's Abr. 899. Lett. N. pl. 6.

On Actions of Debt.

23. If a man acknowledges a recognizance to be paid at a certain day, beyond the year from the date of the recognizance, when the year is past from the date of the recognizance, altho' it be within the year of the day of payment, yet he shall not have execution without a *Scire facias*. 21 Ed. 3. 22. b. adjudged. 1 Roll's Abr. 899. Lett. O. pl. 1.

* 24. If a man acknowledges a recognizance to be paid at a day within a year after the date of the recognizance; in this case he may have an execution by a *Fi. fa.* or *elegit* within a year after the day of payment, although the year from the date of the recognizance be passed. 21 Ed. 3. 22. b. 1 Roll's Abr. 899. Cett. pl. 2. [P* 389]

25. If a man recovers an annuity, he shall have an execution for every term which incurs afterwards by *Fi. fa.* or *elegit* within the year after the term incurred; although the year be passed after the judgment, but not after the year from the terms incurring without a *Scire facias*. 21 Ed. 3. 22. 1 Ed. 3. 3. 1 Roll's Abr. 900. Lett. O. pl. 3.

26. After a judgment, if the plaintiff within one year sues out a *Sci. fa.* he cannot have a *capias* afterwards, though within the year, until he has a new judgment on the *Sci. fa.* Trin. 13 B. R. between Roberts and Picing, *per Cur.* 1 Roll's Abr. 900. Lett. Q.

27. Upon a recognizance if the conusor be dead, a *Sci. fa.* lies against the heir generally, or against J. S. son and heir of the conusor, without suing the tertenant; for he shall not have contribution against the tertenants no more than the conusor could have. 27 Hen. 6. Execution 135. 18 Ed. 2. Execution 242. 1 Roll's Abr. 900. Lett. R. pl. 1.

28. When the conusor is dead, and a *Sci. fa.* is sued out against the heir, and he is returned dead; *Sci. fa.* lies against the tertenants. 18 Ed. 2. Execution 242. 1 Roll's Abr. 900. Lett. R. pl. 2.

29. But until it is returned that the conusor is dead without any heir, or that the heir is summoned; the tertenant shall not be summoned, because the heir may have an acquittance. 18 Ed. 2. Execution 242. 1 Roll's Abr. 900. Lett. R. pl. 3.

30. By Manwood Chief Baron, that the course of the Exchequer was, if a man be indebted to the King by a record or otherwise, and dies, the heir shall not be charged if the Executor hath assets, nor the feoffee, if either of them hath assets: for he said that the executor and heir come to the land *gratis*, and therefore they ought to be charged. New Dyer 207, 208, pl. 15. in the margin.

Readings and Observations

31. A *Sci. fa.* must pursue the nature of the judgment; and where an action of debt was recovered against A. and B. and the plaintiff sued out a *fi. fa.* against the heir of A. and afterwards another against the tertenants and heir of B. this was held to be wrong, for as the judgment was joint, so ought the *fa.* to be to pursue the judgment. Salk. 598. Panton v. Hall.

32. A *Sci. fa.* will not lie in Middlesex upon a recognizance taken at the Judge's Chambers in London, unless it be enrolled of record; and then it will lie either in London where the recognizance was taken, or in Middlesex where the record is. Trin. 10 Geo. 1. Palmer v. Byfield. Mod. Cases in law and equity 290.

33. A *Sci. fa.* for costs must always go into the county where execution on the original judgment should be made; but an action of debt upon a judgment, or upon a recognizance, may be laid in any county. Pasch. 8 Geo. Mod. Cases in law and equity 73.

34. When a *Sci. fa.* is brought against two who are bail, and judgment is had upon it; and the plaintiff dies, and one of the bail dies, whether the executor of the plaintiff can bring a *Sci. fa.* against one of the bail only. Skin. 82. Banaton and Morris.

35. In Salk. 599. it is said, That in the Common Pleas there is but one *Sci. fa.* and upon a *Nihil* returned the party may take out execution: But in the King's Bench there are to be two *Scire facias*'s and two *Nihils* returned; and that heretofore both were used to be sued out together, by making the *teste* of the second, as if the first had been returned; but it is said the court then made a rule that they should not be both sued out together; but that the first should be duly returned before the second should be sued out; and that the second should be tested at the return of the first. Trin. 8 W. 3. B. R. and in Trin. 11 W. 3. B. R. per Clarke, secondary: The first *sci. fa.* even against bail may be antedated, tho' in Term-time: but Chief Justice Holt said it cannot be antedated where it issues by rule of court: So adjudged in Hill. 10 Geo. 1, in the case of Andrews and Harper; and held, that there must be fifteen days between the *teste* of the first *Sci. fa.* and the return of the Alias. Mod. Cases in Law and Equity 227. See the same book, 305.

36. But where the *Sci. fa.* issued against the administrator, tested the twenty-fourth of October, returnable *Die Lunæ prox' post mensem Michaelis*, which was the thirty-first day of October; and the Alias *Sci. fa.* was sued out *teste* upon the day of the return of the first, viz. the thirty-first of October; which last writ was returnable *Dis Lunæ prox' post Crum Animarum*, which was the seventh of November: This was held to be regular, because

On Actions of Debt.

because though there were not fifteen days between the teste of the first writ and the return of the second; yet each writ had eight days between the teste and return inclusive. Carthew 468. Mich. 10 W. 3. B. R. Goodwin v. Beakbean.

Thirdly, For and against whom an Execution is to be granted.

1. If a man recovers the arrearages of rent all in damages, his executors shall have execution of it, and not the heir; for by the recovery it is a chattel vested. 46 Ed. 3. 25. b. But in a writ of couzenage, or in waste, the heir shall have an execution of the rent, and the executor the damages. 1 Roll's Abr. 889. Lett. Q. pl. 1.

2. If a statute be acknowledged to husband and wife, the wife shall have an execution for it after the husband's death. 1 Roll's Abr. 889.

3. If a woman executrix to J. S. marries, and the husband and wife bring an action of debt upon a bond made to the testator, and get judgment; and the wife dies, the administrator *de bonis non* of the first testator shall have execution, and not the husband. 1 Roll's Abr. 889. Cro. Eliz. 334.

4. If A. acknowledges a recognizance to B. and afterwards another to C. and C. extends his recognizance first, 'tis said that B. shall have an execution against him, and oust him. 1 Roll's Abr. 890.

5. If an administrator *durante minori aetate* of an executor recovers in debt, and afterwards the executor comes to his full age, he shall have execution by a *Sci. fa.* upon that recovery; because he is privy to the judgment. Mich. 9 Jac. C. B. Margaret Wright's case, adjudged *per Cur'*. 1 Roll's Abr. 889. Lett. P. pl. 1.

6. If A. makes B. his executor, with condition that if he does such an act, that B. shall be his executor; and afterwards A. recovers in an action of debt, and afterwards he does that act; it seems B. shall have a *Sci. fa.* upon this recovery. Mich. 9 Jac. C. B. upon a Demurrer; otherwise in Mich. 13 Car. B. R. between Walwin and Herbert, by Jones and Crook; *contra* Barkley & contra. Ibid. pl. 2.

7. A judgment in debt was had against two, and one died; and the plaintiff brought a *Sci. fa.* against the survivor, and requested the death of the other, and prayed execution against the survivor; the defendant pleaded that he who died had an heir who was then alive, and demanded judgment, if execution, &c.

The

Readings and Observations

The plaintiff demurred. Wynnington for the plaintiff argued, that the execution was well against the survivor; and as to that, (says he) 1. We ought to enquire what the common law is. 2. What alteration the statute of Westm. 2. hath made: As to the first, At common law, if judgment had been given against two, and one dies, the charge survives. Sir William Herbert's case. To the second; the statute of Westm. which give the *elegit*, doth not take away the privilege of the plaintiff, * but that he may have execution at the common law if he will; for the words of the statute are *fit in electione*; and this statute was made only for the benefit of the plaintiff; and as to the 29 Affiz. Longford's case, I answer, the same case is reported 29 E. 3. 39. and there by Thorpe the lands are equally liable, and by that it may be easily collected they intended execution only upon the lands, and not a personal charge; but here may be a personal charge; and that is the difference; for when the charge is upon the lands, then it doth not survive; but when it is personal it shall; and for authorities direct in the point, vide 3 E. 3. 11. pl. 87. 1 E. 3. 13; 41.

Wyndham Justice, the books of 1 & 3 E. 3. are directly in point; and the reason why this execution shall be against the survivor is, because the plaintiff may take the lands.

Twisden of the same opinion; and if upon this *Scire facias* the plaintiff takes an *elegit*, the defendant may have an *Audita Querela*; or 2dly, he may suggest this matter upon the return to the *elegit*, and have a *Superfedeas*. F. N. B. 166. 44 E. 3. 10. 4 E. 4. 30. 7 H. 4. 30. and judgment was given for the plaintiff *nisi &c.* Raym. 26. Edsar v. Smart.

Fourthly, Of what Things an Execution may be levied.

1. Lands which a man hath by virtue of an extent upon a statute-merchant, may be extended upon an *elegit*. 38 Aff. 4. admitted, 31 Aff. 6. admitted, 1 Roll's Abr. 887. pl. 1.

2. If a man recovers against a corporation, he shall not have an execution of their respective goods in their natural capacity, but of the goods of the corporation. 8 Hen. 6. 1. 10 H. 6. 64. b. 20 H. 6. 9. 26 H. 6. Execution 28. 1 Roll's Abr. 900. Lett. S. pl. 1.

3. Where a gift or fraudulent deed is made of goods or lands where they may be taken in execution. See Dyer 295. a. b.

4. Copyhold is not extendable upon an *elegit*. Patch. 8 Jac. C. B. 3 Co. 9. Haydon's case, *per cur.* 1 Roll's Abr. 887. Lett. M, pl. 2.

On Actions of Debt.

5. If a copyholder leaseth for years by a licence from the Lord, that is not extendable in the hands of the lessee. Pasch.

8 Jac. C. B. Piçtoe's case, 1 Roll's Abr. 888. Lett. M. pl. 3.

6. Lands in antient demesne may be put in execution upon an *elegit*. Pasch. 13 Jac. C. B. between Cockes and Barnesly adjudged, 5 Co. 105. b. Alden's case, *contra* 22 Aff. 5 *contra*. Dyer 22, 23. Eliz. F. 373. pl. 13. 1 Roll's Abr. 888. Lett. M. pl. 4.

7. If a man recovers a debt or damages against a disseisee of certain lands, and an *elegit* is awarded; yet those lands in the possession of the disseisor, are not to be extended. Trin. 4 Jac. B. R. in Stamere and Amoney, *per cur.* 1 Roll's Abr. 888. pl. 5.

8. If a man recovers against J. S. who is *cestui que use* of a lease for years; that term cannot be extended upon that judgment. Pasch. 32 Eliz. B. R. cited to be adjudged, 1 Roll's Abr. 888. pl. 6.

9. A remainder after an estate for life may be chargeable by a statute when it comes in possession, though it be granted away to another. Goldf. 120. Case 5.

10. In debt against an heir upon a bond, who hath nothing by descent but a *seck reversion* expectant (as Roll supposed) upon an estate for life; the plaintiff shall have judgment to have execution thereof *quando accideret*. 1 Roll's Abr. 888. pl. 7. Dyer 373. b. the same point.

11. Where a judgment was given in debt against a lessee for years; and after the lessee aliened his term, and after the year the plaintiff sued out a *sci. fa.* and had execution: It was held that the term was not liable to the execution: if the assignment was made *bona fide*; and if a first assignment had been made by fraud, and this assignee had assigned it over to another *bona fide*, this term in the hands of the said assignee, was not liable to the execution. Godb. 161.

12. It is reported in 1 Show. 174. in the case of Bahurst v. Clinkard, that upon an execution against one partner, who they have a joint and undivided interest; yet the share and part of him, against whom the execution is granted, may be taken in execution.

13. If the judgment in an action of debt against an heir be general upon *nil per discesum* pleaded, and it be found against him, or by confession, without shewing what assets he hath, whether it be by *non sum informatus* or *nil dicit*; the judgment may be general to have an execution of a moiety of all his lands. 2 Roll's Abr. 71. Lett. D. pl. 1. Vide Dyer 344. pl. 1.

14. But if an action of debt be brought against an heir, and the defendant acknowledges the action, and shews the certainty

Readings and Observations

of the assets; and thereupon judgment is given to recover the debt to be levied of the lands descended; there the plaintiff shall have a writ of execution to levy it of all the lands descended, and not to have a moiety only as upon an *elegit*. *Ibid.* pl. 2.

15. So it seems if in an action of debt against an heir, a general judgment be given, either by *no assets by descent* pleaded, or by *nil dicit* or *confession*, without shewing assets; or upon *non sum informatus*, although the plaintiff may have an execution by an *elegit* of a moiety of all his land; yet it seems, he may at his election surmise that the defendant hath such lands by descent, and pray to have execution of all that land; for otherwise if the plaintiff could not have that election, but must be put to his general *elegit*, he would thereby have but the moiety in execution; and peradventure the heir hath no other besides such as are assets. *Ibid.* pl. 3.

16. If the heir pleads *riens per descent*, (except one acre) if the plaintiff pleaseth he may have an execution of that one acre; or if the plaintiff replies that the heir hath assets besides that one acre, and it be found that he hath ten acres more; the plaintiff shall have an execution of those lands only, and not of his person, as it is where the heir pleads that he hath nothing by descent generally, and it be found against him; in that case that land, and all other land which he hath, and his body, are liable to an execution upon the judgment. 1 Brownl. 54. Vide Cro. Eliz. 692. Barker v. Bourn.

17. If an action of debt be brought against an heir, and judgment is given upon *non sum informatus*, his body shall not be taken in execution; because it is not his debt, though the writ be in the *Debet* and *Detinet*; for there is no other form. New Dyer in the margin of the case, fol. 81. a. pl. 62.

18. If the defendant be charged as heir only, the lands descended only are liable; and in that case the party may have an execution of all the lands at common law. 6 Co. 12. 47. But if by his own default it becomes his proper debt, as it appears in Plow. 440. the plaintiff may have an *elegit* of all his lands whatsoever. New Dyer 81. pl. 62. in the margin.

19. If he pleads no false plea, only the lands descended shall be charged; but if he pleads a false plea, or is condemned by *nil dicit*, the plaintiff may have an *elegit* of all his lands; but otherwise it is if he pleads a false plea to a *scire facias* upon a judgment, or a recognizance, of his ancestor. New Dyer 81. pl. 62. in the margin.

On Actions of Debt.

By the statute of 3 & 4 W. & M. c. 14. §. 38. Where any heir at law is liable to pay the debts of his ancestor, in regard of any lands descending to him, and shall make over the same before any action brought; such heir shall be answerable for such debts to the value of the land made over; in which cases all creditors shall be preferred, as in actions against executors and administrators; and execution upon any judgment so obtained shall *be taken out against such heir to the value of such land, as if they were his own debts, saving that lands bona fide aliened before the action brought, shall not be liable to such execution. [P* 391]

Where an action of debt upon a specialty is brought against an heir, he may plead *riens per discent* at the time of the original writ brought; and the plaintiff may reply that he had lands from his ancestor before the original writ brought; and if upon issue joined thereupon it be found for the plaintiff, the jury shall enquire of the value of the lands descended; and thereupon judgment shall be given, and execution awarded as aforesaid; but if a judgment be given against such heir by confession, without confessing the assets descended; or upon demurrer, or *nil dicit*, it shall be for the debt and damages, without any writ to enquire of the lands.

20. A *feri facias* was taken out, which was executed after the party was dead, upon the goods in the hands of the executor; but the *teste* was before his death: but it appeared that the delivery to the sheriffs, and endorsement thereupon, according to the new statute of 29 Car. 2. was after his death: The court held that at law the execution had been clearly good; but the statute is, that the property of the goods shall be bound from the delivery of the writ to the sheriff; and the court rather inclined that the execution was good, and that the statute was made for the benefit of strangers, who might have a title to the goods, between the *teste* of the writ of execution, and the time of the delivery thereof to the sheriff; but as to the party himself the goods were bound from the *teste* ever since the statute of *viceimo nono* Car. 2. but it was ordered to be further spoken to, 2 Ventris 218. 1 Salk. 322. 6 Mod. 290. The same point in Moor, case 473. that the testator's goods might be seized by virtue of an execution against the executor *bonis testatoris, si, &c.* after the death of the executor. Dyer pl. 31. e contra.

21. At common law all the lands were bound which the party had at the time of the judgment given against him; and the judgment always related to the first day of the term; but now by the statute of 29 Car. 2. commonly called the statute of frauds and perjuries, cap. 3. sect. 15, 16. the judgment binds the lands as to purchasers from the time it was signed; but at common law the goods were bound from the *teste* of the execution,

Readings and Observations

execution, though that might be antedated; and if the defendant sold the goods after the *teste*, or died, the sheriff might levy them; but now by the aforesaid statute they are only bound from the delivery of the writ of execution to the sheriff, but not absolutely bound in all cases; for if after the delivery of the writ, and before execution executed the defendant becomes bankrupt, that will hinder the execution. 3 Salk. 159. Smallcomb v. Buckingham.

And by the same act, the day of the month and year of the enrolment of recognizances, are to be set down in the margin of the roll, where the said recognizances are enrolled; and no recognizance shall bind any lands, &c. in the hands of any purchaser *bona fide*, and for valuable consideration, but from the time of such enrolment.

But before this statute the lands were bound from the time of the recognizance; yet it seems there was this distinction made, that if an original writ in debt had been brought upon a recognizance, and judgment was had therein, a *capias ad satisfaciendum* laid, and the body of the conuzor could be taken in execution; because here the plaintiff had waived his speedy remedy which he had by a *scire facias*; and having chosen another remedy, he could not have an execution of the lands and tenements, which the conuzor had at the time of acknowledging the recognizance, as he might have had upon a *sci. fa.* but only of lands and tenements which he had at the day of the judgment given in the action of debt.

22. Where A. brings an action upon the case against B. administrator of C. and B. pleads bonds entered into by the testate, and *plene administravit ultra* so much, which are liable to the bonds; and the plaintiff takes his judgment *de assumpsit* *quando acciderint*; upon which a writ of enquiry must be awarded to ascertain the damages; whereupon a writ of inquiry is executed, and the jury finds the plaintiff's damages to seventy-five pounds twenty-seven shillings and four pence, for costs of suit.

The question that arises upon this case is, whether the court may award costs *de incremento bonis testatoris levand'* *quando acciderint* upon this judgment.

To determine which question, these four following points naturally arise:

First, To consider what judgments are by law to be against executors and administrators.

Secondly, As this plea is a temporary bar, whether it be an excuse for paying any costs, (inasmuch as before the sta-

On Actions of Debt.

which gave costs to the party in personal actions) a temporary bar was an exemption from costs in real actions at common law; and what effect this plea has upon the judgment.

Thirdly. As the defendant was not liable to costs at common law in any personal action, but they were given by the statute of Gloucester; whether the statute in this case gives a power to the judges to award costs.

Fourthly, How the precedents govern in this case.

As to the first point : Where the defendant as executor, &c. suffers judgment by default; that is a confession of the plaintiff's action of assets to the value of the debt; and there the judgment is for the debt or damages, and costs *de bonis testatoris*, *si* (the executor) *habet bona & catalla testatoris* to so much; *et si non*, then the costs *de bonis propriis*; and the reason why the costs are *de bonis propriis* seems to be, for that if he had assets at the time of the plaintiff's bringing his action, tho' he defends in the right of another, yet he ought to have paid the plaintiff's demand, and not to have put him to the expence and trouble of a suit; and as he hath so done, if the testator hath not assets to pay the costs of the suit, the executor, &c. must pay them himself: But where the executor (defendant) defends the action in right of the testator, and is guilty of no laches or fraud, he shall pay no costs; but if he pleads a plea of *ne unquam executor*, and it is found against him, he shall not only pay costs, but be charged *de bonis propriis*; but otherwise if he defends an action of covenant made with the testator, though broken by the executor himself; yet he shall not be charged *de bonis propriis*, but *de bonis testatoris*; and the costs *de bonis testatoris si habet, & si non, tunc* the costs *de bonis propriis*; for in this case he defends himself as executor. Cro. Jac. 671. But in the case of pleading *ne unquam executor*, it ousts him from any benefit of the will. Cro. Jac. 447.

Asto the second point : The objection that may be made to the plaintiff's having costs in this case is, that *plene administravit* is a temporary bar: and where a man in a real action, before the statute of Gloucester, pleaded a temporary bar, it was an excuse from paying any damages to the party, as in 8 Co. 34. Shipley's case: Where the case of a writ of mesne is cited to shew that the plaintiff may take this judgment immediately upon *plene administravit* for his debt to be levied of assets in futuro: The words of the book are, *That this bar being*
in

Readings and Observations

[P* 392] *in effect only saying, that the executor hath nothing in his hands, the plaintiff might have prayed judgment immediately, because he doth thereby confess the *debt; but that the plaintiff cannot have execution till the defendant hath goods of the deceased; as in a writ of mesne, if the defendant pleads no distress by his default, the plaintiff may pray judgment immediately (that is) to save him from, and ward against the danger of a distress; for this plea, says the book, shall serve the defendant for no other purpose, but to save him from the damages. Vide 11 Hen. 4. 52. So in a Warrantia Char: against the heir, the defendant pleads nothing by descent; the plaintiff shall thereupon recover pro loco & tempore.*

Again, it may be objected that it will be absurd to say the court shall give costs to the plaintiff, when the defendant is by law excused from them; and to give costs to be levied of the testator's goods for a suit against the executor, &c. who is only made his trustee to distribute the assets, as the law directs, would be incongruous.

But let it be considered, that it is equally as reasonable for the plaintiff, who hath a just cause of action to have the costs, as it is that the defendant, who hath done no wrong, should be excused from paying any.

Therefore, if there is no impropriety to award costs to be levied *de bonis testatoris*, it would not be reasonable that the plaintiff should lose them; but he ought to have them in that manner, especially as the executor might have prevented the greatest part of them from incurring in that case; for if he had acknowledged the plaintiff's action to so much as it appeared to him was just, that would supersede the necessity of executing a writ of inquiry to ascertain the damages; which, without such confession, must be done as a foundation for the court to pronounce their judgment that he shall have his damages *de bonis testatoris quando assets acciderint*; and there will appear no impropriety in awarding the plaintiff costs of the assets, when they happen: if this case be compared to the case in Dyer 373. b. where an action was brought against the defendant as cousin and heir to the obligor; the defendant confessed the declaration, and did not deny the action, but said that nothing in fee-simple descended to him, but a reversion of thirty acres after the death of J. S. The plaintiff, says the book, may pray judgment upon that confession, *quod recuperet debitum & dampna de prædicta reversione levand' cum acciderit*; so that though this be a temporary bar, for till the reversion incurs, the plaintiff cannot have execution; yet he hath judgment for the debt and damages of the assets *quando acciderint*; and the word *dampna* includes costs; and in the judgments in debt, in the common pleas, the word *dampna* only is used to include the costs.

But Quære, if the case of an heir does not differ from that of an executor.

On Actions of Debt.

costs of the suit: indeed in the King's bench the judgments are, that the party shall recover so much *tam pro dampnis quam pro misis & custodiis*, &c. And Coke in his 2 Inst. 288. says, that costs are in law so coupled together, as that they are accounted part of the damages.

As to the third point: the words of the statute of Gloucester are, *et tout ceo soit tenuis en toutes cases ou home recover damages*; so that in all cases where a man recovers damages, he shall have the costs of purchasing his writ; and Coke there lays down this rule, *ubi damna dantur, victus victori in expensis condemnari debet*.

As to the fourth point: It must be considered it is but of late years, that it has been determined the plaintiff could take such judgment upon this plea; the first authority that appears is the case of Shipley in 8 Co. 34. and the authority of this case was shaken for a while, as may be seen in the case of Dorchester and Webb in 3 Cro. 373. where the court denied Shipley's case to be law; and said, that if an executor pleads *plene administravit*, the plaintiff is to be barred, if he acknowledges that the defendant hath fully administered; and if it be found against him by a verdict, he shall pay costs.

But this resolution which had thus shaken the authority of Shipley's case, is now rendered of no authority at all, by a subsequent case of Noel and others, executors of Noel against Nelson, which was first adjudged in the King's bench upon a writ of error; and that judgment in error again affirmed in parliament. 1 Lev. 286. 2 Keb. 606. 1 Ven. 94. 2 Saund. 226. 1 Sid. 448.

And it may be objected, that in this case of Noel the judgment is to recover the debt only; but nothing is said as to the costs: and in Ashton 249. there is a judgment of assets *in futuro*, upon *plene administravit*, to take the debt; and no mention of the costs. As to the case of Noel and Nelson, indeed the judgment is so; but as this was the first time that the then late resolution of Dorchester and Webb began to be shaken, to let in the authority of Shipley's case, it was very proper for the plaintiff to be tender in taking damages or costs; inasmuch as Shipley's case mentions, that temporary bars in real actions, which confessed by implication the plaintiff's action, should serve the defendant for no other purpose, but to save him the damages: as to the entry in Ashton, 'tis nothing to the purpose; for there is a judgment to the value of the assets confessed, and judgment for *assets in futuro* as to the residue; so that the first part of the judgment carried the costs of the suit along with it.

And

Readings and Observations

And besides, it is likewise but of late years (much about the time of Shipley's case) that it was determined any action at all would lie against executors, upon the simple contract of the testator; and even that resolution has been grumbled at; so that considering this, and that Shipley's case met with opposition, 'tis no wonder there do not appear any judgments of this kind; but if the usual practice of both the courts of king's bench and common pleas of late years is to govern, or have any weight in this case, the master of the king's bench, and the prothonotaries of the common pleas, have taxed costs *de incremento* to the plaintiff.

And in the report of the case of Noel in 1 Sid. 448. Shipley's case was said to be adjudged upon good reason, because the diligence of the plaintiff to recover a just debt, (which the executor by his plea confessed) is to be encouraged; now if the plaintiff cannot have his costs *de bonis testatoris*, when he is put to the expence of a writ of enquiry to ascertain his damages, few or none will take such judgment of assets *in futuro*, but must be always knocked down with *plene administravit*; since, if he takes issue upon it, he not only loses his debt, but must pay costs if found against him; and if he takes only his damages, perhaps the costs are as much or more; so that a man had better sit down by the loss of a just debt, rather than sue an executor or administrator if he is to have his costs no where, upon taking judgment of *assets in futuro*.

Fifthly, When, where and how, to be executed.

1. Upon a *capias ad satisfaciendum* to the sheriff of Middlesex, if the sheriff takes him and puts him into Newgate, which is the common prison for Middlesex and London; and afterwards another writ of execution comes to the sheriffs of London, although the sheriffs of London are also sheriffs of Middlesex and Newgate where the prison is, is the prison for both counties; yet the prisoner shall not be said to be in execution upon this new writ in London; nor can the sheriffs of London serve it upon him, because he is in another county; for when the commitment is to Newgate, by force of a writ to the sheriff of Middlesex, he cannot in any respect be said to be in the county of London. Pasch. 16 Jac. Coe's Case, Trin. 16 Jac. B. R. same case agreed by the court upon a *habeas corpus*. 1 Roll Abr. 894. Lett. C. pl. 2. Moor 179.

2. A defendant cannot be taken in execution after the plaintiff hath consented to his discharge. Stiles 117. Walker Alden.

On Actions of Debt.

3. An execution may be sued out, and executed before the [P 393] judgment entered. Stiles 229.

How the Sheriff is to demean himself in the several Writs of Execution.

1. Upon a *capias ad satisfaciendum* the sheriff is not to break open the house, nor can he (as it is said) pull up the latch and open the door if it be shut, to execute a writ of *capias ad satisfaciendum*; but if he does, and arrest the party, the arrest will be good; but the sheriff may be punished for the abuse of his authority. Hob. 62. Parke & al' v. Evans. 2 Roll's Rep. 137. Hob. 263. Waterhouse & Ux' v. Saltmarsh. 5 Co. 91. Dyer 65, 214. but having once entered the house quietly, he may break open the inner doors to execute his execution. Comb. 327. Palm. 53, 54.

2. So likewise to execute a *fi. fa.* the sheriff is not to break open the door of the house; but if he does, it is said the execution will be good, only the sheriff will be liable to an action of trespass. 5 Co. 93.

3. If the sheriff has an execution against the goods of another man that are in my house, and he brings a jury with him to appraise them; if I shut my door against him, the sheriff cannot break open the door. Yelv. 28. Semayne v. Gresham. Popham, that the sheriff might break open the door; but Fenner and Yelverton *e contra*. See this case reported in 5 Co. 91, 92, 93.

Where he reports these six points to have been resolved, That a man's house is his place of refuge, which he may defend against any one entering with violence to do an unlawful act. 2. That the sheriff may break open the house to execute a writ of *habere facias seisinam*, or writ of possession, because the very house is in judgment of law the house of the party recovering. 3. He may break open the door to execute the king's process, but he must give notice of the cause of his coming there, and request that the door may be opened; otherwise he will be a *trespasser ab initio*. 4. In the case of a subject the sheriff cannot open the door to execute an execution. 5. That the house of another is not a castle or protection but for himself, and not to protect any person in his house, or the goods of another, which are carried and conveyed there, to avoid an execution, the ordinary process of the law; for the privilege of this house extends only to him, his family and goods, or to those which are legally there, and without fraud; and therefore upon

Readings and Observations

upon a request and denial to open the door, the sheriff may break open the house. 6. That though he may break open the house upon a request and denial to open it, yet if he makes no such request, he has not done his duty; so that the sheriff could not have an action against the party who shut his door, to prevent the goods of another from being taken in execution.

By Pollexfen chief justice, in the case of Bealy and Sampson, 2 Ven. 95. that the sheriff cannot deliver the defendant's goods to the plaintiff in satisfaction, but they must be sold; however, it is said, that it is not absolutely necessary that there should be an appraisement, as there must be upon an *elegit*. Cro. Eliz. 504. Thompson v. Clerk.

4. By the sheriff's seizing the goods upon a *feri facias*, he has such a property therein, that he may maintain an action of trover for them. 2 Saund. 47. Wilbraham v. Snow.

5. When the sheriff upon a *feri facias* returns that he has seized the goods to such a value, and that they were rescued, and that the defendant had no other goods; the plaintiff is bound by this return; and if they are less than the debt, he can take out an execution for no more than the residue; but may have a *scire facias* against the sheriff to have an execution to the value of the goods taken. 2 Saund. 344, 345.

6. When an execution is once begun, the sheriff may proceed if there be no irregularity; and though an *audita querela* is brought upon a deed which is confessed, though a *superfedeas* is awarded, yet that shall not prevent the sale of the goods by the sheriff. Comber. 388, 389. and the same law is where a writ of error is brought, and a *superfedeas* is granted. Lev. 95.

7. If two executions are delivered to the sheriff on the same day, he is bound to give preference to that which was first delivered; but if in fact he executes that first which was last delivered, and makes a sale of the goods, the vendee hath a good title; and the party that sued out the first execution, is entitled to an action against the sheriff. Carthew 420. Smallcom against Buckingham and others. Salk. 320.

8. If the sheriff has two *elegits* against the same person, one and the same time, he may not deliver a moiety of the land to one of them, and then to the other; but he is to deliver a moiety of that which is left. 1 Cro. 482. 1 Brownl. 38.

9. But in the case of the Attorney General and Andre where the case was, that H. had acknowledged two judgments to A. A. by one *elegit* extended one moiety, and by the other the other moiety; and these two extents were adjudged good. Hardr. 23.

10. On a *feri facias* against one partner, the sheriff may take the goods of both; and the vendee shall have a moiety common with the other. Comb. 217. Pope v. Homan.

On Actions of Debt.

11. If a Sheriff sells the goods upon a *feri facias* at an under price, yet the sale is good, and the defendant hath no remedy; but if there be covin between the Sheriff and the buyer, there it is said the owner may have remedy by an action upon the case. Kelw. 64.

12. Where the Sheriff after the taking, and before the sale of the goods, by virtue of the execution hath a *superfedeas* delivered to him, he may yet go on to make sale. Moor, case 718. because the execution is an entire thing; and being once begun, the *superfedeas* comes too late.

13. Where the Sheriff levies goods upon a *fire facias*, and pays the money to the party, that execution will be good, though he never return his writ: So if he takes a man upon a *Capias ad satisfaciendum*, the arrest will be good, though he never return his writ; because the plaintiff hath the effect of his suit, and nothing else is to be done on his part afterwards; but in the case of an *elegit* there, inasmuch as the extent is to be made by inquest, and not by the Sheriff only; there it ought to be returned, otherwise it avails nothing. 5 Co. 90. a.

14. And if upon a *feri facias* the Sheriff levies the debt, and does not return the writ, the court will compel him to do it, and to bring the money into court for the use of the plaintiff; so that this is the plaintiff's remedy, and he cannot sue out a *fiere facias*, upon the judgment after the *feri facias* executed, and the goods sold by virtue thereof. Goldsb. pag. 170. case 101.

15. There is a case in Godbolt 147. case 188. where it is said to be held by the court, that if a *fiere facias* goes to the Sheriff to make execution, and he levies the money, and delivers the same to the plaintiff; yet if it be not paid in court the party may have a new execution; and that it shall not be any plea to say that he paid it to the plaintiff, for it is not of record without bringing the money into court. Pasch. 3 Ja. C. B. But *Quare*, if this case be law.

For it was a question in the case of Cannon and Smallwood, 3 Lev. 204. whether the Sheriff, when he had sold goods upon a *feri facias*, * might pay the money to the plaintiff without returning the writ; and the court seemed to incline that he might. The same point in 2 Show. 87. in the case of the King v. Bird. [p* 394]

And so the law seems to be; for that in 2 Show. 281. in the case of Speak and Richards, it was held that an action would lie against an Under-Sheriff for money levied by a *feri facias*, as money received for the plaintiff's use; and that before the writ returned, where likewise one Verdon's case was cited to the same purpose. 2 Show. 49. Cockeram v. Welby; the same point adjudged,

16. If

Readings and Observations

16. If a Sheriff upon a *feri facias* sells a lease or term of a house, he cannot put the person out of possession and the vendee in; but the vendee must bring an *ejectment*. 2 Show. 85. The King v. Dean and Bird & al'.

17. Held, that upon a *levari facias* the Sheriff may take ready money, it being to be levied *de bonis & catallis*. 2 Show. 166. The King v. Welbie.

To understand well the nature of an execution, we hope it will not be deemed prolixity to abridge the following case, under which is couched a great deal of learning relating to executions. F. D. as administrator of J. D. recovered three hundred and three pounds against C. upon a bond made to J. D. the intestate, upon a judgment by default in the Common Pleas, and sued out a *fi. fa. testet of Trin. Term. primo Annæ*, returnable *Tres. Mich.* directed to the Sheriffs of London, which was delivered to the Sheriffs the first of August, who on that day seized goods to the value. F. D. the administrator died in September following; the Sheriffs return the seizure, but that the goods remained in their hands for want of buyers: The twentieth of September the Sheriffs were removed, and others placed in their stead: the plaintiff in error (the defendant in the first judgment) sued out a *scire facias* against the then Sheriffs to have restitution; and upon a *demurrer* judgment was given in the Common Pleas for the plaintiff in the *sci. fa.* against the now plaintiff in error: And upon this writ of error three points were insisted on for the plaintiff in error. 1. That in this case the property remained still in him. 2. That his proper remedy was by a *scire facias*. 3. That the defendant's plea (That he was bound to sell the goods by a *distringas nuper vicecom.*) was not a good plea; and it was argued to this effect, that as the statute of 27 Car. 2. cap. 2. which gives a *sci. fa.* to an administrator *de bonis non* to have execution, where the executor or administrator had a judgment after a verdict did not extend to judgments by default; and as the administrator *de bonis non* could not sue out execution even by a *sci. fa.* the seizure by the sheriff does not alter the property, but that it remained still a chose in action; so that the property was still in the plaintiff, and they resembled it to the case in 1 Jones 385. Cro. Car. 487. where an executor sued out an extent upon a statute-staple, and the writ was returned served; but the plaintiff died intestate before a liberate sued out; and there it was held per cur' against Croke, that the administrator *de bonis non* could not proceed upon this execution, he being not privy to the executor who sued out the extent; so here (said they) the like privacy is necessary to have a *Venditioni Exponas* as to a liberate: They likewise argued that the property was not altered by the seizure for if after the seizure the defendant had paid the money, he

On Actions of Debt.

might have taken his goods again, without any grant to be made by the Sheriff; and an action of trover will lie against the Sheriff for detaining the goods after such payment, and the special property is in the Sheriff for his safety only; but that if goods in execution perish without the default of the Sheriff, it is the defendant's loss; and why should it be his loss, if the property were not in him: They further urged that there would be an inconvenience in restoring these goods; and here was a *laches* in the other party, who might have taken an assignment of the goods immediately upon the seizure, and they quoted Yelv. 44. Moo. 757. 1 Roll's Abr. 894. that the Sheriffs after their removal could not sell; but the court *e contra*; and that point was adjudged in 2 Cro. 73. in the case of Ayre and Ayden, that they might: And they further argued that this was a proper remedy for the plaintiff, for the Sheriff's return of seizing the goods; and that they remained in their hands for want of buyers, was enough to ground a *scire facias* thereupon, (which was granted) if the execution was determined by the death of the party administrator. The substance of the arguments for the defendant in error, appearing in what the chief justice Holt says at the conclusion of the case, we beg leave to recite what he says in giving the judgment of the court, viz. 1. After seizure of the goods there is nothing more to be done by the Sheriff to the plaintiff, though he could sell the goods, and deliver the money to the plaintiff, and that would be well; yet the words of the writ be so that he levy money, and bring it into court; and that may be done notwithstanding the plaintiff's death; therefore he having nothing further to do with the plaintiff, but to execute the writ, he may notwithstanding his death do it.

In the next place, it is true, after he has seized goods to the value of the debt, though he be out of office, yet he is bound to make sale of the goods, and to make a return; and when he has made a return of a seizure of the goods, and that they remain in his hands for want of buyers; that is not a discharge of the command of the writ, but only an excuse that he has not the money, and he is compellable by law to bring it in; and though a *venditioni exponas* does lie, yet a *distringas* is the proper remedy: And there are two sorts of *distringas nuper vice-*
em, vide 34 H. 6. 36. before-mentioned; one is a *distringas* to the new Sheriff to distrain the old one to sell the goods, and bring the money into court; the other to distrain him to sell, & *denar' inde provenientes* to deliver to the new Sheriff to bring into court: Now if a *distringas* does lie for the new Sheriff to compel the old Sheriff to sell, that shews the old Sheriff has an authority to sell by virtue of the former Writ. *Vide Rast. Ent.* 464. *Thef. Brev.* 90. and the book called *Brevia Judicialia*,
and

Readings and Observations

and that which commands the new Sheriff to distrain the old one to sell, and bring in the money, is the most usual now; then since the Sheriff is compellable to sell, having seised the goods, what should hinder in this case that he should not sell, notwithstanding the plaintiff's death; for the writ is as forcible and compellable upon him to levy and bring in the money, as if the plaintiff had lived; the Sheriff after seizure is bound to the value of the goods; it is not to be supposed that he cannot sell; he is bound to sell at all events, if the goods be worth the money that they are appraised at, and that he returns them of, it is not to be supposed he can want buyers, and he is not charged to the value that they shall happen to be sold for, but to that value that he has returned; for if he returns goods to value, and that they are rescued from him, he shall answer to the value returned; so here he shall answer for the value returned, and not to the value that they were sold for.

[P* 395] And when he seized the goods by virtue of the writ, the defendant is actually discharged, though they are not sold; for the plaintiff must depend upon his execution, and rely upon that; and he has no further remedy against the defendant, but altogether against the Sheriff; and the defendant, having lost his goods upon an execution, which the plaintiff himself has chose, the goods are in custody of law, and the defendant is discharged. 1 Cro. 390. 1 Cro. 459. and the same in 1 * Jo. not like this; plaintiff after a writ of *extendi facias* dies, the Sheriff takes an inquisition of the seizure into the King's hands, and then the administrator *de bonis non* comes into Chancery, and prays a liberate: This came in question upon an ejectment brought by an administrator *de bonis non*, and held that the extent was void, for the writ was abated, and no matter whether the plaintiff died before the return or seizure, or after; because no property is vested in him by the seizure, but that only is in order to gain a property by a liberate; and there could be no liberate to him that sued the writ, because he is dead; and there is no more reason for an administrator *de bonis non* to have it, than if the executor had sued out a *sci. fa.* to have execution of judgment, and before the return of the writ died, and administrator *de bonis non* should come for execution, which he could not have: But in this case there is no necessity for the plaintiff in the original action to come to the Sheriff for execution; but in case there be no act of the court to be done, but an *elegit* is sued out, which commands the Sheriff to deliver the lands extended to the party; if there the executor or administrator died after the inquisition, and before the delivery, in that case the death of the plaintiff would not avoid the execution; and that appears by 1 Sid. 29. though not so very plain.

On Actions of Debt.

So the Sheriff seizing the goods in the plaintiff's right as administrator, he by virtue thereof becomes responsible to him as administrator, for the value which he himself has returned; and that right which he had now, comes to the administrator *de bonis non*; and therefore when the execution is compleatly executed, and the money brought into court, the administrator *de bonis non* may produce his administration; and the court will thereupon let him take the money out of court, and that is not by way of judgment.

The Sheriff by the writ is to take goods and sell them in convenient time; indeed the not selling is not such a fault for which he may be amerced; but if a distringas upon his return go against him to the coroners, if he continue Sheriff, and he don't sell between the teste and the return of the distringas, he shall forfeit issues; and after goods once seised, no writ of error or superseas shall stay the sale; *Et sic Jud. affirmatur per 1st. cur.* 6 Mod. 399, 300. Clerke v. Withers.

Of executions erroneously executed, vide Cro. Eliz. 344. Dennis v. Welles. Godb. 26. Luddington v. Amner. 4 Leon. 24.

Of the Sheriff's Fees for Executions.

1. By the statute of 29 Eliz. cap. 4. "No Sheriff is to take more than twelve pence in the pound for every hundred pounds, and sixpence for every sum above an hundred pounds."

These following constructions have been put upon this statute: That this is not to be intended where the execution is for above one hundred pounds, that the Sheriff shall have but six-pence in the pound; for then he would have less for executing a writ for one hundred and forty pounds, than he would for one hundred pounds; but the meaning is, that he shall have five pounds in the first hundred pounds, and fifty shillings for every hundred pounds; and so in proportion for every sum above one hundred pounds; and though the act goes further and provides, That this statute shall not extend to fees to be taken for executions within cities and towns corporate;" it shall not be intended that they shall not have those fees for executions, executed within cities and towns corporate, upon judgments from superior courts; but it shall be intended that these fees are not to be taken upon judgments given in the courts of cities and towns corporate. Cro. Car. 286, 287. Lyfter v. Bromley, Salk. 331. Jones 307. Noy 27, 75. Latch 16, 18.

2. In

Readings and Observations

2. In the case of Peacock and Harris, Pasch. 8 W. 3. C. B. these three points are said to be resolved. 1. That the statute of 29 Eliz. cap. 4. does not extend to executions real, but only to executions in personal actions; and therefore not to an *Habere facias possessionem*. 2. That upon a *Capias ad satisfaciendum*, the Sheriff shall have his fees for the whole debt: And Powell junior said it was the opinion of Holt Chief Justice, that the Sheriff should have such fees for executing an *elegit*; but he said he doubted of it; for says he, it would be unreasonable when the whole debt is five hundred pounds, and the land extended but twenty pounds *per ann.* that the Sheriff should have his fees for five hundred pounds. Chief Justice Treby said, that he should have fees according to the sum levied, and not according to the debt recovered, as upon a *feri facias*: To which Powell answered that could not be, because the party might detain the lands till he was satisfied the entire debt; and says he, the plaintiff by having made his election, is barred of all other executions. 4. That the statute does not extend to executions upon statutes-merchant, recognizances, &c. for the act is to be understood of cases where the judgment is given *in invitum*, i. e. upon a suit in an adversary manner, and not by the voluntary confession of the party. 1 Salk, 331, 332.

The opinion of Chief Justice Holt, cited by Judge Powell junior, appears to be so in the case of Tyson and Paske, in Mich. 4 Annæ, B. R. Salk. 333. and that an inquisition upon an *elegit*, is an extent within the statute.

3. If an erroneous writ be delivered to the Sheriff, and he executes it; he shall have his fees, though the writ be erroneous. 1 Salk. 332. Earl v. Plumæ.

4. *Quære*, Whether the above-mentioned statute mentioned in Keble to be of 29 Eliz. c. 4. is not a statute of 28 Eliz. for it is said to be in the parliament-roll. Salk. 331. Skinner 363.

5. The Sheriff may arrest the party, though he has not the process about him. Noy 55.

6. The Sheriff may have an action of debt for his fees; but can take no bond for it. Noy 75.

On Actions of Debt.

Sixthly, In what Cases an Execution against one shall avail another.

1. In an action of debt upon a bond against two, if five pounds damages are assessed to be recovered of each of them severally, according to the writ; if the plaintiff sues out an execution against one, (it must be supposed with satisfaction) he shall not have an execution against the other. 14 Hen. 4. 19. b. 1 Roll's Abr. 896. Lett. F. pl. 1.

2. If there be a recovery by several *precipes* against two in an action of debt upon a bond, by which they are jointly and severally bound; if the plaintiff sues out an execution against one with satisfaction, he shall not have an execution against the other also. 14 H. 4. 22. b. 1 Roll's Abr. 896. pl. 2.

3. So if he brings a separate action in one court against one, and recovers, and another action against the other in another court, and recovers; if he sues out an execution against one with satisfaction, he shall not have an execution against the other. 14 Hen. 4. 22. b. *Ibid.* pl. 3.

4. If two are bound in a bond jointly and severally, and the obligee recovers in the King's-bench against one, and hath him in execution, and afterwards recovers against the other in the Common Pleas; and upon an *elegit* hath his goods, and the moiety of his lands *in execution; in this case, by the last execution, the plaintiff is fully satisfied; and therefore the other, whose body is in execution, may be discharged by an *audita querela*. Pasch. 12 Jac. B. R. between Cowley v. Lydiat, adjudged *per cur.* *Ibid.* pl. 8. Hob. Rep. 2. the same point adjudged. [P* 396]

5. If a man has once an execution against the bail of J. S. he shall not have an execution afterwards against J. S. the principal; because he hath made his election by the first execution, nor against the principal after an execution against the bail; but he may have an execution against one of the bail, and afterwards another against the other bail. 1 Roll's Abr. 897. Letter G. pl. 1, 2, 3. Cro. Jac. 323. the same point adjudged.

Readings and Observations

Seventhly, How an Execution may be discharged.

1. If one that hath an execution of lands, releaseth one acre of the execution, all is extinct by the release of the execution in one acre only. 1 And. case 273. But if tenant by *elegit* purchaseth part of the lands charged in execution, the execution is not discharged. 2 And. 271.

2. Before the statute of 8 & 9 W. 3. c. 27. If the defendant wilfully escaped without the consent of sheriff, the plaintiff might take him up again upon a new execution; but not where he escaped from the consent of the sheriff. Cro. Car. 240. 255. Hob. 60. But now by that statute, *In case any prisoner committed in execution shall escape, any creditor at whose suit he stands charged, may retake him by a new capias ad satisfaciendum, or sue forth another kind of execution, as if the body of such person was never taken in execution.*

3. If the defendant pays the money, he is discharged; but if the plaintiff executes a release or a defeazance, or other such like act to the defendant being in execution, amounting to a discharge; this will not be a discharge *ipso facto*, yet upon this the defendant may have a discharge by an *audita querela*; but if the plaintiff once delivers the defendant out of execution, thereby he is *ipso facto* discharged of the execution for ever; so if the plaintiff doth acknowledge satisfaction upon record. 5 Co. 86. 8 Co. 152. Dyer 152.

4. If one be in execution upon a *capias ad satisfaciendum*, and the court adjudge the judgment or execution erroneous, and so annul it; by this the defendant is discharged of the execution. 8 Co. 143. b.

5. And though it was said, that though the sheriff, upon a plaintiff's command, may let a prisoner out of execution, yet it was argued that he is not bound to do it; for perhaps the sheriff may not know the plaintiff whether he be the same party; but the court held that as the sheriff is obliged to take knowledge of the defendant to arrest him at the party's suit, so he is to take knowledge of the party to accept of his discharge. 2 Cro. 380. Withers v. Henley.

On Actions of Debt.

6. If the defendant be taken in execution by an erroneous process, it is in the discretion of the court, whether they will discharge the defendant by a *superfedeas*; or put him to his writ of error. Winch 102.

Eighthly, Of charging a Man in Execution already in Prison.

1. If J. S. be taken upon a *latitat*, and committed to the Marshalsea for want of bail; and after the plaintiff recovers against him while he is in prison, yet he shall not be in execution by this judgment before the prayer of the plaintiff for that purpose. Mich. 4 Jac. B. R. between Carr and Copping. Roll's Abr. 894. pl. 1.

2. If a judgment be given against J. S. in the Fleet, who is a prisoner there; and afterwards the Warden of the Fleet informs the court of Chancery that the said J. S. is in his custody of the Fleet, for certain causes, upon which the court commands the Warden to keep him in execution till satisfaction of the judgment; yet J. S. is not in execution upon the judgment, because it was not upon the request of the plaintiff, but done without his desire; for it might be, that he would have chosen another execution. Dyer 13. 14 Eliz. B. R. fol. 306. pl. 63. *Ibid.* pl. 3.

3. If a man recovers in an action of debt, and outlaws the defendant after judgment; and afterwards, within the year, the defendant is taken upon a *capias utlagatum*; he shall be in execution for the plaintiff without his praying it, because the outlawry was at the suit of the party. 5 Co. 88. Garnon's case; adjudged Hill. 41 Eliz. B. R. between Bonner and Stukely, Mich. 43 & 44 Eliz. *per cur.* Cro. Eliz. 850. *Ibid.* pl. 4. The same point adjudged in Bridgman 7. Moor against Keynel: And resolved that in all cases where the defendant may have a *capias ad satisfaciendum*, and the party defendant is taken by a *capias pro fine*; there the defendant is in execution presently, if the plaintiff will, without any prayer; but when the plaintiff hath judgment, and a year and day pass, so that he could not have an execution without a *scire facias*; there the plaintiff must pray to have him in execution; but
R 1 2 otherwise

Readings and Observations

otherwise if he be taken upon a *capias ullagatum* after the year, because there he could not have a *capias* against him: Doubted 31 Eliz. B. R. between Norton and Sharpe. 1 Roll's Abr. 895. pl. 5. Cro. Eliz. 467. S. C.

4. But if a man recovers in an action of debt, and outlaws the defendant after judgment, and afterwards, within the year, the defendant is taken upon a *capias ullagatum*; although that he be in execution for the plaintiff *prima facie*, yet he may make his election, whether he shall be in execution for him or no. Mich. 43. & 44 Eliz. B. R. between Shaw and Curteris. 1 Roll's Ab. 895. pl. 6. Cro. Eliz. 850. S. C.

5. If a man recovers debt and damages in the Common Pleas against J. S. and hath judgment, although J. S. be a prisoner in the Fleet (which is the prison of the court) for other causes; and the warden informs the court thereof; and the court commands him to retain J. S. in execution, till satisfaction of the judgment; yet he is not in execution, because he was not brought to the bar by a *Habeas Corpus*, for the court to see and demand of the prisoner, if he be the same person that is condemned or not; which is the duty of the court to do. Dyer, 13 & 14 Eliz. fol. 306. pl. 3. 1 Roll's Abr. 895. Letter E. pl. 1.

6. If an execution by default be awarded on a *scire facias* upon a judgment in debt; and the defendant after a year and day as suppose four year afterwards) was in the Fleet for another cause, and is brought up by a *Habeas Corpus* to the Common Pleas; and being asked by the court, whether he was the same person against whom the judgment was given; which he owns; he shall be committed in execution by the prayer of the plaintiff, though it be after the year and day. Dyer 4 Eliz. fol. 214. pl. 47. 1 Roll's Abr. 196. pl. 6.

[P* 397] *7. If A. recovers against B. by a judgment in the King's-bench, and thereupon B. renders him to prison, and afterwards brings a writ of error, and hath a *superfedeas*; yet afterwards upon the prayer of the plaintiff, the court may commit him in execution, though the record be removed, in as much as he had not found bail upon his writ of error. Pasch. 9 Car. B. R. Simmon's case, 1 Roll's Abr. *ibid.* pl. 7.

8. If the sheriff hath a man in custody by process of law, and afterwards a writ of execution is delivered to him; there the defendant shall be said to be in execution presently upon that writ, though he never actually arrested him. 5 Co. 89. otherwise if the defendant was out of the county at the time of the delivery of the writ. Salk. 275. If one be in execution for the debt of the King, he cannot afterwards be taken in execution at the suit of a subject. 2 Roll's Rep. 302

On Actions of Debt.

9. If a man recovers against J. S. in the King's Bench, (J. S. then being in the custody of the marshal) yet he shall not be in execution upon that judgment, although it be within the year before the prayer of the plaintiff; for the marshal cannot take notice of every judgment against every prisoner put upon the prayer of the plaintiff; a *committitur* shall be entered upon the roll, and then he is in execution. Hill. 12 Jac. B. R. between Sir Henry Bellows and Hanford adjudged. 1 Roll's Abr. 895. Lett. D. pl. 2.

10. If a judgment is regularly obtained against a defendant, the plaintiff must charge him in execution within two terms afterwards, and not after those two terms are expired; or if he is charged afterwards, the court will discharge him with costs. Modern Cases in Law and Equity 227.

Observe, there is this difference between charging a man in execution in the King's Bench and in the Common Pleas; for in the Common Pleas the plaintiff must sue forth a *Habeas Corpus & satisfaciendum* upon a double half-crown stamp; and the prothonotary, in whose office the proceedings are, must sign it, for which you pay him 1s. 4d. and then having sealed it, you deliver the same to the deputy-warden of the Fleet, and he will bring up the body of the prisoner in court, the day you direct; and there he is committed in execution: But in the King's Bench you draw up a rule with the clerk of the rules, for the marshal to bring up the body of the defendant, or to own him in his custody, which rule you are to carry to the marshal and he will keep it a day or two, (if you have not given him notice before) to enquire if he is in his custody; and when he is so found, the marshal returns the rule signed by him, by which he acknowledges the defendant to be in his custody, and for which you pay him 10s. 6d. and then you ingross a *Committitur* on a piece of parchment, and file the same with Mr. Hawley, paying him 3s. and then enter it with Mr. Lantow, the clerk of the judgments, for which you pay nothing, if brought in to be entered in due time.

Prerogative

Readings and Observations

Prerogative Execution.

1. A bond for performance of covenants may be assigned to the King for a debt; but an extent shall not issue without a *scire facias*. 2 Lev. 55.

2. If a debt by recognizance is contracted to the King, after lands settled *bona fide*, or upon marriage to his son, they shall not be liable. 2 Leon. 91.

3. If the king grants the goods of a *felo de se*, and the *felo de se* is indebted to the King; the King's debt shall be satisfied. 3 Leon. 113.

4. If the King's debtor conveys lands to A. who conveys them to the King, and the King reconveys these lands to A. these lands are not extendible for the King's debt. Hob. 45.

5. If a man makes his wife a jointure, and afterwards becomes indebted to the King; this debt shall avoid the jointure. 1 Brownl. 163.

6. The body, lands and goods of the King's debtor or accountant, if the account be stated, are liable to the King's execution at common law. 3 Co. 12. b. But for a debt due upon an account found upon an inquisition, no *scire facias ad satisfaciendum* lies; but a *distringas ad computandum*. Har. 227. And the reason is, that this writ of *scire facias ad satisfaciendum* lies not before the debt be determined upon record, and before the account is stated, 'tis uncertain what the case is: And the act of 13 Car. 2. cap. 3. which vested those debts in the king, did not alter the nature of them so as to make that a debt certain; which in its own nature is uncertain. The Attorney General v. Sparrow & al.

7. If one obtains a judgment, and the plaintiff is indebted by a bond, which is assigned to the King, and an execution is taken out upon the judgment, and the lands taken by an *elegit*, the judgment shall not be avoided for the King's debt. Har. 27. The Attorney General v. Andrew. And the reason is, that here the subject's title is prior to the King's, and actually executed; and the King's debt shall only be preferred, when it is in equal degree; and the King's prerogative in suits for recovery of debts, extends only to the debtor himself, and not to a third person.

8. If lands are settled upon a man for his own life, with remainder over, with a power of revocation, and then he is made a remembrancer of the first-fruits, and becomes indebted to the King; these lands shall be subject to the King's debt, for the power

On Actions of Debt.

power of revocation makes them at the debtor's disposal.
Har. 24.

9. If A. is taken by a *capias ad satisfaciendum*, and before the return a prerogative writ issues from the Exchequer for the King's debt, tested a day before he was taken by the *ca. sa.* in this case he shall be in execution for the King's debt, and the debt of the subject. Dyer 197.

10. Where a collector of the first-fruits and tenths, at the entering into his office, is seised of lands, and possessed of goods, and becomes a debtor to the King, and aliens all, and dies without heir or executor; the ter-tenants, and the possessors of the goods, are liable to pay the King's debt. Dyer 160.

11. If a commissioner is indebted to the King, and purchaseth lands with the King's money, by fraud; and the vendor doth enfeof his friends in fee, but the debtor recovers the profits; this estate shall be seized for the King's debt. Dyer 160. [P* 398]

12. If upon an extent upon a statute, the goods of the conuzee are taken into the King's hands; and before the delivery upon a liberate, the King takes out a prerogative execution for a debt due to the crown; the King shall take the goods to his own use. Dyer 67.

13. If the Sheriff extends lands upon a statute-merchant, and returns the writ, but doth not return that he hath delivered them to the conuzee; execution shall stay till the King's debt is levied. New Dyer in the margin, fol. 67.

14. And note by Manwood Chief Baron, the course of the Exchequer is, if a man be indebted to the King by a recognizance, or otherwise, his heir shall not be charged if the executor hath assets; and the feoffee, who comes to the lands by a purchase, shall not be charged if the heir or executor hath assets; for the heir or executor come to the lands gratis, and therefore 'tis but reasonable they should be first chargeable. Ibid.

15. If a man is indebted to the King, and purchaseth a lease for years to him and his wife, and dies; the term in his wife's hands is liable to the debt. 2 Roll's Abr. 157. Lett. E. pl. 5. 50 Affize 5.

16. But if he purchaseth an estate to him and his wife for life, and his heirs; the lands in the wife's hands are not extendable after the husband's death for the King's debt. Dyer 255. a.

17. If tenant in tail becomes indebted to the King, unless it be by judgment, recognizance, obligation, or other specialty, and these originally suffered, or made to the King, or to another to the King's use; his lands in the hands of the issue shall be extended by 33 Hen. 8. 7 Co. 21, 22.

18. If

Readings and Observations, &c.

18. If tenant in tail becomes indebted to the King by any of the ways mentioned in the act of 33 Hen. 8. cap. 39. and dies before any process thereon; if the issue in tail aliens *bona fide*, the lands shall not be extended in the hands of the alienee by the said act. 7 Co. 21.

19. At common law, if the tenant in tail became indebted to the King by judgment or otherwise, and dies; his lands are not extendable in the seisin of the issue in tail. 7 Co. 21.

20. The Court of Exchequer may give relief upon an English bill, by virtue of 33 Hen. 8. c. 39. though the process, by which he is grieved, be at common law by a suit before the Barons.

21. If the King grants to the almoner *bona & Catalla felonum de se*; if a *felo de se* be intended to the King, the King shall have his debt out of the goods before the almoner; but if he hath lands, it is in the discretion of the court to pay the King's debt by extending them. Moor 127.

22. If an accountant to the King purchaseth lands and sells them, and afterwards is in arrear to the King; his lands in the hands of the purchaser, are liable to the King's debt; but if he receives the office of accountant, after the sale of the lands, then they are not liable to the King's debt. Moor 127.

23. If a bond be given to the King for performance of covenants; if the covenants are not performed, this is the King's debt within the statute of 33 Hen. 8. c. 39. which makes all the King's debtors lands chargeable with the King's debts, in the hands of the owner; and that act extends to all the King's debts, as well those that are not, as those that are created by the act itself. 7 Co. 20.

24. And if the King's debtor hath any matter of law or equity to discharge a debt charged upon him by the crown, he may do it by virtue of that act; for that act likewise extends to relief by the proviso therein, as well to debts due to the King at common law, as those by the said act. 7 Co. 20. b.

25. If a man brings an action, and recovers damages before execution; he cannot assign over part of this debt to the King. Owen 2.

26. A. was indebted to B. by bond, and afterwards A. delivers to B. certain hogsheads of wine, in satisfaction of the debt; and afterwards the bond is assigned to the King; whether the property of the wines was altered by the delivery of them to C. before the assignment. 2 Leon. 89. Clark's case.

REFERENCES

*R E F E R E N C E S

[P* 399]

TO

PRECEDENTS in ACTIONS of DEBT.

Upon Bonds.

WITH a condition for payment of money at one day. 18 H. 6. 8. Modern Entr. 160. At a feast. Ra. Entr. 160, 80. Co. Entr. 130, 137. 2 Co. 1. Plow. 63. At several days. Bro. Red. 221.

Upon a bond in the name of two, where one only sealed it. Brownl. 165.

For a survivor upon a Bond made to two. 1 Brownl. 163, 75. Tho. 115. Mod. Entr. 158. 2 Mod. Entr. 232. Cl. Man. 254, 282. 2 Entr. Cl. 317. 3 Brownl. 120. The like upon a Bond made.

Upon a Bond where two were jointly bound, and one was outlawed, and the other appeared. 1 Brownl. 165. Bro. Red. 97. Tho. 114.

Upon a Bond to pay money upon demand, and part was paid. Brownl. 162. Wi. Entr. 180. Bro. Vad. 205. 2 Instr. Cl. 27. Co. Entr. 126, 168, 244. 3 Co. 80.

Upon two Bonds. 2 Brownl. 73. Wi. Entr. 241, 177, 181. Co. Intr. 168. Bro. Red. 192. Bro. Vad. 161, 208. Cl. Man. 209. 1 Saund. 288. Wi. Entr. 181. Mo. Intr. 149. Ath.

Upon a Bond without a date. Bro. Red. 196. 2 Instr. Cl. 322.

Upon a Bail-Bond at the suit of the Sheriff. 1 Saund. 289. 2 Man. 234. 2 Mo. Intr. 233. Bro. Red. 222. 3 Brownl. 124.

Upon a Bond made to the Marshal of the King's Bench. 1 Saund. 156.

Upon a Bond for appearance made to the Bailiff of a liberty. Saund. 14.

Upon a Bail-Bond upon the late statute, at the suit of the assessor, against the principal defendant. 2 Instr. Cl. 348. Lill. 173.

The like against the Bail. Lill. Entr. 175.

Upon a Bond dated one day, and delivered of another. 18 H.

For husband and wife against husband and wife, upon a bond made by the wife to the other's wife when sole. Ra. 179.

Upon

References to Precedents

Upon a bond in the name of two, where one only sealed.
Ash 200.

Upon a bond where part was satisfied. Ra. Entr. 297.

Upon Bills.

Upon a single bill. 1 Brownl. 81. Wi. Entr. 170, 237. Han.
37. Bro. R. 169. Bro. Vad. 155. Cl. Man. 201.

The like by an executor. Han. 88. Bro. R. 198.

The like by an administrator. Co. Entr. 142. Bro. R.
198. Han. 87.

The like upon a bill penal. Mo. Intr. 177, 160, 167, 166.
Bro. Vad. 158.

Against an administrator upon a penal bill. Co. Entr. 142.
Mo. Intr. 150. Bro. Vad. 209. The like, and a Mutuatus.
Mo. Intr. 231.

Upon a bill penal. Cl. Man. 201, 274. The like. 1 In.
Cl. 162, 318.

Upon a penal bill against two. Cl. Man. 213.

For an executor upon a penal bill. Han. 88. Mo. Entr. 19.
Pl. Gen. 261. The like by an administrator. Mo. Intr. 15.
The like against an heir. 2 Inst. Cl. 318.

The like upon two penal bills. Han. 88. Tho. 114. T.
like upon one in twenty marks. Pl. Gen. 289. Bro. Vad. 19.

For a man and his wife executors upon a single bill.
Man. 244.

The like upon a penal bill. Mo. Intr. 167.

The like against an administrator upon a single bill. B.
Met. 149.

To a deliver bond with sureties for the payment of money.
Bro. R. 210.

Upon a bill penal to pay money at a day, or to bring the
defendant's wife to surrender a cottage at the next court. 1 Bro. R.

Upon a bill penal to be paid at several days. Cl. Man. 2.
Bro. Vad. 158. The like at several feasts. Ra. Entr. 329.

Upon a bill obligatory to pay 5l. per ann. towards the
education of the defendant's daughter. Lev. Entr. 50.

Upon a bill indebted for payment of money at several
whereof part was paid. 2 Bro. 71. Ra. Entr. 39.

Upon a joint bill against one where the other was outlawed.
Tho. 114. Mo. Infr. 158. 3 Brownl. 125.

Upon a bill to pay money at the birth of the plaintiff's
son. Tho. 115. The like against an executor. Mo. Intr. 2.

Upon a bill obligatory payable at the plaintiff's return.
J. Bro. Vad. 156, 157.

Upon a bill for payment of money without day of payment.
Tho. 118. The like upon demand. Mo. Intr. 169.

Upon a bill to pay money immediately after the return of
ship to M. or L. from her voyage. Tho. 130.

In Actions of Debt.

Upon a bill for payment of German money in half a year after notice. Ro. Entr. 222. The like of Flemish money payable at several times. Ra. Entr. 155. 2 Brownl. 88.

Upon a bill to deliver to the plaintiff the seal of an office, upon the defendant's return to London, or to pay the plaintiff 20l. Bro. Red. 170.

Upon a bill without a date. Mo. Intr. 177. Ash 218.

By an administrator for payment of money at the day of marriage of his daughter, or at her death. Bro. Red. 198. Mo. Intr. 159. Bro. Vad. 157. 2 Intr. Cl. 322.

By a man and his wife administratrix for money at the day of the defendant's marriage. 1 Brownl. 87. Vide 6, 53. Bro. R. 175. The like by an administrator. 3 Brownl. 126.

Upon a bill of 20l. to pay 6l. 12s. such a day, and to pay for all the beer to be delivered to the defendant by the plaintiff, before such a day. Bro. R. 183. 1 Brownl. 98.

Upon payment of money and delivery of goods to the plaintiff on the day of marriage, or death of the defendant. Bro. R. 198. 3 Brownl. 126.

For payment of 11l. by quarterly payments, from feast to feast, with an averment that the defendant had not paid at the last feast, &c. Bro. Red. 197.

For an executor of an executor for the payment of money immediately upon sight. Ash. 182.

The like for payment of money, and for corn to be delivered. Pl. Gen. 262.

For an executor upon a bill penal for payment of money at such a feast, if, &c. where the testator died before the day of payment. Bro. R. 198. 3 Brownl. 128. The like by an executor against an heir. Bro. Vad. 159.

For an administrator during the minority of an executor upon bill penal. Br. R. 199. 3 Brownl. 128. Herne 301.

Upon a bill penal to pay money if the plaintiff should not seem two acres of pasture to be a good title in fee before such feast. Pl. Gen. 321.

Against an executor upon a bill obligatory of the testator to pay 68l. as soon as several bills of costs should be taxed by two attorneys indifferently to be chosen, &c. 2 Saund. 103.

In debt upon a bill for payment of money, and in detinue the delivery of chattels. Bro. Red. 186.

Upon a special bill to keep indemnified, and to pay money, Pl. Gen. 231.

For a surviving plaintiff for money to be paid when God shall make the defendant able.——Bar that he is not able, 201.

Upon a bill written in a foreign language for the delivery of such. Re. Dec. 219.

Against

References to Precedents

Against an heir upon divers bills obligatory made by the ancestor. Re. Dec. 221.

Upon a bill obligatory where two bound themselves jointly, and one of them outlawed. Mo. Intr. 158.

Against an executor upon a bill penal to pay a legacy. Bro. Vad. 224. 2 Inst. Cl. 325.

Upon a bill obligatory to pay five guineas in case a woman upon the death of her husband did renounce administration. Bro. Met. 139.

By a man and his wife against a prothonotary's clerk upon a bill obligatory made to the wife (*dum sola*). Bro. Met. 146. Herne 297.

Upon a bill to deliver letters patents upon the defendant's return to London, or to pay 10l. 1 Brownl. 78.

For payment of money if the plaintiff should within such days and hours go or run with such a weight from such a place to such a place. 3 Brownl. 127.

[P* 400]

*For Goods, &c. bought and sold.

For several wares bought by the defendant of the plaintiff. Ro. Entr. 121. Cl. Man. 276. 1 Brownl. 160, 166. Pl. Gen. 280, 319, 325. Mo. Intr. 152, 163. Co. Entr. 125. Vet. Intr. 3. Ra. Entr. 204. Vet. Intr. 233. Ra. Entr. 168. Vet. Intr. 64.

For goods sold where part was paid. 1 Brownl. 151, 165, 187. Bro. Vad. 163, 164. Ro. Entr. 176. Thom. 103. Pl. Gen. 280. Cl. Man. 169. The like for an administrator. Mo. Intr. 170.

By an executor for goods sold by the testator. 2 Inst. Cl. 277. 1 Inst. Cl. 319. The like for monies borrowed. Ra. Entr. 152.

For a term of years in a messuage, and lands sold for 10l. to be paid at two payments. 1 Brownl. 151. For a messuage and lands. Ra. Entr. 176. Vet. Intr. 22. For lands only. Ra. Entr. 204.

For a guardian of an heir, and lands for 108l. to be paid upon demand. 1 Brownl. 177.

For the profits of a bill for seven years, and goods sold, &c. Ash 214.

For goods bought, and on a writing for the security of payment. Ra. Entr. 205. Vet. Intr. 75.

For money for a horse to be paid at such a feast. Ra. Entr. 88. The like on the defendant's marriage. Ash 178. For monies lent.

For monies lent to be paid upon demand. Tho. 177. Ha. 86. Mo. Intr. 164. Bro. Vad. 162. Cl. Man. 275. 1 Inst. Cl. 325.

In Actions of Debt.

Cl. 320. For monies lent as to part. Tho. 107, 112, 115. 1 Brownl. 154. 2 Brownl. 83. Wi. Entr. 191. Ro. Entr. 122, 200. Han. 90, 92. Mo. Intr. 170. For several sums lent. Bro. Va. Me. 162. Ra. Entr. 152. Upon a mutuatus for part. Ra. Entr. 152, 177.

Upon a stated account. Mo. Entr. 164. Bro. Vad. 162, 163. 1 Inst. Cl. 321. Ra. Entr. 149. Vet. Intr. 23. The like for an attorney. Mo. Intr. 169. Bro. Vad. 163, 173. 2 Inst. Cl. 346.

By an executrix and her husband upon an account made up with the testator. Bro. Vad. Me. 163.

Upon an account for the arrears of rent. 3 Brownl. 176.

For an executor of a prothonotary upon an account with the plaintiff for money due by the defendant. 1 Brownl. 94.

Against an executor. Ra. Entr. 149. Ash 195. Against an administrator. Ra. Entr. 149.

Against husband and wife administrators. Ra. Entr. 149.

Upon a Retainer.

Vide Postea by and against whom.

For a curate retained to serve a curacy. 1 Brownl. 77. Bro. Red. 170. 2 Inst. Cl. 331. The like for a chaplain. Ra. Entr. 153.

For a presbyterian parson. 1 Brownl. 176. Ra. Entr. 202. Vet. Intr. 110.

For a servant hired for a year, and so from year to year; and the defendant served five years which was in arrear. Han. 90.

For a taylor retained to do work in his trade, and for wares bought of him. Tho. 123. Ro. Entr. 191. Pl. Gen. 262.

The like for a smith. 1 Brownl. 108.

For a taylor hired at so much per week. 3 Brownl. 161.

For a mariner retained by the owner of the ship, to serve in a voyage to B. in France, and so back again, taking for his salary 3l. 15s. Ro. Entr. 235.

For a schoolmaster retained to teach the defendant's son. Bro. Red. 179. 1 Brownl. 94.

For a surgeon retained to cure a wound. 1 Brownl. 174. 2 Inst. Cl. 33. Han. 89. Bro. Red. 182. 1 Brownl. 96.

For one retained for a year to serve in waiting, brought against the administrator of the master. Bro. Va. Me. 167.

For one retained to plow lands, and a mutuatus. Tho. 111.

Upon a retainer for carrying five load of household stuff from one town to another. Bro. Red. 172. 1 Brownl. 81. The like to carry goods by water. Co. Entr. 305.

To carry a pile or reek of wood from the house of J. to the house of K. 1 Brownl. 165.

Upon

References to Precedents

Upon a retainer to depasture sheep. Bro. Va. Me. 166.
The like to dye clothes. Bro. Va. Me. 167.

For one retained to serve a year, and so from year to year for seven years in husbandry; and as a maid-servant in the house, where part was satisfied. Pl. Gen. 315. Ash 196.

Upon a retainer to ride to (such a place) in order to get the plaintiff discharged from an impeachment of treason. Ra. Entr. 203. Vet. Intr. 42.

To procure the defendant a safe conduct for his goods from the king of France. Ra. Entr. 203. Vet. Intr. 67.

Declarations where several Debts are joined together.

Upon an emisset, and in detinue. 1 Brownl. 187. Upon a lease and an emisset. Ro. Entr. 176. Upon a lease and an account. Clift 292. Upon an account and a mutuatus. Ro. Entr. 122. Han. 92. Upon an account for money lent, and for detinue. Bro. Red. 259. Upon a retainer, and for money lent. Tho. 111, 131. Han. 90. Bro. Red. 172, 176, 179. Upon a statute, and for an amercement in a leet. 1 Brownl. 169. Upon an emisset, and a mutuatus by an administrator. Mo. Intr. 170. Upon a bond, and for goods bought. Han. 74. Upon a bond, and for money lent. 1 Brownl. 166. W. Entr. 191. Bro. Vad. 16. By an executor. Idem 147. Upon a retainer, and for goods bought. 1 Brownl. 165. Tho. 123. The like by an executor. 1 Brownl. 159. Upon an amercement in a court-baron, and for money borrowed. Tho. 107, 115. Ro. Entr. 200. Upon a bill penal, and for goods fold. Han. 74. By an executor upon a bond and a bill penal. Mo. Intr. 164. Bro. Red. 174. By an executor upon a retainer, and for the arrears of an annuity. Pl. Gen. 269. The like for the arrears of an annuity, and upon an account. Pl. Gen. 271. For rent and boarding. Pl. Gen. 316. Against an administrator upon a single bill, and for rent. Bro. Met. 149.

For Diet.

The defendant put T. to board with the plaintiff at so much a week; and the like for himself, and the like for servants. Brownl. 162. Ra. Entr. 151, 176.

The like for a year, to be paid at the end of the year. Ra. Entr. 177.

The like for the defendant's wife and servants, and keep his horse at so much a year. Ro. Entr. 236. 2 Inst. Cl. 1. Ra. Entr. 177. Vet. Intr. 142.

For the plaintiff's wife nursing the defendant's child, to be paid at so much a week. Ash 182. Ra. Entr. 202.

In Actions of Debt.

For a rector and scholars of a college for commons. Tho.

For the principal of Clifford's Inn for commons and pensions.

ro. Red. 219.

Against an executor for the testator's sister's board. 2 Inst.

330.

For meat, drink, &c. and curing the defendant of diseases.

Brownl. 166. Ra. Entr. 187.

The defendant puts his son as a boarder with the plaintiff for twelve years, to be paid so much every week. Ra. Entr. 177.

For money for rent for part of the plaintiff's house let at will, and for board, &c. for the defendant's son, *Quamdiu parvus placeret*, to be paid yearly 40s. Ra. Entr. 177. Vet.

Mr. 142, 217.

For a surgeon for boarding the defendant's daughter, and for so much if the plaintiff cured her of a disease, &c. and for money lent. Ra. Entr. 153. Vet. Intr. 126.

For Cattle.

For depasturing a horse at so much per annum. 1 Brownl.

5. Pl. Gen. 319.

On a Marriage.

It was agreed between the plaintiff and the defendant, that

the plaintiff should marry the defendant's daughter, and the

defendant should pay 20l. upon demand. Mo. Intr. 150. 2

Cl. 328. Ra. Entr. 178. Vet. Intr. 129.

The like for 12l. to be paid upon request after marriage. Ra.

Mr. 178.

Upon an Award without a Specialty.

For an husband and wife, where the wife, while she was

married, submitted to an award of two arbitrators, of all matters

of difference, who awarded 18l. to be paid to the wife while

she was sole, in satisfaction of her portion; and that the wife,

on the receipt thereof, should execute a general release.

107.

Where the plaintiff and defendant submitted to an award,

concerning the subtraction of tithes, and an award made for

the defendant to pay the plaintiff 20l. in satisfaction of all de-

bts. Tho. 116. But no releases awarded. The like concern-

ing the repairs of a rectory, and of all other matters. Ra. Entr.

Ven. Intr. 64. The like of trespasses with general releases

awarded. Han. 69, 77, 89. 2 Inst. Cl. 323. 3 Brownl. 149. Ra.

153. The like without releases. Pl. Gen. 276, 314. Co.

159. Ash 200. A submission to an arbitration by parol, [P* 401]

and

References to Precedents

and money awarded without a release. *Han.* 91. *Re. Dec.* 116.
 Upon a submission to an award of two arbitrators to be made
 before such a day; and if they did not agree, then to the award
 of an empire, to be chosen by the arbitrators, who made his
 umpirage. 2 *Saund.* 61. *Re. Dec.* 398. 2 *Mo. Intr.* 299.
 The like where the umpire is named by the parties. 2 *Saund.* 127.

For an Escape.

Against the late sheriff for an escape of one taken upon a
Ca. fa. upon a judgment in the common pleas. 1 *Brownl.* 157.

For an administrator, with a recital of the process. *Pl. Gen.*
 228.

Against the marshal of the king's bench for an escape of a
 prisoner charged in execution by the court of king's bench
Herne 316. *Vid.* 197. *Read.* 192, 198, 202. *Cl. Man.* 983.
Herne 316. The like for an executor. 2 *Inst. Cl.* 337. The
 like upon a judgment in debt. *Tho.* 122, 150. *Ro. Entr.* 223.

For an attorney against the marshal for an escape of one com-
 mitted on a judgment in debt. 2 *Brown* 59. *Herne* 316.

Against the warden of the fleet upon a judgment in debt in
 the common pleas, and the prisoner committed to the warden
 of the fleet in execution; and by a Habeas Corpus committed
 to the marshalsea in execution. *Ro. Entr.* 106. *Vid.* 181, 193.

The like against the warden of the fleet. *Wi. Entr.* 171. 3
Lev. Rep. 390.

The like against the warden of the fleet, where the prisoner
 was committed in execution to the marshal, and turned over
 from the marshal to the fleet by a Habeas Corpus, returnable in
 the court of chancery. *Lev. Entr.* 56.

The like upon a Habeas Corpus returnable in the King's
 bench. *Lill. Entr.* 156.

Against the marshal of the King's bench for an escape after
 a commitment in execution on a Habeas Corpus, on a judg-
 ment in the common pleas. *Lill. Entr.* 187, 188.

Against the late sheriff for an escape of one in custody upon
 a Testat. *Ca. fa.* in the King's bench. 1 *Saund.* 34. *Ro. Entr.*
 300.

The like upon a judgment in trespass and assault by non in-
 form' in the King's bench. *Ro. Entr.* 305. *Re. Dec.* 196. The
 like in debt by nil dicit. *Up. Ben.* 60.

Against the late sheriff of the city of C. for an escape of
 judgment in debt recovered in the sheriff's court. *Han.* 83.

Against the late sheriff of London upon a judgment in debt
 in Guildhall. *Ro. Entr.* The like in case, *Dyer* 66. 1 *Brownl.*
 178.

Against

In Actions of Debt.

Against one of the sheriffs of London, after the death of the other, upon a judgment at Guildhall, in case. 1 Bro. 178.

Against the late Mayor upon a judgment recovered in the pie-powder court after a verdict in debt. Rast. Entr. 168. Vet. Entr. 64.

Against the Mayor and keeper of a town gaol upon a judgment there recovered, and a commitment thereupon. Re. Dec. 188. Rast. Entr. 169. 3 Brownl. 161. The like against the bailiff of a town. 1 Brown 155. The like upon a judgment upon the statute of labourers. Rast. Entr. 169. Vet. Entr. 65.

Against the bailiff of a liberty for an escape upon a judgment in debt. Tho. 112. 2 Brownl. 12.

For an escape from an arrest by an extent upon a statute-staple by the late sheriff, and the escape suffered by the new sheriff. Ro. Entr. 311. Rast. Entr. 171.

Against the Mayor of the staple of Westminster for an escape of one taken by him upon a statute acknowledged before him. Rast. Entr. 171. Vet. Entr. 128.

The like upon an arrest on an extent on a statute-staple. 3 Co. 67. Vet. Entr. 231.

For an escape on a Capias Utlagatum after judgment. Ash 178.

For an escape on a Non omittas Ca. fa. 2 Saund. 98.

By the Queen dowager against the Marshal for an escape upon a commitment in execution. Lill. Entr. 151.

Against the late sheriff for an escape of W. taken by him upon a Plures Testat' Ca. fa. upon a judgment in the Common Pleas. Ra. Entr. 170. The like upon a testatum Ca. fa. Ash 94.

Upon Indentures and Agreements in Writing.

Upon a charter-party between the plaintiff and defendant, and another whereby the defendant bound himself in 1000l. to perform the covenants; and the defendant had not performed them, inasmuch as neither the defendant or the master had brought back the ship. Vid. 129. Bro. Va. 168.

The like for not carrying goods within seventy days after notice. Vid. 155.

The like for not paying for the freight, nor any part of the port-charges, primage, &c. Vid. 159.

Upon an indenture, whereby the defendant bound himself with others, to pay the plaintiff money for clothes bought of and sold by the plaintiff, or to procure an assignment, &c. Ra. Entr. 161.

For not delivering herrings, whereas the defendant bound himself in ten pounds for the performance of covenants. Ra. Entr. 161.

References to Precedents

Upon articles for the payment of money at two days. *Wi. Entr.* 154. The like of the non-payment of 20*l.* for free ingress, egress and regress upon the plaintiff's lands. *Bro. Red.* 187.

For not paying money upon an indorsed covenant for drink. *Re. Dec.* 222. For not paying money upon a covenant in an indenture made on the sale of lands. *Pl. Gen.* 65.

Upon a special covenant to repay money if a third person did not cure the plaintiff of the gout. *Bro. Met.* 163.

For 200*l.* upon a letter of attorney irrevocable, made to the plaintiff to receive money due, or to be due for tithes, which the defendant afterwards revoked. *Bro. Met.* 174.

Upon a written agreement wherein the defendant covenanted that he would keep, teach, and instruct an apprentice in his trade of a surgeon, in his house, and obliged himself in 20*l.* for the performance; breach, that the defendant sent his apprentice to the Indies. *Wi. Entr.* 269. *Hob.* 134.

A breach that the defendant had incumbered the lands before the demise made to the plaintiff. *Pl. Gen.* 242. *Bro. Va.* 241.

Upon an indenture whereby the defendant bound himself in ten pounds to perform covenants, and a breach generally, that the defendant had not performed his covenants: bar, that he did perform all the covenants, &c. replication, that he had not repaid an half; rejoinder, that he did repair, &c. *Ra. Entr.* 162.

Upon an indenture of lease, by which the defendant bound himself to pay the plaintiff ten pounds for every time that the rent should be in arrear for half a year; and the rent was in arrear for two half years. *Ra. Entr.* 162. *Vet. Intr.* 128.

Upon an indenture of marriage between the plaintiff's son and the defendant's daughter; and the defendant covenanted upon an assurance of lands by the plaintiff on his son, to pay the plaintiff 100*l.* and bound himself to the performance of the covenants, and a breach assigned in non-payment of part of the 100*l.* *Ra. Entr.* 163. *Vet. Intr.* 48.

To a curate of M. W. for forty marks, covenanted to be paid by the defendant, by an indenture between him and the dean and chapter, who granted the rectory to the defendant and the statute of 29 Car. 2. for confirming and perpetuating augmentations made by ecclesiastical persons to vicarages and curacies, is recited: to which there was a plea of a sentence of deprivation by 13 Car. 2. of conformity; adjudged, that the statute is not like the case of minority, that he is ipso facto deprived; but his continuance in his ministry amounts to a nomination. 3 *Lev. Rep.* 75, 83.

For Rent.

Of a messuage. *Ra. Entr.* 152, 174. 1 *Brown.* 161. T 109, 118, 123. *Vid.* 152. 1 *Saund.* 1. Of a bill. *Tho.* 1

In Actions of Debt.

Bro. Red. 230. Of a messuage and customary lands. Tho. 110. Of two closes of land. Tho. 116. The like of one. Re. Dec. 212. Of a messuage and land. Tho. 117. Ra. Entr. 152, 176. Of five hundred eighty-nine acres of pasture. 1 Bro. 183. Of divers parcels of arable, pasture and marsh land. Vid. 195. Ro. Entr. 180. Of lands and cattle. Ra. Entr. 175. Of a house and household goods. Ra. Entr. 175. Of a messuage and brewing vessels. Keil. 153. Of a messuage containing several rooms, particularly. Vid. 152. Of several chambers, part of a house. Ra. Entr. 176. Of several parcels of pasture and marsh, containing 11244 acres and tithes. Vid. 162. Of a moiety of a rectory. Tho. 108. Of a rectory and tithes. 1 Brown. 163. 3 Brownl. 15. Of a chapel, lands and tithes. Ro. Entr. 187. The like of a portion of tithes. 2 Saund. 296. Bro. Red. 226. Bro. Met. 158. The like of all tithes. Clift 247. Han. 67. Of a manor with the appurtenances. Tho. 153. Of a manor with all lands, &c. and services, except underwood, &c. Ra. Entr. 175. Of fifteen sheep by such a time, to pay 40s. Bro. R. 180. The like for twenty cows. Mo. Intr. 149. Of two chambers in a messuage. Bro. R. 208. Clift 231. Ra. Entr. 277. Of several rooms in a house. 2 Saund. 22. Of two *rooms in a [P* 402] yard. 2 Ven. 249. Upon two several demises by lease parol; the like, Clift 224, 232, 237. Of a messuage, lands and mill. Saund. 250. For rent unpaid for a whole year; the like, 1 Saund. 1. Of a manor and flock of sheep. Pl. Gen. 244. Of a warren. Pl. Gen. 263. Of a fourth part of two corn-mills, and one malt-mill, and a house-mill. 2 Ven. 176. Upon a lease parol. Mo. Intr. 174. Bro. Vad. 207. Clift 234, 248. The like for so long as the parties should agree, &c. Mo. Intr. 174. Bro. Vad. 165. The like, 199. Upon several demises. Cl. Man. 211. Id. 257. Against Exec. 259, 269. 2 Inst. Cl. 134. Of a messuage for a year. Ra. Entr. 152, 174. Vet. Intr. 42, 42. The like of a manor, with an exception of part. Ra. Entr. 175. Upon a demise to hold till the feast following for rent, payable upon demand. 3 Brownl. 12, 13. Where tenements were demised for a year, and so from year to year, at the will of the plaintiff and defendant; and the defendant held the tenements four years, and the rent was in arrear for the whole time. Ra. Entr. 152. The like for a year and half's rent. Ra. Entr. 175.

For the Arrears of an Annuity.

For an executor against the receiver of the profits of a messuage and lands, for the arrears of annuity granted to the testator

References to Precedents

for life: 1 Brown 179. 1 Saund. 276. 1 Saund. 282. Tho. 133. The like granted by the plaintiff to the defendant. Bro. Red. 190. The like granted in fee. Ro. Entr. 219. 2 Instr. Cl. 355. For the arrears of an annuity granted by the defendant and his late wife. Pl. Gen. 96. Han. 92. Bro. Red. 184. For an husband for the arrears of an annuity granted to his deceased wife for her life, against the heir of the grantor. Co. Entr. 119. For the arrears of an annuity granted for another's life. Clift 247. For an executor of an executor for the arrears of an annuity granted by the defendant's testator to the plaintiff's testator. Ro. Entr. 219. Co. Entr. 120.

For an administrator for the arrears of an annuity, payable to the vicar of a church, by the rector or his farmer, by prescription, against the impropiator. Bro. Red. 169. The like against a parson for an annuity by prescription. Pl. Gen. 101. For a dean and chapter. Pl. Gen. 99.

Against an executor for the arrears of an annuity granted to the plaintiff, and J. her late husband, by the testator for years, determinable upon the death of the said J. who died. Ra. Entr. 151.

For an executor against the heir of the feoffee of a manor, for the arrears of an annuity granted to the testator for life. 1 Brownl. 8.

For an executor for the arrears of an annuity granted by the defendant to the testator for life. Ash 216.

The like for services done and to be done: bar that the testator in his life-time refused to do the service for which the annuity was granted. Ash 216.

Upon Recognizances.

Upon a recognizance taken in the court of chancery. Han. 81. 1 Brown 173. Tho. 127. Pl. Gen. 238. 2 Instr. Cl. 369. Ash 191.

The like before the justices of the grand sessions at Wales and inrolled in the common pleas. 1 Brown 164.

The like before the chief justice of the common pleas. Brown 164. Bro. Red. 210. The like before one of the judges of the common pleas. Bro. Red. 209. The like against bail in case upon a judgment recovered. Tho. 125. Bro. Red. 209. The like in debt, setting forth the original, the Capias, an Habeas Corpus, the declaration, imparlance, and judgment by non sum informatus. Tho. 129. The like setting forth the original, the declaration, the imparlance, conditions performed, judgment upon a verdict, a capias ad satisfaciendum, and non est inventus returned. Bro. Red. 210.

Upon a recognizance taken in the court of King's bench. Bro. Red. 223. The like against bail in debt, whereupon execution was awarded after two nihil's returned. 2 Instr. Cl. 369.

In Actions of Debt.

341. The like against bail in the king's bench in trespass, after an issue joined, a trial at bar, and a judgment for the plaintiff. 1 Brown 177.

Upon a recognizance taken before the mayor and clerk of the staple of N. Tho. 123. Han, 80. 2 Instr. Cl. 369.

For an administrator upon a recognizance in chancery, and the recognizance certified by a mittimus into the court of common pleas. Pl. Gen. 238.

Upon a recognizance in the king's bench, certified by mittimus, issuing out of the court of chancery. Ra. Entr. 192. Vet. Intr. 64.

For the king upon bail given in the court of chancery to appear before the king and council; and in the mean while to keep the peace; whereas the defendant committed an assault. Ra. Entr. 192.

For a patentee of the king, upon the like recognizance acknowledged in the king's bench, to keep the peace. Vet. Intr. 68.

Against bail upon a writ of privilege in the common pleas; whereupon the original attachment, the declaration and impleurment were set forth, and conditions performed pleaded; and thereupon a verdict and judgment, a *ca. sa.* and *non est inventus* returned. 3 Brownl. 176.

Against bail in trespass after issue joined in the king's bench, and a trial at bar, and judgment for the plaintiff. Upp. Bench 57.

Against bail in debt in the king's bench, and an execution awarded after two *nihils* returned. Ash 204.

Upon Judgments.

Upon a judgment in the common pleas by a *cognovit actionem*. Tho. 116. 2 Mo. Intr. 223. Ra. Entr. 194. Vet. Intr. 23. The like upon a *mutuatus*. Idem 227. The like in trespass. 1 Brown 157. The like in debt. Re. Dec. 249. 2 Instr. Cl. 353. For costs upon a *non pros* in the common pleas. 2 Brown 72. Ash 213. The like in an inferior court. Bro. Mer. 148. 2 Mo. Intr. 228, 229.

Upon a judgment in debt in the king's bench. Cl. Man. 221, 223, 224. Re. Dec. 248. Bro. Vad. 164. 2 Instr. Cl. 351. Against an administrator. Re. Dec. 218.

Upon a judgment in debt in the king's bench upon a recognizance in chancery; whereupon there was an issue, and relinquishing of an averment, and an acknowledgment of the action. Brown 173.

Upon a *non pros* in the king's bench. Ro. Entr. 194. Wi. Entr. 351. 2 Mo. Intr. 225. The like against an executor. Tho. 118. 2 Mo. Intr. 226. Upon a *non pros* in the palace-court, reciting the process to the trial. Tho. 127. Wi. Entr. 183. The like in a county-court in case after trial. 1 Brownl. 109. The like without reciting the process. Ash 193.

Upon

References to Precedents

Upon a judgment obtained upon a bill filed against an attorney; whereupon there had been a plea of *per minas*, and a *relicta verificatione*. Ra. Entr. 194. Vet. Intr. 22.

Upon a judgment in debt where there had been an outlawry in the Common Pleas, and the judgment affirmed upon a writ of error. Co. Entr. 153.

Upon a judgment in the Common Pleas where the original, a *plures distringas*, *narr' issue*, the *nisi prius*, and judgment certified into the King's-bench by a writ of error. Ver. Intr. 66.

For damages in a writ of entry in the nature of an affize, where there had been a judgment by default upon a grand cape. Ra. Entr. 196.

For damages in waste against tenant by the curtesy. Ra. Entr. 197.

For the value and damages in dower, wherein there had been an issue upon a detinue of charters. Hern. 322.

Upon a judgment by default in a *sci. fa.* for the arrears of an annuity. Ra. Entr. 193.

The like after a plea, and a verdict for the plaintiff. Ver. Intr. 65. Ra. Entr. 193.

Upon a judgment in debt in the King's-bench without reciting the process. Hern. 303.

The like for an executor reciting the process in trespass. Ash 203.

For damages in affize. Ra. Entr. 194, 195. The like for a surviving plaintiff. Ra. Entr. 195.

The like where the affize was taken by default. Ra. Entr. 195. Vet. Intr. 168.

For damages in *duplo* in an affize of a nuisance upon the borders of two counties. Ra. Entr. 196.

For damages in a writ of right prosecuted, in the nature of an affize in the court of a manor. Ra. Entr. 195. Vet. Intr. 108.

For Fines and Amercements.

That the plaintiff seised of a manor, had a leet; and the defendant being an inhabitant, and making default, was amerced at the court. 1 Brownl 152. Ash. 176.

The like against the defendant as constable and inhabitant. 1 Brown. 254. Re. Dec. 178.

That the plaintiff seised of a manor, had a leet and a court-baron, and by a custom the tenants, residents and inhabitants within that manor, ought to do suit to the plaintiff's mill; and the defendant was amerced for placing timber in the highway, and for grinding at another mill. 1 Brown. 167.

[P* 403] *The like for inclosing lands nigh a highway, to the nuisance of the inhabitants. 1 Brown 169. Co. Entr. 118.

For a fine for refusing to appear to inquire and present matters presentable at the court. 1 Brown 168.

Where the plaintiff was seised of a manor, by custom that the homage might make bye-laws for the preservation of the common;

In Actions of Debt.

common; and at a court it was ordered, that no inhabitant should feed the common before such a day, under the penalty of 40s. which the defendant had forfeited, &c. 1 Brown. 170. Co. Entr. 118.

Where the plaintiff seised of a manor, had a court-baron, and used to punish delinquents; and the defendant built a wall in the highway, and was amerced at the court. 2 Brown 23. The like for digging clay-pits. Lev. Entr. 62. The like for not removing an inmate or lodger. Tho. 113. The like for breaking into a common, and driving away an estray. Tho. 219. Re. Dec. 163. 2 Mo. Intr. 229. The like for not removing a hedge. Ro. Entr. 200.

By the Mayor and Freemen of a corporation for not paying a forfeiture by their bye-laws, for refusing to accept an office. 2 Ven. 243.

Against a copyhold tenant for three offences. 1. Upon an amercement for non-appearance. 2. Upon a penalty for the breach of the bye-laws. 3. For keeping sheep upon the Lord's waste. Bro. Met. 169.

That H. seised of an Hundred, had a leet which he leased to the plaintiff for years; and the defendant was amerced for a fault. Tho. 132.

By the mayor and burgeses of a vill for a foreigner's selling goods within their corporation. Tho. 115.

For fines upon admissions to copyhold lands. Clift 244.

That a bishop, seised of a borough, had a court-leet for all the inhabitants; where the defendant appearing, refused to be sworn to present, and by taking upon him the office of Judge, disturbed the plaintiff of his court, for which a fine was laid upon him. Ash. 180.

That the plaintiff being seised of a manor had a leet; and there is a custom in that manor, that the chief pledges shall present the defaults, &c. and the defendant being a chief pledge was sworn, and departed before the verdict was given. Ra. Entr. 151. Vet. Intr. 63.

Upon Statutes.

For the party grieved. Ra. Entr. 186, 191. Co. Entr. 160, 164. Bro. Entr. 410, 411, 452. Cl. Ass. 259. Tho. 76, 78. 1 Brown 91. Pl. Gen. 80. Mo. Intr. 180, 270.

For the King and party prosecuting. Co. Entr. 163, 165. Ro. Entr. 414, 443. 1 Brown 59, 100. Bro. Red. 184. 2 Brown 30, 31. Wi. Entr. 349. Vid. 192. Lev. Entr. 135. Pl. Gen. 81. Bro. Va. Me. 225, 229. 2 Mo. Intr. 176, 177. 2 Instr. Cl. 264, 355, 361.

For the King only. Ra. Entr. 206. Co. Entr. 167. Ro. Entr. 418. Pl. Gen. 83.

For the party only. Ra. Entr. 315. 1 Brown 93. Tho. 77.

For

References to Precedents

For the party only where a moiety of the forfeiture was due to the king. Tho. 88. Pl. Gen. 86, 89. Cl. Aff. 267.

Where the statute was recited in the writ. Ra. Entr. 599. Plow. 77. Dyer 95. 1 Brown 93, 98. Wi. Entr. 36. Ro. Entr. 420, 423.

For not setting out tithes brought by the executor of the assignee of a term in the rectory. Co. Entr. 161.

For the proprietor of a rectory for the tithes of grain for a year. Hern 303. Wi. Entr. 197. Tho. 83. 1 Brown 90. The like for tithes of grain and hay not being set out for three years. Hern. 321. 2 Mo. Intr. 167. 2 Instr. Cl. 363. Wi. Entr. 209. The like for tithes of wool. Bro. Va. Me. 243. The like for the rector. 2 Brown 32. Wi. Entr. 342.

For the farmer of a rectory for not setting out tithes of grain for a year. Wi. Entr. 211. 1 Brown 90. Tho. 85. Han. 67. The like for tithes of grain and hay. Tho. 135. The like for three years. Tho. 94. The like for tithes of hay only. Ro. Entr. 201.

For a vicar for the tithes of wood and underwood for a year. Tho. 119. 2 Mo. Intr. 170. The like of hay. 2 Instr. Cl. 366. Against the sheriff upon the statute of 23 Hen. 6. who would not let the plaintiff out upon bail, that was arrested upon an attachment. Han. 81. Instr. Cl. 355. The like upon a latitat. Ash. 69. The like upon an indictment of trespass. Ash. 79.

For a false return of a writ for electing a member of Parliament. Ro. Entr. 415. Ra. Entr. 186, 446. Plow. 118. Vet. Intr. 149. Ash 72, 91.

For taking 13s. 4d. for the return of a venire facias. Upp. Ben. 257.

Against an under sheriff who remained in his office beyond a year, contrary to the statute of 23 Hen. 6. Ra. Entr. 206. a. Vet. Intr. 117. Ro. Entr. 427. Lev. Entr. 435. Bro. Va. 255. Bro. Va. 225.

Upon the statute of 8 H. 6. c. 16. against an escheator, who took upon him an office by a jury not impannelled by the sheriff. Ra. Entr. 315.

Against a sheriff for taking 4s. and 6d. upon an arrest, contrary to 23 Hen. 6. Ro. Entr. 443.

The like against the bailiff of a hundred. 2 Instr. Cl. 369.

Against a sheriff for extortion. 2 Instr. Cl. 361.

Against a justice of peace, who sat as justice at four general sessions, not having twenty pounds per ann. in the county, upon 23 Hen. 8. 2 Brown 31.

Upon the statute of fraudulent conveyances, 13 Eliz. Ro. Entr. 441. Bro. Red. 184. Ra. Entr. 207. Co. Entr. 162. 1 Brownl. 101.

Against

In Actions of Debt.

Against a recusant who absented himself by the space of six months, upon 1 and 13 Eliz. 1 Brown. 91. The like for not receiving the sacrament. 2 Brownl. 172.

For not baptizing a child within one month after its nativity, upon 3 Jac. 1. 1 Brown 92.

Against the vicar of a church for non-residence, upon 21 Hen. 8. Ro. Entr. 414.

The like against a rector. Ra. Entr. 599.

Against a doctor of physic for practising in the country not being licensed, upon 3 H. S. Ro. Entr. 414. Ash 81. The like in London. Ra. Entr. 463.

For taking pheasants in the plaintiff's soil, upon 11 Hen. 7. Pl. Gen. 80. Ra. Entr. 599.

For exercising a trade (not having been an apprentice to it) contrary to the statute of 5 Eliz. c. 4. §. 31. Tho. 89. Bro. Va. Me. 247. 2 Mo. Intr. 176. Upon the same statute, cap. 4. §. 11. for retaining a servant without a testimonial from his late master. Tho. 88. Upon the statute of usury. 1 Brown. 95. Vid. 192. 2 Inst. Cl. 264.

For not filing a warrant of attorney in dower, contrary to 32 Hen. 8. cap. 30. Ro. Entr. 418.

Upon the statute of 5 Eliz. cap. 9. §. 12. for not appearing at the assizes to testify being served with a subpoena. 1 Brown. 91. The like against an attorney. 2 Mo. Intr. 172.

Upon the statute of 3 & 4 Ed. 6. c. 19. §. 2. for buying wretches out of a market. Tho. 92.

Against a butcher who sold cattle, alive, and fat, in open market, contrary to the stat. 3 & 4 Ed. 6. cap. 19. §. 31 Brown 113.

Against one, who by speaking words, revived late differences between parties, contrary to the stat. 12 Car. 2. c. 11. §. 24. Tho. 79.

Upon the stat. 1 Jac. 1. c. 24. §. 3. against one who employed workmen to make sail-cloth, not having been bred up in that trade. Tho. 88.

Upon the stat. 5. Eliz. cap. 4. §. 11. for hiring a servant who departed his service without a testimonial from his master. Bro. Va. Me. 229. 2 Mo. Intr. 177.

Upon the Habeas Corpus act against a captain of the militia, who seized the defendant upon a warrant from the lieutenant of the county, for a matter bailable; and the defendant refused to give a copy of the commitment. 2 Mo. Intr. 180.

For driving a distress contrary to the stat. 1 & 2 P. and M. Last. Cl. 270.

Upon the stat. 5 Eliz. cap. 9. §. 6. for perjury in evidence, upon a trial in the King's bench, in trespass, at the nisi prius Westminster. 1 Brown 100. Ra. Entr. 481.

The like in the common pleas, in trespass, at the nisi prius at the assizes. Tho. 92. Co. Entr. 164. Upp. Ben. 56. Vid. Cro. 133.

The

References to Precedents

The like in an action of assault and battery. Wi. Entr. 349.

The like in a deposition upon an examination by a commission out of chancery, Co. Entr. 165.

For costs allowed upon a non pros in the king's bench. Ra. Entr. 599. Up. Ben. 58. Ash 77. Vide 2 Cro. 111. 1 Brown 102. Wi. Entr. 351. Tho. 87. Ro. Entr. 194.

The like upon a non pros for want of a declaration. Tho. 86.

The like in an inferior court. Brown. Entr. 412.

Upon the stat. 8 Eliz. cap. 3. §. 4. for arresting the plaintiff in the name of another without his leave. Ro. Entr. 437, 439. Vid. 189. 2 Inst. Cl. 259. Co. Entr. 160. Ra. Entr. 598, 599.

For maintenance against the stat. 32 Hen. 8. c. 9. brought in the common pleas upon a writ in the court of chancery. Brown 96. The like upon a suit in trespass. Mo. Intr. 155. The like upon a suit in trespass in the king's bench. Upp. B. 54. The like for an information in the exchequer. Co. Entr. 163.

Against a buyer of lands, &c. upon a pretended title. 3 H. 8. c. 9. Pl. Gen. 86. Ro. Entr. 420. Ra. Entr. 430. Ash 70. The like against the grantor. Plow. 77.

For selling wines by retail, beyond the rates appointed by the statute of 20 Car. 2. cap. 1. §. 4. 1 Brown 108. Tho. 9. 148. Vid. 186.

Upon the stat. 8 H. 6. c. 9. of forcible entry, (i. e.) for entering by main force into lands, &c. Tho. 77. 2 Inst. Cl. 271.

Upon the stat. 21 Hen. 8. c. 5. §. 7. against a bishop who refused to deliver to the plaintiff a copy of a will. Ra. Entr. 603.

Upon the same statute, §. 5. for extortion in the probate of a will. Co. Entr. 166.

Upon the Habeas Corpus act of 31 Car. 2. for 500l. against a gaoler for denying a copy of a commitment to a prisoner. Lill. Entr. 153.

Upon the stat. 7 W. against a returning officer for refusing a copy of the poll, and a verdict for the plaintiff. Lill. Entr. 2.

Upon the stat. 9 Annæ, for preventing excessive gaming. Lill. Entr. 168.

Upon an assignment of a bail-bond, according to the statute in an action brought against the principal. Lill. Entr. 173.

The like against the bail. Lill. Entr. 175, 176.

In debt qui tam, &c. upon the statute of Car. 2. for coming to church. Lill. Entr. 175.

Against a legatee pursuant to the 3 & 4 W. 3. Lill. Entr.

Upon the stat. 7 & 8 W. 3. for refusing a copy of the will. Lill. Entr. 255.

In Actions of Debt.

By and against whom.

1. By whom.

For the King against the constable of a castle, for an escape of a receiver committed by auditors of his duty of Lancaster, for the arrears of an account. 1 Brown 150.

For a grantee of the King, upon a bond made to one who committed felony; whereupon there was inquisition taken before the coroner. Bro. Red. 181. 1 Saund. 270. Bro. Vad. Me. 239.

For a bishop and his commissary upon a bond. Bro. Red. 220.

For a chamberlain of the city of London, upon a bond made to his predecessor, setting forth the custom of the city. Tho. 134.

For a chamberlain of the city of London, for a forfeiture upon an act of common council of that city, against a clothworker for not presenting his apprentice before the master and wardens of the company, according to an act of common council. Tho. 110.

For the chamberlain of London upon a recognizance before the mayor, &c. for 500l. of the orphan's money. Bro. Met. 144.

For the mayor, commonalty and citizens of the city of London, against a foreigner for the custom of scavage, granted by letters patents of Ed. 4. and confirmed by act of parliament 13 H. 8. Vid. 154.

For the mayor and burgeses of L, against an executor upon bond. Wi. Entr. 201. 10 Co. 120.

For the mayor and burgeses of T. upon a by-law, Tho. 15. Ro. Entr. 204.

For the mayor and wardens of merchant-taylors company, against an attorney of the Common Pleas, who was free of their company, and refused to take the livery. Wi. Entr. 257.

For the governor of an hospital upon a bond. Wi. Entr. 328.

For the mayor and goodmen of the town of G. 2 Ven. 243.

An action of debt brought by two, and one being an infant, by guardian. Bro. Vad. 167.

For a treasurer against the collectors of monies upon a brief granted from the King. Re. Dec. 138.

For a surviving obligee. Tho. 115. Mod. Intr. 158. Cl. an. 282. Lill. Entr. 165.

For churchwardens upon a bond. 2 Saund. 80.

For a lord of a manor against his customary tenant, for a fine upon an admission. Vid. 176. Lill. Entr. 146.

For

References to Precedents

For the King's coroner and attorney upon a bond made to a Felo de se. 1 Saund. 269.

For a prothonotary against an attorney for fees. 1 Brown 177.

For the master, wardens and company of Shipwrights of R. for a fine laid upon the defendant. Ro. Entr. 204.

For the marshal of the marshalsea (Coram ipso Rege existens) upon a bond. 1 Saund. 156.

For the bailiff of a liberty upon a bond. 1 Saund. 14.

For an assignee under a commission of bankrupts, upon a bond made to the bankrupt. Tho. 106. Bro. Red. 185. Bro. Va. 258. Bro. Met. 159.

By Queen Anne on a bond made to King William III. Lill. Entr. 145.

By the duke of York on a bond against one attainted of high treason. Lill. Entr. 144.

By the queen dowager against the marshal, for an escape on a commitment in execution upon a judgment. Lill. Entr. 151.

2. By Attornies, Entering Clerks, and other Officers.

For an attorney upon a bond, reciting the general pardon allowed to the defendant, with a reversal of an outlawry; and the defendant's appearance. 2 Brown 84.

For an attorney upon a bond. Wi. Entr. 333, 334. 1 Brownl. 113. The like against three persons. Bro. Met. 155.

Upon an Infimul Computasset. Mo. Intr. 169.

For an attorney for fees. Bro. Red. 176.

For an attorney retained to prosecute a writ in the Common Pleas. Bro. Red. 176. Han. 92. Co. Entr. 121. 1 Brownl. 89. The like for all writs in the Common Pleas generally. Pl. Gen. 270. Ra. Entr. 207, Vet. Intr. 67.

For an attorney retained to be attorney for the defendant, to prosecute and defend two writs in the Common Pleas, taking for every term in both 3s. 4d. besides expences and costs. 1 Brown 183. 2 Brown 82. Bro. Met. 152. The like for fees and charges after part paid. Bro. Met. 154.

For an attorney retained to appear for the defendant in the King's Bench, and to defend a suit in trespass and assault, taking for every term 3s. 4d. besides expences and costs; and upon another retainer. Tho. 111.

For an attorney against the marshal of the King's Bench, for an escape of one committed upon a judgment in debt. 2 Brown 59.

By a clerk to the chief clerk of the King's Bench, Cl. Man. 277. Han. 69. The like for the chief clerk of the King's Bench. Han. 77. 2 Instr. Cl. 347.

In Actions of Debt.

For a counsellor at law retained by the year in all causes.
Bro. Red. 172. Ra. Entr. 194. Vet. Intr. 23. 1 Brownl. 80.
For a Prothonotary against an attorney for fees in entering
and enrolling pleas. 1 Brownl. 177.
For a Prothonotary's clerk. Ash 183.
For fees in levying a fine. Ash 184. The like in passing a
recovery. Ash 212.

3. By Husband and Wife.

By husband and wife for monies recovered in the Sheriff's
court by the wife dum sola. 2 Brown 72.

By husband and wife upon a bond made to the wife when
sole against an husband and wife administratrix. Ro. Entr. 176.
Bro. Va. Me. 204.

By a husband and wife upon a bond made to the wife only.
Re. Dec. 188.

By a husband and wife executrix for rent, for cows demised
to the defendant; and the rent unpaid. 1 Brownl. 95.

By a husband and wife seised of lands for their joint lives;
and the husband demised to the defendant, rendering rent; the
wife died, the husband demised and granted to the plaintiff for
years, determinable upon his life; the defendant attorned, and
the rent was in arrear. 1 Brownl. 96.

By an husband and wife executrix upon a bond. Han. 86.
Upon a single bill. Cl. Man. 244.

The like upon a bill penal. Mo. Intr. 167.

The like against an administrator. Han. 86, 47.

By husband and wife executrix, and a co-executrix against
a survivor, upon a retainer and an emisset. 1 Brown 151. Pl.
Gen. 261.

By husband and wife executrix for rent for cows demised
to the defendant, and the rent unpaid. 1 Brownl. 95.

By an husband and wife executrix, and a co-executor against
an heir upon a bond. Bro. Red. 194.

By husband and wife against an executrix upon a bond made
and entered into by the testator, to the wife, before coverture.
Bro. Va. Me. 204.

By husband and wife administratrix. Wi. Entr. 310. Bro.
Red. 175.

By husband of administratrix de bonis non administrat' by
the wife, with the will annexed. Bro. Va. Me. 160. Cl. Man.
248.

By husband and wife administratrix against a son and heir
upon a bond. Tho. 134.

By

References to Precedents

By husband and wife executrix upon a single bill. Cl. Man. 244.

By husband and wife administratrix for monies to be paid at the day of the defendant's marriage. Bro. Red. 175.

[P* 405] By husband and wife against a prothonotary's clerk upon a bill penal made to the wife when sole. Bro. Met. 146.

Where the husband and wife were *seised of lands for their lives, and the husband demised to the defendant for years, rendering rent; the wife died, the husband demised, and granted to the plaintiff for years, determinable upon his life; the defendant attorned, and rent became in arrear. Bro. Red. 182.

1 Brownl. 96.

By a husband and wife executrix for rent unpaid for cows. 1 Brownl. 95.

By husband and wife, grantee of a reversion for life, upon a lease made by her former husband. Rob. Entr. 198.

By husband and wife on a lease made by them. Clift 228.

By an husband and wife, devisee against husband and wife upon a lease made by the devisor to the wife before marriage. Tho. 123.

By a husband for rent in arrear, in the life of the wife, upon a lease made by the wife before marriage. Clift 235.

By Heirs.

By a son and heir upon a lease made by his father for twenty-one years. Ro. Entr. 187. 3 Brownl. 16.

By an heir against an executor upon a demise made by the father for years by an indenture, and part of the rent was due by the testator, and part by the executor. Bro. Red. 186. Brownl. 105.

By a son and heir upon a demise by the father against the second assignee of the lessee for years. Tho. 118. 3 Brownl. 16.

By Executors.

By executors upon bonds. Wi. Entr. 180, 228. Bro. Red. 173, 175. Cl. Man. 203. Mo. Intr. 157. Bro. Vad. 174. Cl. Man. 291. Cl. Aff. 314. 2 Instr. Cl. 308. Lill. Entr. 174.

By an executor upon a bill indented for the payment of money at several days. 2 Brown 74.

By two executors upon a bond and a bill penal. Mo. Intr. 164.

By a surviving executor. Vid. 197. Bro. Vad. 152.

By an executor, together with two others co-executors. Tho. 133. The like where one renounced. Bro. Vad. 151.

By two surviving executors, named in the will with two others deceased. Ro. Entr. 199, 227.

In Actions of Debt.

- By executors against executors upon a bond. Wi. Entr. 168
6, 307, 353. Mo. Intr. 171. Bro. Red. 175. Bro. Vad.
1, 210.
- By an executor against an administrator. Han. 87. Mo.
Intr. 157.
- By an executor of an executor, upon a bond against an ad-
ministrator. Lill. Entr. 165.
- By executors of executors. Ro. Entr. 208. Bro. Red. 194.
Aff. 332. The like against an heir upon a bond. Clift
2. Lill. Entr. 165.
- By one executor, where another was summoned and severed.
Gen. 272.
- By an executor, where another executor being summoned to
prosecute made default. Tho. 124.
- By two executors for rent. Bro. Met. 140.
- By an executor against an heir upon a bill penal. 2 Instr.
1, 318.
- By an executrix and a co-executrix against an heir, where the
executrix was married. 2 Instr. Cl. 321.
- By an executor for rent due in his own time: Bar, that the
fee, assignee and plaintiff entered. Lill. Entr. 155.
- By an executor against the heir of R. D. son and heir to W.
brother and heir of W. D. brother and heir of J. D. Lill.
Intr. 147.
- By an executor for rent due in the testator's life-time. Lill.
Intr. 163.
- Upon bond by a surviving executor. Lill. Entr. 144.
- By an executor against an assignee upon two demises of sever-
al parcels of lands in the indenture, and of several rents un-
paid to the plaintiff, after the death of the testator. Vid. 201,
4. The like for rent due to the testator. Mo. Entr. 173.
Intr. 330. The like for rent due to the executor. Ash
3, Cl. Man. 260.
- By an executor against the person of the profits for 1360l.
to be paid to the testator for an annuity. 1 Saund. 276.
- By an executor for rent due to the testator for free and copy-
hold lands, and goods and chattels demised. Bro. Met. 166.
- The like for rent upon an indenture. 2 Instr. Cl. 332.
- By an executor for rent due in his own time. Lill. Entr. 155.
- The like for rent due to the testator. Lill. Entr. 163.
- By the executor of the assignee of the reversion, where one of
the executors are summoned and severed against the third assign-
ee of the lessee. Bro. Va. 245.

By Administrators.

- By an administrator upon a bond. Mo. Intr. 161. Cl. Man.
5, 271. Lill. Entr. 164. Upon a bill penal. Bro. Red.
98.

By

References to Precedents

- By an administrator, with the will annexed. *Mo. Int.* 151.
 Upon an Emisset, and for money lent. *Mo. Intr.* 170.
 By an administrator during the minority of an executor. *1 Brown* 56, 160. *Bro. Red.* 198, 199. *Re. Dec.* 232. *2 Instr.* Cl. 320. *Lill. Entr.* 177.
 By an administrator against an heir upon a bond. *1 Bro.* 156. *Tho.* 134. *Vid.* 177. *2 Instr.* Cl. 314.
 By an administrator upon a bond to pay the intestate where he should come to his age of twenty-one years. *1 Brown* 171.
 By administrators against administrators upon two bonds. *Wi. Entr.* 177.
 By an administrator upon an award made in the intestate's life-time. *Re Dec.* 186.
 By an administrator of a surviving obligee upon a bond. *Han.* 78. *Cl. Man.* 254.
 By an administrator against husband and wife, as daughter and heir. *Mo. Intr.* 161.
 By an administrator against an executor upon a bond. *Cl. Man.* 246. *Bro. Vad.* 209. *2 Mo. Intr.* 220. *Cl. Man.* 246. *2 Instr.* Cl. 316.
 By an administrator against an executor upon a recognizance in Chancery. *Tho.* 127.
 By the administrator of a vicarage for rent due by prescription on by the defendant, as proprietor of the rectory. *1 Brownl.* 76.
 By the administrator of a coheir for the third part of a rent recovered upon a feoffment of lands to A. whose estate the defendant hath. *Ash* 236.
 By an administrator for rent unpaid to the intestate upon lease at will. *Ash* 202.
 By an administrator de bonis non, &c. on a bond made by feme to the intestate. *Lill. Entr.* 167.
 By an administrator upon several bonds. *Lill. Entr.* 167.
 By an administrator de bonis non of an administrator. *Lill. Entr.* 187.
 By an administrator for rent due to the intestate, as well to the plaintiff. *1 Saund.* 1. *Lev. Entr.* 52.
 By an administrator for a surviving lessee, against his assignee for rent unpaid for six years. *Ro. Entr.* 187.
 By an administrator of a coheir for a third part of the rent reserved upon a feoffment. *Ash* 236.

By Grantees and Devisees.

- For a grantee of a reversion for life, by indenture inrolled against the assignee of a lessee for years. *Ro. Entr.* 215. *Brownl.* 19. For a grantee of a reversion, by indenture inrolled, against the lessee for years. *Ro. Entr.* 218. *3 Brownl.*
 For a devisee of the grantee of the reversion, by indenture inrolled, against the assignee of the lessee. *1 Saund.* 2

In Actions of Debt.

By a devisee of the reversion, upon a demise made by the deviser against the lessee for years. Wi. Entr. 215.

By the vendee of the reversion upon a bargain and sale for a year. Clift 229.

By a vendee of the reversion of a term, sold by the serjeant of mace, upon a recovery by the chamberlain of London, after a scire facias upon a recognizance, and a fieri facias executed. Rob. Entr. 211.

By Tenants in Common.

By tenants in common for rent in arrear upon a lease parol, where one of the plaintiffs declares by his Prochein Amy. Clift 224.

By Tenants by Elegit.

For a tenant by elegit against a lessee for years Wi. Entr. 184. 1 Brown 104. Ash 206.

For a tenant by extent, upon a lease for years, if the plaintiff or his assignee should so long live. Winch. Entr. 303.

2. Against whom.

Against a Sheriff who had levied monies upon a liberate, and not paid it to the plaintiff upon a Levavi feci returned. Wi. Entr. 304.

Against a Filazer of the Common Pleas upon a bond. Brq. Red. 219.

Against a serjeant at law by a bill filed upon a bond. Mo. Entr. 158.

Against a bishop's ordinary, to whose hands the goods of the intestate had come. 1 Brown 172. Pl. Gen. 291. 2 Instr. Cl. 344.

Against the tutor of an infant. Bro. Red. 220.

Against the marshal of the King's Bench for an escape after commitment in execution, on a Habeas Corpus * on a judgment in the Common Pleas. Lill. Entr. 187. [p* 406]

Against the warden of the Fleet for an escape after a commitment in execution. Lill. Entr. 156.

Against a legatee pursuant to the statute of 3 & 4 W. 3. Lill. Entr. 145.

Against Grantees, Devisees and Assignees.

Against an assignee of a manor, lands and sheep demised for ten years, for two years rent. Pl. Gen. 244, 263. Clift 249.

Against the third assignee of the lessee. Bro. Va. 245. The like against the second. Tho. 118. The like against an assignee. Clift 249.

Vol. II.

T t

Against

References to Precedents

Against Attornies.

Against an attorney upon a bond. Ro. Entr. 188. Wi. Entr. 173. Mo. Intr. 152. Bro. Red. 231, 158. Bro. Met. 152, 153. 1 Brown 62. Cl. Man. 286. Cl. Aff. 370. 2 Instr. Cl. 345, 346, 347. Clift 241. Bro. Va. Me. 205.

Against an attorney for rent, &c. Bro. Red. 208. Vid. Postea.

Against Heirs.

Against a Son and heir upon a bond. 1 Brown 156. Tho. 117. Han. 89. Vid. 177. Bro. Red. 194. Bro. Va. Me. 154. 172. 2 Mo. Intr. 232. Cl. Man. 208. 2 Instr. Cl. 314. Lill. Entr. 180.

The like against a son and heir within age. 1 Brown 182. Cl. Aff. 401. 1 Instr. Cl. 373.

Against a son and heir upon diverse bills penal made by the ancestor. Re. Dec. 221. Clift 243. The like upon one. 2 Instr. Cl. 318, 321.

Against several heirs upon a bond. Bro. Va. Me. 155.

Against a brother and heir. Clift 243. The like where another person named in the bond did not seal it. 1 Brown 163.

Against a brother and heir of J. late son and heir of T. upon a bond made by the father. 2 Brown 72. The like against sisters and heirs of a son and heir. Clift 242.

Against three coheirs of lands in gavelkind. Bro. Red. 191, 195.

Against two sons and heirs, one by the common law, the other by custom of borough English.

Against the heir of the grantor of an annuity. Co. Entr. 119.

Against the heir upon a statute-staple. Ash 191.

Against the heir and devisee of the obligor. Lill. Entr. 172, 529.

Against Husband and Wife.

Against husband and wife administratrix upon several specialties. Bro. Red. 174. The like upon bond. Idem 112. Re. Dec. 247. Han. 86.

Against husband and wife, daughter and heiress, by an administrator. Mo. Intr. 161.

Against husband and wife daughter and heiress, by an executor. Ro. Entr. 210.

Against husband and wife as cousin and heir upon a bond. Ro. Entr. 2. 3 Lev. Rep. 300.

Against husband and wife upon a bond made by the wife dum sola. 2 Brown 63. Bro. Red. 255. Re. Dec. 229.

Against husband and wife, administratrix by husband and wife upon a bond made by the wife of the one, to the wife of the other.

In Actions of Debt.

other dum sola. 2 Brown 63. Bro. Red. 253. Re. Dec. 229.

Against husband and wife for rent upon a demise made to the wife before marriage. Mo. Intr. 162, 175.

Against the husband only who married the administratrix of the lessee, for rent unpaid for two years after the death of the intestate. Tho. 117.

Against husband and wife executrix of the lessee, for rent unpaid for a year after the death of the testator. Tho. 120.

Against husband and wife executrix for rent. 1 Brown 161. Tho. 109.

Against husband and wife upon a demise made by a devisor to the wife dum sola for years. Tho. 123.

Against husband and wife for the arrears of an annuity granted to the plaintiff for life by the wife dum sola. Han. 92. Bro. Red. 184.

Against an husband for the arrears of an annuity granted by him and his late wife. Pl. Gen. 96.

Against Executors.

Against an executor upon a bond. Ra. Entr. 321. Co. Entr. 127, 268. 10 Co. 120. Lill. Entr. 113, 176, 482.

Against an executor, together with a co-executrix. Ra. Entr. 325. Co. Entr. 148. The like against an executor of an executor, together with a co-executor, upon a bill. Ra. Entr. 329.

Against an executor, together with husband and wife co-executrix. Vet Intr. 63.

Against one executor, where another executor was outlawed. 3 Brownl. 124. Ash 186.

Against two executors, together with a co-executor for the surplus of an account made with them, after the death of the testator before auditors. Ra. Entr. 151.

Against executors for a year and quarter's rent due from the testator, upon a lease parol laid several ways. 2 Ven. 176.

Against an executor for rent accrued in his time, upon an indenture made to the intestate. Vid. 105. Bro. Met. 141.

Against an executor, and a co-executrix, and her husband. Bro. Me. 231.

Against an executor upon a penal bill made by the testator, for the payment of an annuity. Lill. Entr. 177.

Against Administrators.

Against an administrator upon a bond. Co. Entr. 149. Bro. Me. 152. Cl. Aff. 413. 2 Instr. Cl. 311.

Against an administrator, together with a co-administrator. Co. Entr. 323.

References to Precedents

Against an administrator of an administrator upon a bill. Brownl. 83. Bro. Red. 173.

Against an administrator upon a bill penal. Co. Entr. 143. Bro. Met. 149. Cl. Man. 201, 274. 1 Instr. Cl. 162, 318. Mo. Intr. 154. Bro. Va. Me. 209. The like and a mutatus. 2 Mo. Intr. 231.

Against an administrator upon an account stated. Ra. Entr. 149. Mod. Intr. 155.

Against an administrator for rent. Lev. Entr. 52, 149. The like on articles. Lill. Entr. 215.

Against an administrator de bonis non, &c. upon a bond. Cl. Man. 207. Bro. Va. Me. 154. 2 Instr. Cl. 312.

Against an administrator, by a servant, for wages due by the intestate. Bro. Va. Me. 167.

Against an administrator, together with another co-administrator, (who stands outlawed) upon a bond. 1 Brown 164.

Against an administrator for rent unpaid, part by the intestate, and part by the administrator. 1 Saund. 1 Lev. Entr. 52.

Against an administrator by an executor upon a bond. Lill. Entr. 178.

Against an administrator on a bond made by the intestate to the plaintiff's wife dum sola. Lill. Entr. 174.

Pleas in Debt.

The defendant appears in the Exchequer and the corporation of Wigan, with the dutchy of Lancaster, come and claim cognizance of the plea. Bro. Met. 241.

The defendant pleads that the plaintiff such a day and year was attainted of felony; which attainder is still in force unrevoked and disannulled, and not pardoned by the King. Bro. Vad. 252. The like that the intestate was felo de se. Bro. Met. 224. The like.

Privilege pleaded by a clerk as member of parliament, being nominated and elected procurator of the clergy for the diocese of Oxon. Bro. Met. 186. The like by a member of parliament. Idem 250.

A replication to a plea of privilege of parliament pleaded a bond. Idem 217.

To privilege pleaded by a master in Chancery; the plaintiff replies, that he sued forth an original out of the court of Chancery, and outlawed the defendant thereon; whereby he hath lost his privilege. Idem 219.

The defendant pleads to the jurisdiction, that he is one of the barons of the Cinque Ports; to which the plaintiff demurs. Ro. Entr. 199. The like by a clerk of the court of Chancery. Idem 210.

In Actions of Debt.

The defendant pleads a prior action depending undetermined: Replication by Nul tiel record; rejoinder and issue. Bro. Met. 251. Lev. Entr. 54. Another action depending against the executrix as heiress.

The defendant pleads another action depending in London upon the same bond; replication and issue.

The defendant pleads the King's protection under the great seal for a year and day. 2 Brown 106. Tho. 214. The like where the defendant brings in the Queen's letters patents for the protection into the court; and the same are allowed Cl. Aff. 318. Han. 126, 127. The entry of a protection. Cl. Aff. 320.

Plea in debt, that the plaintiff was not in England at the day of payment. Clift 146.

Where the defendant pleads an outlawry in bar; replication and Nul tiel record.—The defendant fails of the record.—Judgment quod respondeat ouster, and then a plea of conditions performed. Ro. Entr. 213.

* To Debt upon a Recognizance.

[P* 407]

That the principal rendered himself before the day of suing out the writ. 1 Brown 178.

To debt upon a recognizance by an administrator, that the intestate released to the defendant; replication, non est factum. Ra. Entr. 192.

An indenture of defeazance pleaded on payment of 20l. on such a day; replication, that the defendant did not pay, &c. 1 Brown 174.

To debt upon a recognizance for the breach of the peace for an assault; that it was the party's own assault. Ra. Entr. 193.

A bar by defeazance pleaded to an action of debt upon a recognizance. 1 Brown 174.

Upon Judgments.

Nul tiel record, and judgment thereupon. Tho. 180. Rob. Entr. 204. Raft. Entr. 194. Lill. Entr. 182, 392, 404, 473. The like in an inferior court. Bro. Vad. 244.

That the plaintiff sued out a Ca. sa. upon the judgment, upon which the defendant was taken, and the plaintiff voluntarily permitted him to escape; replication, that he was not taken upon that writ. Ash 237. The like plea, with a replication that the plaintiff did not permit, &c. 2 Brown 62.

Plea by an administrator to an action of debt upon a judgment, that the plaintiff had before sued out a Scire facias; to which the defendant pleaded, and there was judgment for the plaintiff upon a demurrer. Co. Entr. 154.

On an action of debt upon a recovery in the County-court; the defendant pleads Nil debet per patriam. Hern 325. The like by Nil debet per legem.

By

References to Precedents

By Release.

By a general release, with a replication *Quod non est factum*. Ra. Entr. 197. Vet. Intr. 18, 202. 1 Brownl. 104. Pl. Gen. 248, 346, 347. Bro. Va. 503. Tho. 429. The like after the last continuance. Ra. Entr. 549. Pl. Gen. 349. Bro. Red. 187.

A release to the other obligor, who was bound in the same bond. 2 Mo. Intr. 234. Bro. Va. 503. Ra. Entr. 192, 197.

A release from the testator, and tendered in court; replication, *Quod non est factum*. 2 Mo. Int. 241. Ra. Entr. 324. Vet. Intr. 23.

A release of all actions from an obligee who died. Bro. Met. 249.

A release pleaded at the assizes after the issue joined. Tho. 481.

To an action of debt brought by an executor, a bar by release in *hæc verba*; a replication, that it was not the testator's deed. Vet. Intr. 232.

To an action of debt brought by J. and M. his wife, upon a bill penal made to the wife when sole; a plea, that one F. was bound by the same bill, who made E. his executor, who married G. to whom J. after the marriage, released; replication, that E. died before the release executed; a demurrer thereto. Hern 297.

To an action of debt upon a bond, dated 8 Die, &c. a plea by a release dated 1 Die, and first delivered 8 Die, after the execution of the bond; a replication that the release was first delivered the said 1 Die; and a traverse that it was first delivered after the execution of the bond. Ra. Entr. 198. Pl. Gen. 348.

To an action of debt upon a bond dated 6 Die, and first delivered 7 Die; the defendant pleads that the plaintiff and defendant submitted themselves to an award; and that the defendant, according to the award, executed a bond to the plaintiff's wife 6 Die; that she delivered it to the plaintiff 7 Die, and that the plaintiff before the day of the delivery, by release dated 6 Die, and delivered 7 Die, released to the defendant; a demurrer thereto. 18 Hen. 6. 8.

To an action of debt upon a bond; a plea by a release dated 6 Die, and delivered 7 Die; a replication, that upon some disputes between the plaintiff, husband of an executrix, and the defendant, it was agreed that the defendant should execute a bond to the plaintiff, and the plaintiff should execute to the defendant a release; and that the release was executed before the bond; and a traverse that the release was first delivered after the bond. 18 H. 6. 10.

A plea that the defendant paid the money mentioned in the declaration before the day of the original; and the plaintiff

In Actions of Debt.

gave a release. Cl. Aff. 129. A replication protestando, that the defendant had not paid, and that it was not his deed of release, for plea maintaining the declaration. Ibid.

By Acquittance.

By acquittance of part of the money due; replication, denying the deed. Bro. Red. 174. Bro. Met. 185.

By an acquittance, mentioning that the bill could not be found; and an averment that the action is on the same bill; replication, denying the deed. Bro. Red. 201.

An acquittance general pleaded to a bond: a replication by Non est factum. Bro. Red. 186. Bro. Met. 185.

To an action of debt brought against a Sheriff for 300l. levied upon a liberate; a plea as to 100l. part, Nil debet per patriam; as to 200l. the residue, a special acquittance. Wi. Entr. 306.

To an action of debt for 200l. upon a bond, a plea of an acquittance of 100l. part; a replication, that he made the acquittance of part of another debt due upon a bond; a rejoinder, that it was for part of the debt demanded. Pl. Gen. 5.

By Concord and Agreement.

Where the defendant pleads a general agreement between him and his creditors, of which the plaintiff was one under hand and seal, to take stock and security for 20l. in full discharge of their debts. Bro. Va. 253.

A concord, payment and acceptance of 30s. pleaded; replication, protesting that there was no such concord; for plea, that the defendant did not pay the money. Bro. Red. 190.

Per minas pleaded.

To action of debt upon a bond, at the suit of the chamberlain of London, that the defendant was threatened by the lord mayor with imprisonment, unless he executed that writing. Tho. 209.

To an action of debt upon a bond. Bro. Va. 561. 1 Inst. Cl. 217. Han. 106. Ra. Entr. 350. Vet. Intr. 17, 22. The like upon a bill; replication, that he made it of his own accord, and not through fear. Pl. Gen. Cl. Aff. 70, 313. Bro. Va. 591. The like to an indenture. Bro. Va. 492. Tho. 426.

By Coverture.

Pleaded to debt upon a bond brought by a widow, that she was married at the time of the bond's being made; replication, that she was sole. Pl. Gen. 351, 318. Ra. Entr. 163. Vet. Intr. 74.

That

References to Precedents

That the plaintiff at the time of exhibiting the bill was a feme covert; replication, that she was sole; and traverse, that she was covert and issue. Pl. Gen. 351. Bro. Red. 203. Cl. Aff. 81. Bro. Vad. 501. Ra. Entr. 168. Vet. Intr. 74.

Infancy pleaded.

To an action of debt upon a bond. Ra. Entr. 163. Vet. Intr. 18. Ro. Entr. 227, 334. Mo. Intr. 186. Cl. Aff. 76. 1 Instr. Cl. 216. Tho. 427. Bro. Red. 176. The like to debt for rent. Clift 149.

The like to debt upon a bond; replication, that the defendant was indebted to the plaintiff in 14l. for necessary cloathing, and gave a bond for the security of the re-payment thereof; rejoinder, that it was not made for the payment of money for necessaries. Ro. Entr. 215. Bro. Red. 200.

The like to an action for goods bought. 3 Brownl. 132.

Durefs.

Pleaded to an action of debt upon a bond. Ra. Entr. 250. Vet. Intr. 18. Ash 218. 2 Bro. 99. Pl. Gen. 343. 2 Mod. Intr. 233. Bro. Va. 214. Cl. Aff. 77. 1 Instr. Cl. 216. The like plea, and a replication that the party was at large. Bro. Red. 200. Tho. 426. Han. 106. The like upon several bonds. 3 Brownl. 171.

To a plea of durefs; a replication, that the defendant was indebted to the plaintiff in 18l. whereupon the plaintiff procured the defendant to be arrested by a warrant upon a latitat. Ash 248.

A replication that the defendant was committed to the Fleet in execution at the plaintiff's suit, and made the bond for payment of the money; and traverse, that it was made by durefs. Ash 249.

To an action of debt upon a bond against the mayor, sheriffs and commonalty; a plea, that the mayor was imprisoned till the sheriffs and commonalty executed the bond; a demurrer thereto. Ra. Entr. 251. Vet. Intr. 67.

To a plea of release; a replication that it was made by durefs. Ra. Entr. 250.

Non est factum.

[P* 408] *Pleaded generally to actions of debt upon a bond. Ra. Entr. 160. Wi. Entr. 20. Pl. Gen. 333, 334. Mo. Intr. 187. The like to a bill. Pl. Gen. 334. Cl. Aff. Tho. 424.

That the deed is not the testator's deed. Mo. Intr. 188. 10 Co. 120. Lill. Entr. 166.

Pleaded

In Actions of Debt.

Pleaded specially ; that the defendant paid the plaintiff the money due by the writing, and that the plaintiff delivered a writing to the defendant, in the name of an acquittance ; and afterwards withdrew the deed, et sic non est factum. 1 Brown 198. Ra. Entr. 180. Vet. Intr. 109. Dyer 51.

That after the delivery of the bill the plaintiff interlined these words, &c. et sic, &c. 1 Bro. 199. Mo. Intr. 190.

That after the delivery of the writing the word four was razed, and the word forty inserted, et sic, &c. Tho. 181. The like for a rasure in the date of a writing ; replication, that the rasure was before the delivery, and an issue thereupon. Bro. Va. 450. The like of the vill T. and the vill C. inserted instead thereof. Bro. Red. 258. The like of the figure 7. in the room of the figure 2. et sic, &c. 1 Brown 179, 180. The like of the letter x. after the l. to make the sum 63l. instead of 43l. Replication, that the deed was acknowledged for 63l. and traverse at the rasure after the delivery. Mo. Intr. 189. Bro. Red. 260. The like by an interlineation. Mo. Intr. 190. Tho. 182. 2 Mo. Intr. 221. Cl. Aff. 92. The like by a rasure in a bill. Pl. Gen. 259. The like bar with a replication, that before the delivery of the writing the sum 20l. was razed, and the sum 30l. put instead thereof, with the consent of the plaintiff and defendant ; and traverse, that the plaintiff razed it ; an issue thereon. Bro. Red. 177. 1 Brownl. 90.

That the defendant was not able to read, and he agreed to make the writing for 10l. and the writing was so read to him. Bro. 198. Tho. 173. Mo. Intr. 206. Ra. Entr. 180. Vet. Intr. 17.

That the testator was not able to read, and that the writing was read to him as a written letter of attorney only, and not as a bond. 1 Bro. 198. The like as a release. Pl. Gen. 353.

That the bond was made with a condition, which he sealed with several spaces therein ; and that after the delivery one E. wrote words in these spaces ; replication, that before the sealing, the defendant agreed that the spaces should be filled up ; joinder, maintaining the bar, and traversing the consent. Ro. Intr. 233.

To a plea of a special acquittance ; a replication of non est sum. Bro. Red. 201. Mo. Intr. 190.

To a plea of a general release ; a replication by non est sum, for that it was razed. Pl. Gen. 346, 347.

That the defendant caused the writing to be written, and delivered it as an escrow under a condition that the plaintiff should deliver within three days an indenture of lease, and a bond for the performance of the covenants therein made by the defendant, which the plaintiff had not delivered. 2 Brown 82. The like. Han. 115.

The

References to Precedents

The like under a condition that a man and a woman, the then defendant, should not marry. Tho. 141.

The like under a condition that one J. would deliver to the defendant a bond wherein the defendant was bound to J. Vid. 154. Mo. Intr. 188. The like when the plaintiff should execute to the defendant a release. Ra. Entr. 181. Vet. Intr. 18. The like upon condition that the plaintiff would execute an indenture of defeazance. 9 Co. 137. The like with a condition, that if deodands should belong to the mayor, the writing should be kept as an escrow; but if they should belong to the plaintiff as the king's almoner, then the writing should be delivered as a deed; and an averment that the deodands belonged to the mayor. 1 Brown 177. Ra. Entr. 198.

That the defendant being illiterate, agreed to execute the writing with a different condition. Bro. Red. 201. Ra. Entr. 181. Vet. Intr. 18, 235. 3 Brownl. 133.

To a single bill; a plea that the defendant executed the writing with a condition. Pl. Gen. 260. Ra. Entr. 180, 181. Vet. Intr. 17, 18.

That the defendant being illiterate, delivered the writing as an escrow to be delivered to the plaintiff, after that one D. had found the defendant security to save him indemnified against the plaintiff, of the monies contained in the writing. Bro. Red. 201. Ra. Entr. 181. Vet. Intr. 18. 3 Brownl. 154.

The like where a colloquium was laid to be had concerning the payment of the money; whereas the writing was delivered without any such colloquium had thereon. Bro. Red. 202. 3 Brownl. 134.

A plea that there were obliterations and interlineations made in the indorsement after the delivery thereof; a replication denying it. Bro. Red. 202.

That the defendant was illiterate, and that the indenture was read to him with such condition; and that it being thus expounded to him, he delivered it. Mo. Intr. 189. Han. 109.

That the defendant delivered the writing as an escrow, under a condition that if the defendant before such a feast should not pay the plaintiff 40s. then he would deliver the writing otherwise not; which 40s. the defendant before the feast tendered, and the plaintiff refused it, et sic non est factum. Pl. Gen. 281. Lill. Entr. 186.

The like under a condition to be delivered when the plaintiff should execute to the defendant a grant of an annuity. Pl. Gen. 290.

To an action of debt upon two bonds; as to the first, the defendant delivered it as an escrow, under a condition that the plaintiff should execute to the defendant a release; as to the second, conditions performed specially. Ra. Entr. 182.

In Actions of Debt.

That the defendant caused the writing to be made, and delivered it as an escrow, with an intent that one J. should be intimidated so that he might personally appear, &c. Ra. Entr. 112.

That the defendant delivered the writing to J. to be delivered to the plaintiff, who refused to accept it; whereupon J. left the writing with the plaintiff only as an escrow, et sic non est factum; a demurrer thereto. Co. Entr. 145. Dyer 167.

That the defendant delivered the writing to W. to be indorsed, with a condition to stand to an award, and then to be delivered to the plaintiff as a deed. Ra. Entr. 181.

That the defendant and the plaintiff executed bonds to each other, and delivered them to arbitrators chosen between them, to be by them delivered, if the parties should perform the award; and the arbitrators made no award, notwithstanding which the plaintiff surreptitiously got the bond from the arbitrators. Ra. Entr. 181. Vet. Intr. 42.

To a plea of a release; a replication that the plaintiff agreed to execute a release of the arrears of rent; but not a release of an entry into lands for a condition broken. 2 Co. 7.

In an action of debt for 80l. the defendant craves oyer of the bond; and upon oyer the defendant pleads, that the bond does not warrant the writ, because that in the bond there are these two distinct words, *ostin gentam*, which signify no certain sum; a judgment thereupon for the defendant. 3 Brownl. 150.

By a Defeazance.

To an action of debt upon a recognizance; a plea by an indenture of defeazance for the payment of 20l. such a day, which the defendant paid; a replication that he did not pay. Brown 174.

A plea to an action of debt upon a bond entered into by three, by articles of defeazance made between the plaintiff and the defendant, and two others, whereby the defendant granted to the plaintiff an annual rent of 80l. during the life of one E. and that if the defendant should faithfully pay the said annual rent, then the bond to be void; and the defendant paid the annual rent during the life of E. who died (such a day); a replication, *protestando*, &c. For plea, that the defendant is alone bound without any other person; and a traverse that the defendant with two others became bound, &c. a special demurrer, for that it was an ill traverse. Co. Entr. 207.

A plea to an action of debt upon a bill by a defeazance, that the plaintiff, or any other person, should sue the defendant, whereby the defendant should be obliged to prove himself no manner with one E. the bill to be void; and shews that there was a suit in chancery brought against him by E. but he did not shew in his plea, that the plaintiff brought an action upon the bill mentioned in the defeazance. Wj. Entr. 237.

A defeazance

References to Precedents

A defeazance pleaded to an action of debt upon a judgment.
2 Mo. Intr. 231. Tho. 433.

A plea to an action of debt upon a bond, that the plaintiff by a writing indented demised a rectory to the defendant for years upon several covenants; and that at the end of the writing he agreed, that if the defendant should keep the covenants, then the bond to be void; and the defendant at the end of the first year surrendered the term; and during that year he kept the covenants; a replication, protestando, &c. For plea, that the defendant had not paid the rent; *a rejoinder, alledging payment, &c. Ra. Entr. 183. Vet. Intr. 235.

To an action of debt upon a bond; a plea, that an indenture of demise of a rectory was made with a defeazance, (ut supra) and that the defendant performed all the covenants; a replication, that the defendant on a Sunday entered and expelled the plaintiff; a rejoinder, that at another day he did enter for rent in arrear, and a traverse that he entered on the said Sunday. Ra. Entr. 184.

To an action of debt upon a bond; a plea by defeazance upon payment of money at several days, and that he paid, &c. replication, that he did not pay the money (such a day) and issue thereupon. Ra. Entr. 185. Vet. Intr. 74.

Bar by Conditions performed by Payment of Money

To an action of debt upon a bond with a condition for the payment of money at such a day; a plea that he paid it. Ra. Entr. 185. Vet. Intr. 18. Ro. Entr. 200. Pl. Gen. 288, 323, 334, 337. Bro. Va. 220. Cl. Aff. 82. The like. 1 Inst. Cl. 219.

The like to two bonds with two days of payment; a plea that the defendant paid the money at the several days. Ra. Entr. 184, 185. Vet. Intr. 18. Ro. Entr. 221. Wi. Entr. 287. As to two issues thereupon. Bro. Red. 192, 222. Pl. Gen. 258, 323, 330. Bro. Va. Me. 219. Tho. 434, 435. Clift 147. Mo. Intr. 178. Bro. Met. 243. Cl. Aff. 118.

A plea to a bond for the payment of money upon demand that the plaintiff did not demand it. Bro. Va. Me. 157. Ha. 109.

To three bonds where the defendant pleads severally solvit diem after oyer of every separate condition; replication, that three several issues upon non solvit severally. Mo. Intr. 219. Aff. 219.

Upon a condition to pay the plaintiff 20l. at the end of the months after he should attain to the age of 21 years; a replication, and issue, that he had not paid it. Bro. Red. 192. Brownl. 117.

In Actions of Debt.

To a bond with a condition of several ways of payment; that at two of the days the defendant paid, &c. and that the other is not yet incurred; issue that he had not paid, &c. at one of the days. Mo. Intr. 178. Han. 108.

The like at two days, and that before the rest was due, the plaintiff exhibited his bill; the like issue. Bro. Red. 222.

The like at three days; but that before the third payment was due, the plaintiff sued out his original; replication of non solvit at the third day, and issue. Pl. Gen. 246. The like to a bond and bill. Cl. Aff. 150.

Payment at the day to a bond; replication, denying the payment, and issue. Cl. Man. 250. The like to a bill. Ibid. 225. Bro. Va. Me. 212.

Bar, that the principal obligor paid the first and second payments; and that the third is not yet due; replication as to the first payment, and an issue thereon. Bro. Va. 177, 221.

To a condition for the payment of money upon the plaintiff's return from Rome, with a certificate; a plea protesting, &c. that he was not there; for plea, that he did not bring a certificate thereof; replication, that he was there, and brought a certificate thereof. 3 Brownl. 143.

That the plaintiff received yearly for four years 8d. for the farm of lands; and that the defendant, at the end of the term, was ready to have enfeoffed the plaintiff thereof; replication, protesting that he did not receive any monies; for plea, that he received none the last year. Ra. Entr. 182.

By Delivery.

To a bond with a condition for the delivery of barley; a plea after oyer of the condition, that the defendant delivered the barley at the several days mentioned in the condition; a replication denying the delivery of one quarter at such a day; rejoinder, insisting upon the delivery, and an issue. 2 Brown 101.

To a bond for the delivery of goods; the like plea; a replication protesting, &c. that the defendant had not delivered any; for plea, that he did not deliver such; the like rejoinder, and issue. Tho. 182.

To a condition for the payment of money, and for the delivery of goods; that the defendant had not paid, and delivered, &c. Bro. Red. 173.

The like condition; a plea that he delivered four quarters of wheat, and ten quarters of barley, and paid the money between the feasts of M. and N. Replication, and issue, that he did not deliver, &c. Bro. Red. 192.

That

References to Precedents

That the defendant paid and delivered to the plaintiff wheat and money, in satisfaction of the wheat to be delivered. *Vet. Intr.* 235.

To a condition for payment of money, and the delivery of salt. 1 *Brown* 83. 3 *Brownl.* 116.

Concerning Awards.

To an action upon a bond, with a condition to perform an award; a bar, that there was no such award; replication setting forth the award; and protestando that the defendant had not performed any thing, &c. for plea, that the defendant had not paid the money awarded; rejoinder that there was no such award. *Wi. Entr.* 302, 318. *Tho.* 155. *Ra. Entr.* 153. The like without a protestando. *Ra. Entr.* 154. *Vet. Intr.* 121. 3 *Brownl.* 143. *Ash* 240. The like with a rejoinder after oyer of the award; a demurrer. *Wi. Entr.* 249. The like with a demurrer without a rejoinder. *Wi. Entr.* 309, 315, 317. 2 *Ven.* 220, 240. *Lev. Entr.* 40.

The like bar, the like replication, without a protestando, and a rejoinder, that before the day of the award the defendant gave notice to the arbitrators concerning several controversies arisen between the plaintiff and defendant, whereof the arbitrators had made no award; a special demurrer, for that the defendant had departed from the matter in his bar. *Wi. Entr.* 174.

The like bar and replication, that the arbitrators made an award, and assigns a breach; rejoinder that they made no award. *Tho.* 178. *Pl. Gen.* 248.

The like bar and replication by an award made between the plaintiff and defendant, and others; and that the defendant and the others had not in any respect performed the award. *Ra. Entr.* 154.

The like bar, and a replication, that the arbitrators made an award; and a breach assigned in not repaying monies before that time received by the defendant of the plaintiff; and after oyer of the award, a demurrer thereto. *Wi. Entr.* 190.

The like bar and a replication by an award made, and that it was ready, and offered to be delivered to the defendant on such a day; but that neither the defendant, nor any body for him, came there to receive it; and a breach assigned in non-payment of the money awarded; a rejoinder that the award was not ready, nor was offered to be delivered; a demurrer thereto. 2 *Saund.* 184. Judgment for the plaintiff.

Bar, that the arbitrators made no award either in writing or by word of mouth, and that they named one T. an umpire who made no award within the time limited; a replication confessing that the arbitrators did not make an award, and that

In Actions of Debt.

they named F. as an umpire, who refused, that the arbitrators thereupon named one C. who undertook the charge of the umpirage; and he by word of mouth ordered that the defendant should pay to the plaintiff 70l. and that the plaintiff and defendant should seal general releases to each other; and a breach assigned in non-payment of the money; a special demurrer thereto. 2 Ven. 100.

Bar by no award; the plaintiff replies and sets forth the award made for him to pay money in the house of a stranger, and the defendant to deliver possession of an house, &c. That the defendant had notice, and that the plaintiff was ready at the day to have paid the money, and that none was there ready to receive it; and avers that the defendant did not deliver possession; the defendant demurs. Lev. Entr. 42.

Bar, that the arbitrators did not make any award, nor choose any umpire; replication setting forth an award made by the arbitrators; and protestando, that the defendant has not performed any thing, &c. For plea that he did not pay the money. Brown 102. Rejoinder that they made no such award. 313.

Bar, that the arbitrators did not make any award, nor choose any umpire; replication, that the arbitrators could not agree, that they did choose an umpire, who made his award; and the defendant had not paid upon demand the money awarded; rejoinder maintaining the bar, and that the arbitrators made no award, with a traverse that they did choose an umpire; an issue thereupon. Vet. Intr. 236.

Bar, that the several arbitrators did not make any award, nor did an umpire make an umpirage; replication confessing that the several arbitrators did not make an award; but that the umpire made an umpirage, and a breach assigned in non-payment of money; an issue that he did not make, &c. Vid. 190. Ift 142. The like; and a demurrer thereto. 1 Saund. 62. Ift 137.

The like plea and replication with a rejoinder, setting forth revocation of the umpirage; and an issue thereupon. Cist

After oyer of the condition, a bar that the arbitrator made [P* 410] award in writing; but that there was a debt within the submission, whereof the arbitrator had notice, and made no award thereof; a replication protesting that the arbitrator had not notice of any such dispute, &c. for plea, that the arbitrator ordered releases to be executed by each to the other of the parties. Wi. 267.

The defendant pleads that he tendered to pay the money, and a general release; and the plaintiff refused to accept them; replication, that at another time he demanded the money, and then the defendant refused; to which the defendant demurred. Lev. Entr. 44.

Bar,

References to Precedents

Bar, that the arbitrators awarded that each of the parties, upon request, should seal and deliver to each other a legal release, which the plaintiff had not required; replication, that he did require, &c. rejoinder and issue. Tho. 204.

Bar, that the arbitrators did not make an award to be delivered to the parties at S. A replication, that two of the arbitrators made their award, and protestando that the plaintiff had performed every thing on his part, and that the defendant had not performed any thing; for plea that he had not paid the money awarded; a demurrer thereto, and judgment for the plaintiff. 1 Saund. 164.

Bar, that the arbitrators made an award for the payment of money, and for the delivery of general releases, which the defendant for his part had done; a replication, that he had not paid the money, and an issue tendered; but a rejoinder by way of estoppel; a demurrer thereto. 1 Saund. 324.

Bar, that the arbitrators did make any award of several things to be done, and for the payment of money at several feasts, which the defendant had paid; replication, protestando that the defendant did not pay any money; for plea, that he had not paid the money at such feast; and an issue that he had paid. Pl. Gen. 284.

That the arbitrators made an indented award in writing, in the manner following; (viz.) setting forth the award, and pleading performance specially; replication, that the defendant did not surrender twelve acres of land, and a close of pasture; and an issue thereon. Pl. Gen. 297.

An award pleaded after the last continuance at the assizes; replication, no award made; an issue thereupon. Bro. Red. 181.

Where the defendant pleaded payment according to the award. Bro. Met. 184.

To a bond of arbitration for dilapidations; the defendant pleads no award made; replication setting forth the award. Bro. Met. 225.

A bar of no award made; a replication confessing it, but shewing an award made by the umpire, and a breach assigned therein for non-payment of money; a demurrer and judgment for the defendant. Re. Dec. 147.

The defendant, after oyer of the bond which was made to the arbitrators, sets forth the award at large; and that M. S. the other party submitting, was not damnified, &c. replication, by a fine levied, and no notice given, whereby one N. B. who married M. S. coming with his servants to the park to cut wood according to the award, were disturbed by the servants of the conusee; rejoinder that he was not disturbed; and an issue thereon. Cl. Aff. 380.

In Actions of Debt.

The like plea of non dampnificatus ; a replication, protestando, &c. for plea, that he did not deliver a writing of acquittance as the defendant had alledged ; and an issue thereupon. Cl. Aff. 300.

Replication to a plea that there was no award made, setting forth the award for the payment of money, and alledging non-payment of the money. Clift 139, 140, 142. The like with a demurrer thereto, 144.

A bar, that the arbitrators made an award in writing under their hands and seals, ready to be delivered to the parties, and awarded, (prout patet per scriptum prolat', &c. in curia ; and performance generally ; replication, that the defendant did not discharge the plaintiff from the forfeiture of his recognizance, according to the award ; rejoinder that he did discharge, &c. a demurrer, (for that he had not shewn how he discharged him). Hern 305.

Bar, that the arbitrator made an award that the defendant should pay to the plaintiff on such a day 40s. which the defendant had paid, and that he should pay the fine that should be assessed upon the plaintiff in the marches of Wales ; which fine is not yet assessed ; replication, protestando that such fine was assessed ; for plea that he did not pay the said 40s. 3 Brown. 147.

A bar, that the arbitrators before such a feast made an award that, &c. and that the defendant is ready to perform, &c. if the plaintiff, &c. replication, that the arbitrator made another award ; and a traverse of the award alledged by the defendant. 33 Hen. 6. 28.

Bar, that the arbitrators awarded that the plaintiff should pay to the defendant 20s. and that the plaintiff should have of him a quantity of fish, which he offered to the plaintiff, and he refused to accept them ; replication, that the arbitrators did award the defendant to deliver to the plaintiff four ——— of fish, and to other things which he had not done ; and a traverse that they made such award as the defendant alledged. Ra. Entr. 155.

Bars by Masters, Servants and Apprentices.

To an action of debt upon a bond, with a condition to perform covenants in an indenture of apprenticeship, after oyer of the condition ; the defendant pleads the indenture, and protestando that the apprentice did in no wise defraud the master ; for plea, that the master did not give notice to the defendant, nor did the plaintiff request the defendant to satisfy him ; replication, that he defrauded the plaintiff, his master, of 40s. in money, whereupon the plaintiff (such a day) gave the defendant notice thereof, and requested the defendant to pay him ;
 Vol. II. U u rejoinder,

References to Precedents

rejoinder, and issue. Tho. 183. The like replication with a demurrer thereto. Wi. Entr. 168.

The condition, &c. bar, by the statute of Eliz. that neither the apprentice's father or mother had tenements of the yearly value of 40s. of an estate of inheritance, or of a freehold, whereby the bond was void. Ro. Entr. 193. Bro. Red. 224.

To an action of debt upon an agreement in writing; bar, that the plaintiff for the better instruction and experience of his apprentice, sent him with a skilful surgeon to sea at B. in India; a demurrer thereto. Wi. Entr. 270.

Condition for an apprentice to render an account within six months after request; bar, that the apprentice upon request did render to the plaintiff an account, and duly discharged himself from all goods, monies, &c. which came to his hands; replication, that the apprentice did render an account, and omitted out of the account 60l. by him received of J. a demurrer thereto. Wi. Entr. 324.

The plaintiff retained a servant for five years, and paid him 20l. yearly for his salary, and to a bond with a condition for the repayment upon the death or departure, without notice for a quarter of a year before discharge; bar, that the plaintiff turned away his servant from his service without a quarter of a year's notice; replication, that on such a day the plaintiff gave notice. Bro. Red. 277. 1 Brownl. 91.

That the defendant before such a day discharged the plaintiff from his service, whereupon the plaintiff departed his service, replication, that the defendant did not discharge. Pl. Gen. 315. The like with a traverse. Hern 272.

The defendant pleads that the apprentice did not purloin or imbezil any goods, except such particular goods for which the plaintiff offered to pay; replication, protestando that he embeziled 5l. besides other things confessed; rejoinder maintaining the plea, and issue thereon. Bro. Met. 231.

The defendant pleads that the testator, after making the writing, died, and that the apprentice had not any time after making the writing absented himself, and that he did imbezil; rejoinder, and issue. Cl. Aff. 353.

To a bond, with a condition for faithful service, by an apprentice in London; bar, setting forth the custom that the indentures of apprenticeship were not enrolled, and therefore void. Replication denying the custom. Co. Entr. 144.

To Bonds to Sheriffs and other Officers.

Bar, that the defendant's bail had not sufficient, nor was commorant within the county, whereby the bond was void by the stat. 25 Hen. 6. a demurrer thereto. Tho. 212.

Where the defendant demurred to a declaration upon the bail-bond.

In Actions of Debt.

bail-bonds after oyer, 2 Saund. 289. The like, for that the defendant is sued separate. 1 Saund. 290.

To a bond with a condition for an appearance; a bar, that the bond was executed at such a day after the return of the writ; and a traverse, that the bond was delivered before such a day. Tho. 219.

The like bar without a traverse; replication, that J. was arrested by virtue of a latitat returnable die martis prox' post, &c. rejoinder, that *J. was arrested by a latitat returnable die lunæ prox' post tres trin'; a surrejoinder, and issue without a traverse in the precedent, which ought to have been. Vid. 200. The like with a traverse, and a demurrer thereto. 1 Saund. 15. [*P 411]

To a bond with a condition for the payment of 40l. a bar by the stat. 23 Hen. 6. that the defendant was arrested upon a capias issuing out of chancery; and the plaintiff being under-sheriff, took this bond for the defendant's enlargement; a demurrer thereto. Wi. Entr. 333. The like bar upon an attachment, and a demurrer thereto. 2 Ven. 235.

Bar, by comperuit ad diem in the king's bench; replication by nul tiel record of such appearance. Bro. Red. 203. Pl. Gen. 366, 367. Han. 115. Ro. Entr. 203. 1 Inst. Cl. 213, 337. 3 Brownl. 137.

To a bond made to the marshal of the marshalsea, &c. to be a true prisoner; a bar by the stat. 23 H. 6. that one P. was in execution in the plaintiff's custody, at the suit of R. and the defendant, for ease and favour to be shewn to P. became bound, &c. replication, that the defendant gave the bond to the plaintiff for his better security, lest the said P. should escape; and a traverse that the bond was given for ease and favour; a demurrer. 1 Saund. 157.

The like plea, and a replication, that the bond was given for a just and true debt; and a traverse that the bond was taken colore officii; issue upon the traverse. Ro. Entr. 209. Ash 235.

To a bond given to the warden of the fleet; a bar, by the stat. 23 H. 6. that bond taken colore officii is void; replication, that by a proviso in the same statute, that the warden of the fleet should not be dampnified in his office; demurrer thereto. Wi. Entr. 192.

To a bond given to an under-sheriff for the payment of money; the like bar, replication, that a writ of extent upon a statute-staple issued out of the court of chancery, directed to the sheriff of L. and the plaintiff being under-sheriff, it was agreed (before the writ of liberate) between the plaintiff and defendant, that the defendant should pay the plaintiff 32l. for executing the said writ; and for the payment thereof, the defendant gave the bond; and further replies the stat. 29 Eliz. for execution fees; a special demurrer thereto. Wi. Entr. 334. Plow. 61.

References to Precedents

The like in the common pleas, and a day given to bring in the record. Mo. Intr. 186. Pl. Gen. 368.

To a condition to appear in the king's bench such a day, &c. a bar, that the bond was void by the stat. 23 Hen. 6. a demurrer thereto, and judgment for the defendant. Bro. Red. 222.

To a Condition to do several Things.

To debt upon a bond, with a condition for the payment of money, and the delivery of salt; bar, that the defendant paid the money, and delivered the salt at the feast specified in the declaration; replication protestando that he did not deliver; for plea that he did not pay; issue that he did pay. Bro. Red. 173. 1 Brownl. 82.

The like condition; a bar, that the defendant did deliver the oats and barley, and paid the money according to the effect of the condition; replication, protestando that he did not, and an issue upon the not-delivery. Bro. Red. 102.

To a bond with a condition to render an account of goods, &c. which should come to his hands; the defendant pleads that no goods, &c. came to his hands; replication, that a silver cup came to his hands; a demurrer thereto. 1 Saund. 101.

To an action upon a bond with a condition to collect money in several counties upon a brief; the defendant pleads that he placed the briefs in the several counties, took the monies, and gave the plaintiff an account; replication protestando that the defendant did not endeavour to place the briefs, pro placito, that he did not come to a just account; and an issue thereon. Bro. Met. 232. Re. Dec. 240.

To an action upon a bond for payment of such legacies at such a time, and in such sort as J. S. should direct by his will; the defendant protestando that J. S. made no will; pro placito, that he gave no legacies to the plaintiff and his wife, replication, that J. S. made his will, and gave such legacies; rejoinder, and issue. Re. Dec. 237.

To a condition to pay rent, and to repair; bar, that he was not reasonably required to pay the rent, and that he did well repair, and so left the premises; replication protestando that he was duly required to pay the rent, and refused to pay; rejoinder, and issue. Cl. Aff. 403.

Bar to an action of debt, that the defendant did truly perform the office mentioned in the condition; replication, that he did not render an account according to his covenant. Clift 146.

[P* 411]

Bar, that the plaintiff did not give the defendant salt-petre to make the gun-powder, that the defendant offered to deliver the hay to the plaintiff every year, which he refused to accept, and that the plaintiff had not put the defendant's horse to pasture; replication, that he did not tender the hay. Co. Ent. 127. That

In Actions of Debt.

That the plaintiff received 8s. yearly for the farm of lands, and that the defendant, at the end of the term, was ready to have enfeoffed the plaintiff of the lands, and the plaintiff did not come there; replication protestando that he did not receive the 8s. yearly; pro placito, that he did not receive it the last year. Ra. Entr. 182.

Bars to Actions of Debt upon Bonds, with Conditions relating to Lands.

To a condition to levy a fine of lands before the end of Easter-term; a bar, that the plaintiff, before the end of the term, did not prosecute any original writ of covenant for levying a fine; replication, that before the end of Easter-term the defendant enfeoffed A. of the lands specified in the condition, and that he had no right, whereupon he could have levied a fine; a special demurrer. Wi. Entr. 331.

To a condition to perform covenants, &c. Bar, by performance of all the covenants generally; replication, that T. was seised of the messuage, until he was disseised, and demised to the defendant, who assigned the term to the plaintiff, upon whom T. entered, and drove him out, and T. was seised in his former estate, whereby the term became void; demurrer thereto, and judgment for the plaintiff. 1 Saund. 51.

The like bar, protestando, &c. That the defendant did not pay the rent due at the feast; rejoinder that the plaintiff came to live upon part of the premises, and that the rent was not payable; surrejoinder, protestando, &c. Pro placito maintaining the replication, and a traverse that he came to live upon part of the premises; issue upon the traverse. Mo. Intr. 181.

That the premises were discharged from all incumbrances; and a traverse that he demised for ninety-nine years; issue upon the traverse. Pl. Gen. 243.

That the defendant requested the plaintiff to execute a release; which the plaintiff refused; surrejoinder denying the request. Pl. Gen. 267.

Bar to a bond that an estranger had not any title to make a release. 1 Saund. 213.

To a bond with a condition for the payment of the profits of the lands, &c. a bar, that the profits of the tenements within the time were worth 10l. and no more, which he offered to pay to the plaintiff; replication protestando, &c. for plea, that the profits of the tenements were worth 30l. and a traverse that they were worth 10l. only. 1 Brown 161.

Bar, that the plaintiff or his conusee did not devise any release; replication protestando that he devised a release; pro placito, that the plaintiff's counsel devised an assurance in writing, which the defendant was obliged to execute, and refused; a demurrer to the replication. Tho. 189.

To

References to Precedents

To a condition to make a sufficient estate in all the lands of the defendant; a bar, that he enfeoffed the plaintiff of all his freehold lands, and surrendered all his copyhold lands in W. before such a feast; replication, that the defendant was seised of nine acres in W. besides those specified in the bar, whereof he had not enfeoffed the plaintiff; rejoinder that he was not seised, &c. Ro. Entr. 184.

To a condition to assure lands and deliver up writings; a bar, that he had not reasonable warning to deliver the writings, and that the plaintiff's counsel did not devise any assurance; replication protestando, &c. for plea, that the plaintiff gave the defendant reasonable warning to deliver the writings. Ro. Entr. 197. Co. Entr. 65.

To an action of debt upon a bond, with a condition for quiet enjoyment; a bar, that before the expiration of the term the earl of E. entered upon the possession of R. and drove him out; replication, that the defendant and his assigns quietly enjoyed the premises during the term; and traverse, that the earl of E. drove out R. an issue upon the traverse. 2 Brown 91.

That the plaintiff quietly enjoyed the wood and underwood, without the interruption of the defendant, and of one R. 2 Brown 102.

[P* 412] To an action of debt upon a bond, &c. a bar, that A. did not lay any claim of dower to the tenements; replication, that A. married J. who claiming a title, required the plaintiff to assign the third part of the tenements for the dower of A. *rejoinder, protestando that J. did not require; for plea that J. did not lawfully claim the third part of the tenements for A. his wife for her dower; and an issue. Tho. 197.

To an action of debt upon a bond against the lessor; a bar by conditions performed pleaded specially, that the plaintiff quietly enjoyed the said tenements, and that the plaintiff did not give the defendant notice that the house was out of repair; replication protestando, &c. for plea, that the plaintiff (such a day) gave the defendant notice that the house was in decay in the roof, timber, &c. and that the defendant did not repair; rejoinder denying the notice. Ro. Entr. 179.

To an action of debt upon a bond with a condition to perform covenants in an indenture; bar, by performance of all covenants generally; replication, that the defendant had not paid the rent; rejoinder and issue upon the payment. 2 Brown 7. Tho. 185. Vide 186.

The like bar and replication, with a demurrer thereto. Ro. Entr. 178. Wi. Entr. 287.

The like bar, and the like replication in an action against an executor; a rejoinder, that the testator paid in his life-time, &c. Ro. Entr. 199.

The

In Actions of Debt.

The like bar, a replication protestando, &c. for plea, that the lands were sold by the indenture charged with a title of dower to the defendant's wife; rejoinder that they were not charged. Ro. Entr. 183.

The like bar; a replication that he had not paid the rent due at such a feast; rejoinder, that before the feast the plaintiff entered into part of the demised premises, and drove out the defendant; a surrejoinder denying the expulsion. Wi. Entr. 289.

To an action of debt upon a bond against the lessor brought by the administrator of the lessee; bar, that the lessee surrendered the term to the defendant, who until the surrender observed all the covenants; replication, that the lessee died intestate possessed of the tenements, and administration was granted to the plaintiff, who entered, and granted to E. who was possessed until the defendant expelled him; and traverse the surrender, and an issue thereupon. Tho. 178. Ra. Entr. 182.

To an action of debt upon two bonds, with a condition of the first bond, to make a surrender of a tenement or cottage at the next court, and of the second bond for the payment of money, if a surrender should not be made; bar to the first, that the defendant at the next court, according to the custom of the manor, surrendered into the hands of the lord the tenements aforesaid, to the use of the plaintiff; a demurrer thereto. Wi. Entr. 241. Ra. Entr. 183.

To an action of debt upon a bond to perform covenants in articles; a bar by performance of all covenants generally; a replication that he did not surrender the possession of the premises at the end of the term; and an issue thereon. Wi. Entr. 294. The like replication. Bro. Red. 257.

To an action of debt for the payment of money at two days, upon a sale of lands in writing; a bar, that he paid the money at the first day, and as to the residue, that the plaintiff did not nominate any person or persons to whom the defendant should give security for the payment thereof. Wi. Entr. 255.

To a condition to make a new lease at the end of the term; a bar, that at the end of the term the plaintiff did not tender to the defendant an indenture to be sealed by him; a demurrer thereto, with a note. Wi. Entr. 309.

To a condition to pay money, if the corn upon the farm did by law belong to the plaintiff; a bar, that the corn did not belong to the plaintiff, nor could he reap the same by the laws of England; replication, that the plaintiff was seised of the farm whereupon the corn grew; wherefore by law it did belong to him; rejoinder, that before the plaintiff was seised one N. was seised of the same, which he demised to R. for twenty-one years, and covenanted that R. should have all the corn growing upon the premises at the end of the term, that R. made J. his executor, who sold the corn to the defendant; a demurrer thereto. Wi. Entr. 300.

To

References to Precedents

To an action of debt upon a bond with a condition to perform covenants in an indenture; bar, by performance generally; a replication, that the lands were not of such a yearly value. Co. Entr. 635.

To a condition to pay rent quarterly for the demised premises, with a proviso that it should cease upon an expulsion; a bar, that the lands descended to a daughter within age, in ward of the king, who granted the custody to the lessor, that the heiress sued for livery, and married, who entered, &c. and that the defendant paid the rent till the expulsion; replication denying the expulsion. 3 Brownl. 153.

A bar, that there were no such lands in the county whereof the defendant had the reversion; a replication, that B. was seised of customary lands for life, and the reversion belonging to the defendant; a demurrer thereto. Co. Entr. 137.

Bar, that the defendant did not obstruct the plaintiff from taking possession, and that the plaintiff might have quietly enjoyed the tenements till such a day, on which day the plaintiff herself demised for years by an indenture; replication, that the plaintiff entered into the lands, and would have occupied the same, but that the defendant remained in possession of the messuage; and traverse the demise. Co. Entr. 65.

Bar, that the demise was upon a condition of re-entry for rent in arrear, and that the heir entered after the feast for rent in arrear; a replication, that he entered before the feast. Ra. Entr. 183.

Bar, that the plaintiff quietly enjoyed the lands demised for years, till the defendant surrendered to the heir; replication denying the surrender. Ra. Entr. 112.

To a condition for quiet enjoyment, to make an assurance, and to deliver up writings; a bar, that the defendant and others made all assurances devised by the plaintiff, and that the defendant delivered all the writings; replication protestando, &c. for plea, that one N. an attorney devised a release, which was tendered to the defendant to be sealed; that he refused; rejoinder denying the refusal. 3 Brownl. 156.

A bar, that the tenements were not charged with prior incumbrances. 2 Co. 1.

Bar, that the plaintiff was not dampnified by reason of any former grants, &c. Co. Entr. 65.

Bar, that the plaintiff quietly enjoyed the lands enfeoffed indemnified from all former titles, and that the plaintiff required the defendant, and his son, to seal a release, which the defendant sealed; but his son being illiterate, requested to have the writing of the plaintiff, that he might shew it to some person of skill, whether it was according to the condition; that the plaintiff refused it; whereby the son did not seal the writing, and that the plaintiff did not require any further assurance; a demurrer thereto. Co. Entr. 1.

Bar,

In Actions of Debt.

Bar, that the defendant was ready to make an assurance to the plaintiff on his costs, and that he delivered to the plaintiff all writings, &c. Replication protestando that he did not deliver the writings; for plea, that the plaintiff required the defendant to go before a justice of the common pleas, to acknowledge a fine, and tendered him 6s. 8d. for his costs; rejoinder denying the tender, &c. Ra. Entr. 182.

To Counter-Bonds.

A plea of non dampnificatus; a replication, that the obligee recovered judgment against the plaintiff upon a bond in the sheriffs of London's court, et sic dampnificatus; rejoinder by null tiel record; surrejoinder, that there is such a record, and a writ awarded to certify the record. 1 Brown 194.

The like bar; replication by a judgment recovered against the plaintiff as obligor in the king's bench; rejoinder, that the judgment was obtained by fraud. Tho. 145.

Replication, that N. recovered 27l. in the common pleas for damages against the defendant; and the plaintiff being his bail, N. sued out a scire facias against the plaintiff, and obtained judgment thereon, et sic dampnificatus. Tho. 171.

A plea of non dampnificatus; a replication, that the monies being unpaid the obligee sued the plaintiff in the stannary court, and the plaintiff was taken and detained till he found bail; whereupon the plaintiff to avoid the costs and vexation, &c. paid the monies. Wi. Entr. 236. Ash 247.

To a condition to save the plaintiff harmless from a bond given to the Queen for the true execution officii Feodarii; the defendant pleads the first bond given to the Queen, and performance of every thing contained in the condition on his part to be performed, et sic non dampnificatus; a demurrer. Wi. Entr. 327.

That the defendant paid the monies at the day, and so saved the plaintiff harmless; replication denying the payment. Tho. 84. Pl. Gen. 340. Bro. Red. 193, 194. Bro. Red. 257.

To a condition that J. should perform articles made between him and one H. and that the defendant should save the plaintiff harmless from the articles; a plea, that the articles were made for the payment of money by J. to H. which J. paid, et sic non dampnificatus; a demurrer thereto. Wi. Entr. 187.

To a condition to save the plaintiff harmless from all charges which should happen upon releasing the defendant out of prison, when being in execution at the plaintiff's suit from all persons who should trouble him about the release; a plea, that the plaintiff

[P* 413]

References to Precedents

plaintiff levied a plaint against N. in the city-court of York, for 100l. and the defendant and one H. were bail; that the plaintiff obtained judgment against N. and the bail, and the defendant was taken in execution thereupon; that the plaintiff discharged him from the execution, and that the plaintiff was not dampnified by the releasing, &c. a replication confessing the whole matter in the bar; but that before the defendant was taken in execution H. (the other bail) with another became bound to the plaintiff for payment of the money upon the judgment, upon the consideration whereof the plaintiff permitted H. that he should take the defendant in execution, and that the plaintiff should not release him without the consent of H. that the defendant was taken in execution, and the plaintiff released him; that H. brought a suit against the plaintiff upon the promise, and recovered, Et sic the plaintiff dampnificatus by the releasing, &c. a demurrer thereto, and judgment for the plaintiff. Wi. Entr. 271. The case is in Hob. 269.

To a condition to save a parish harmless from a bastard child, (wherewith the defendant's daughter was then pregnant) a plea by non dampnificatus; a replication, that E. the defendant's daughter had a male bastard child, and that by an order of justices, at the general sessions, the inhabitants of C. were charged with keeping and maintaining thereof, and that they now maintain it at their own expence; a demurrer thereto. Wi. Entr. 325.

The like condition, and the like plea; a replication that the plaintiff, and no other person, did provide for the child for the space of a month; a rejoinder that the defendant offered to maintain the child, and the parishioners refused, &c. this is a departure. 2 Saund. 81.

To a condition to save harmless from a bastard child, as well the mayor, commonalty and citizens of London, as the parish of A. upon a bond by the governors of the hospital of B. after Oyer, &c. the defendant pleads letters patents for the incorporating of bridewell, and that it does not appear that the said governors had power to take or sue on such bonds; a demurrer thereto, and judgment for the plaintiff. Wi. Entr. 328.

A plea of non dampnificatus; a replication that the monies were unpaid, and the obligee endeavoured to arrest the plaintiff whereby he dares not go about his lawful affairs, Et sic dampnificatus; a rejoinder that the defendant had not notice thereof a demurrer thereto. 1 Saund. 114.

The like bar; a replication that the wife obligee married and after they sued out an original and capias upon the bond for the monies unpaid, whereby the plaintiff for his discharge from the bond, and the payment of part of the debt laid out 30s. a rejoinder that the defendant, after the original and capias

In Actions of Debt.

was sued out for the plaintiff's discharge, paid the whole debt and costs of suit, and delivered the plaintiff the bond to be cancelled; and a traverse that the plaintiff laid out 30s. an issue tendered thereon; but the defendant let judgment go by nil dicit. Bro. Red. 188. 1 Brownl. 107.

The like plea; a replication that the monies to have been paid at such a day were unpaid, whereupon the plaintiff, for his discharge from the bond, was compelled to pay the money; a rejoinder by protestation, &c. for plea, that the obligee before the day gave the defendant a general release; a special demurrer that it was a departure from the plea. Bro. Red. 228.

The like plea; a replication that the defendant, as collector of rents, belonging to the governors and company of the new river, received 1300l. which he had not paid to the treasurer of the company, whereby the plaintiff was threatened to be arrested, and for his redemption, &c. he was obliged to agree to pay 250l. a demurrer thereto: The plaintiff amended his replication, and omitted for his redemption, and by making the said sum 23948l. a rejoinder that it was true that the defendant received 2159l. which he paid to the treasurer; and traverse the receipt of 23948l. Bro. Red. 204.

By non dampnificatus; a replication that the monies were unpaid, and to avoid a suit and trouble, the plaintiff paid the money to the obligee, Et sic dampnificatus; a rejoinder denying the payment, and an issue thereon. Mo. Intr. 192. Ash 247.

The like plea to a special condition; a replication protesting that the defendant did not save the plaintiff harmless; for plea, that the plaintiff had laid out and paid for the proper use of G. the defendant's son, 100l. which the defendant had not repaid him; and an issue upon the payment. Mo. Intr. 193.

The like plea; and a replication that the money was unpaid, and the obligee sued the plaintiff upon the bond to an exigentias, which the plaintiff superseded. Mo. Intr. 195.

By an administrator that the intestate when alive paid the money (such a day) according to the condition, and so saved the plaintiff harmless; a replication denying, and a rejoinder alleging the payment, and an issue thereon. Bro. Red. 194.

Bar, by conditions performed, et sic non dampnificatus; a replication by non-performance of the condition of one of the twelve bonds specified in the bar. Re. Dec. 234.

Conditions performed, et sic non dampnificatus. Cl. Aff. 282. To a condition to save the inhabitants, &c. indemnified from taxes; a plea by conditions performed; a replication shewing a dampnification by a suit in the court christian; the defendant demurs. Cl. Aff. 408.

Non dampnificatus to a counter-bond; replication by non-payment at the day. 1 Infr. Cl. 218, 338. Han. 118. Tho. 426.

A plea

References to Precedents

A plea that no request or notice in writing was made to save the plaintiff harmless. Cl. 147.

To a replevin-bond; a plea, that the defendant sued out a plaint not yet adjudged, and that the plaintiff is not yet dampnified. Clift 191.

A plea of non dampnificatus; a replication that the monies were unpaid, and the obligee made an executor, who arrested the plaintiff upon a latitat, and detained him till he paid the money with the costs; a demurrer thereto. 3 Brownl. 174.

A plea that the defendant paid the money at the day, and so saved the plaintiff harmless; a replication protesting that he did not save him harmless; for plea, that he did not pay the money at the day. 3 Brownl. 118, 119.

That a creditor obtained a judgment against the plaintiff in the king's bench, and the defendant, upon the plaintiff's request, paid the money in discharge of the judgment. Co. Entr. 139.

To a condition to discharge lands from a claim of rent; a plea of non dampnificatus; a replication that one H. being seised, demised to A. B. and C. for lives, rendering rent, the reversion descending to coheirs, who by their bailiff distrained the plaintiff's cattle for rent in arrear; and the plaintiff to avoid a suit, entered into a bond to pay all the rent due before such a feast, and gave notice to the defendant, and requested payment, which he had not done; whereupon the plaintiff paid the rent. Hern 309.

Non dampnificatus to an action of debt upon a Sheriff's bond to prosecute a replevin with effect. Lill. Entr. 124.

Non dampnificatus to a counter-security by bond as bail. Lill. Entr. 494.

By Conditions performed relating to Ecclesiastical Matters.

To a bond made to the bishop and commissary, with a condition to nurse and educate an infant during his minority, and render an account upon demand; a plea that the bond was unlawfully taken, and void in law, a demurrer thereto. Bro. Red. 220.

To an action brought upon a letter of attorney, made irrevocable to receive all monies due for tithes; the defendant pleads that he did not revoke; and an issue thereon. Bro. Met. 17.

To a bond given to a bishop to obey the commands of the church; the defendant after oyer pleads that he was excommunicated by the bishop's vicar, and that before the making of the bond, he sued out a writ de cautione admittenda, directed and delivered to the bishop, and gave the bond aforesaid pro ca-

In Actions of Debt.

tion, and that he then ought to have had absolution, and that from thence he was always ready to obey the commands, &c. but the bishop refused to absolve him, whereby he became incapable to obey, &c. a replication, that the bishop was always ready to have given absolution, but was never requested; and an issue thereupon. Clift 194.

The defendant to a bond pleaded performance of the duty of a preacher; a replication that he did not read prayers appointed upon the feast of St. Michael. Clift 189.

That the defendant presented the plaintiff to a church of which he was not capable, for that he was a bishop, and had not a licence to take a benefice. Ra. Entr. 182.

A plea that the archbishop dispensed with the defendant's exhibiting an inventory, that the ordinary did not appoint the defendant to pay any debts of the testator, and that he *fulfilled [P* 414] the will; a demurrer thereto. Co. Entr. 179.

That the judge of the prerogative court did not appoint the defendant to make any release; a demurrer thereto. Co. Entr. 130.

To a condition to perform the sentence in the ecclesiastical court concerning a will; a plea that the defendant appealed from the sentence. Hern 317.

Conditions performed relating to Temporal Matters.

To a bond given to the sheriff in an action against the bailiff of an hundred after oyer, conditions performed pleaded specially; a replication, and a breach assigned in non-payment of a post fine collected by the defendant; a rejoinder alledging payment, and an issue thereon. 2 Brown 92. Tho. 195.

To an action brought upon a bond by the governor and company of merchants trading to the East-Indies against their factor, with a condition to render a true and perfect account, and to deliver and pay the goods and money of the company to the governor; a bar, that he rendered a true and perfect account, and that he delivered and paid all the goods, money, &c. belonging to the company, to the governor, &c. Bro. Red. 227.

To a bond, with a condition, that one of the defendants would not marry during the life of E. without his consent; a bar, that E. such a day died, and that the defendant before such a day did not marry; a replication that the defendant before the death of E. was married; and a traverse that E. died such a day; a demurrer thereto. Tho. 194.

To a bond with a condition for curing a disease; a plea protesting, &c. for plea, that he entirely cured E. but that by ill management in diet he was relapsed. Ro. Entr. 230.

The

References to Precedents

The defendant pleads that he was ready to have cured the plaintiff of the gout, but that the plaintiff's wife would not suffer the defendant to come near him, but abused the defendant; a replication that the plaintiff sent, and the defendant refused to come; and a traverse of the wife's hindering him, and issue upon the traverse. Bro. Met. 246.

To a bond that the defendant should quietly permit T. and his assignee, to carry wood, coals, &c. without the defendant's interruption, or of any other for him; replication that the defendant did not permit T. to carry all the wood, &c. Ro. Entr. 235.

To an action of debt upon two bonds; the first with a condition for the delivery of a legal surrender of a tenement by the defendant, or one T. to the plaintiff at the next court; and to the second bond for the payment of money, if a surrender should not be made; a plea to the first, that T. at the next court, according to the custom of the manor, surrendered the tenement into the hands of the lord, to the use of the plaintiff; the like plea to the second bond; a demurrer to the plea. Wi. Entr. 241.

To a condition to make a surrender, and that the defendant should enjoy; a plea that he did surrender, and that the plaintiff enjoyed; a replication that one J. entered, and ejected the plaintiff; a demurrer thereto. 1 Saund. 145.

Conditions performed by a bailiff of an hundred; a replication that the defendant permitted goods and chattels seized and taken (by virtue of a warrant upon a fi. fa. directed to him) to be rescued out of his possession, whereby the plaintiff as sheriff became liable to pay the money; and so the defendant had not well executed his warrant. Bro. Red. 256.

To a condition to find and provide for the plaintiff's wife and children; a plea that the defendant did not provide sufficient meat, drink, &c. Mo. Intr. 200. The like for a daughter, with a replication, rejoinder, and issue. Cl. Aff. 345.

To a condition to pay for the hire of cattle, and to deliver the increase thereof; a plea that he paid the money, and delivered the increase; a replication denying the delivery of the increase. Pl. Gen. 282.

To a condition to pay for coal-wood, to be delivered; a plea that he did not receive any from the plaintiff, nor from any other person appointed by him; a replication, and issue. Cl. Aff. 34.

To a condition that the defendant should expel W. R. from a messuage; a plea that he did expel him; a replication denying it, and an issue thereon. Id. 352.

To a condition with covenants concerning woods; a plea that the plaintiff agreed by a writing that he should give authority to one J. B. to demise, &c. and that he did so, and the

In Actions of Debt.

J. B. paid the plaintiff 100l. thereupon, and that no further profit could be since made; a replication protesting that he did not give any such authority, prout, &c. for plea, that J. B. had not paid the said 100l. and issue thereon. Cl. Aff. 360.

To a condition to deliver up certain articles of agreement; a plea that he did deliver them up, and an issue thereon. Id. 263.

To a condition to perform marriage-articles, the defendant sets forth the articles that he should settle such and such lands upon the plaintiff, and to surrender copyhold lands which he had done; a demurrer, and judgment for the plaintiff. Idem 371.

Conditions performed, and that the testator surrendered the premises before the action brought. Lill. Entr. 109.

Conditions performed generally; a replication that the defendant received 40l. of his master's money, which he converted to his own use; a rejoinder denying that the apprentice wasted, &c. and an issue thereon. Lill. Entr. 114.

Conditions performed pleaded to articles; a replication with a breach assigned in the non-payment of 34l. a general demurrer. Lill. Entr. 115.

Conditions performed specially to an action of debt upon a bond, conditioned for the payment of an annuity; a replication quod non performavit; a rejoinder of a tender. Idem 115.

Conditions performed specially to a bond to resign a benefice; a replication protesting the defendant had not performed; for plea, that the defendant had resigned the benefice; a rejoinder denying that he resigned the benefice, and an issue thereon. Lill. Entr. 118.

The Statute of Usury pleaded.

A plea that the bond was made for the security of payment of 200l. and a recognizance acknowledged for the payment of 200l. for wares bought of the then value of 200l. and no more; a replication that the bond was made upon a good consideration. 1 Brown 187.

The like plea, and a replication that the bond was made for just debt; and a traverse of the usury. 1 Brown 180.

The like plea within the statute of 12 Car. 2. without reciting the statute of usury. Bro. Va. Me. 254.

A plea to a bond that the plaintiff reserved to be paid to him 7l. for deferring and giving a way of payment of 7l. for six months; a replication that he lent the 7l. to the defendant without the consideration of lucre contra formam statuti; and a traverse of the usury in the plea. 1 Brown 189, 190, 201. Tho. 157. 2 Brown 66. Han. 79.

That the plaintiff had the feeding of certain sheep, for the feeding of 20l. a replication denying the depasturing, &c. Cl. Aff. 315.

The

References to Precedents

The like plea by collateral usury ; a replication and issue. Idem 320. The like plea ; a replication, rejoinder and issue. Idem 424, 428. Tho. 437.

A plea to a bill penal by the statute, and 5*l.* paid in hand ; a replication that it was by a just debt, and a traverse by the corrupt agreement ; a demurrer thereto. Clift 283, 185.

A plea that the bond was void, being against the form of the late statute of usury ; a replication that the bond was made for the payment of 50*l.* and 3*l.* for interest, at the end of a year, and not before ; a rejoinder maintaining the bar, and a traverse that the money was payable at the end of the year. Tho. 159.

A plea to a bond that the defendant was indebted to the plaintiff in 5*l.* and that for the same he should deliver to the plaintiff ten quarters of barley at such a feast, and for the security of the delivery of the same, he became bound in the 20*l.* that the barley was worth 10*l.* that for thus deferring the day, the plaintiff reserved to himself 5*l.* a replication, that for the said 5*l.* lent, and for the said 5*l.* to be paid upon the delivery of the barley, the defendant became bound, &c. 2 Brown 85.

That the plaintiff lent the defendant 20*l.* and for deferring and giving a day of payment thereof for a year, the bond was made for 24*l.* which is contrary to the statute ; a replication that the bond was made for a good consideration ; and a traverse of the usury ; a rejoinder and issue upon the traverse. Ro. Entr. 247.

That the plaintiff lent the defendant 30*l.* for seven years, and the defendant for giving a day of payment, granted to the plaintiff an annual rent of 3*l.* till the defendant should repay the plaintiff ; a replication that the defendant should repay the plaintiff ; a replication that the defendant for 30*l.* bona fide paid, granted the said annual rent ; and a traverse of the corrupt agreement in the plea, and an issue thereon. Ro. Entr. 229.

[P* 415] That the plaintiff lent the defendant 100*l.* and for giving a day of payment from the twentieth day of *October till the twentieth day of January next, the plaintiff kept back to himself 6*l.* a replication that the defendant was indebted to the plaintiff in a real debt of 100*l.* for payment whereof the defendant with others became bound, and a traverse of the usury. Ro. Entr. 229.

That plaintiff lent the defendant twenty pounds, and for deferring and giving a day of payment thereof, for the time the defendant made three several bonds with penalties for three several sums of 10*l.* at several days, whereof the bond in fact was one ; a replication that the bond was made for a true debt and a traverse of the usury. Vid. 205. Wi. Entr. 234.

In Actions of Debt.

The like bar; a replication that the plaintiff agreed to lend the defendant 50l. according to the rate of 5l. per cent. and that the scrivener who made the bond mistook, &c. 2 Ven. 81. Note; this is a good replication.

By an executor against an executor, where the testator lent W. 20l. for four years; and W. for giving the day of payment, granted to the plaintiff an annual rent of 40s. in fee, with a proviso for redeeming the annuity by payment of the money, and that the bond was for the security of the testator's enjoying the annuity; a replication that the said W. was indebted to the testator in 20l. as for a true debt, and for monies paid to W. by the testator; that W. granted an annuity, and that the bond was made as well for the payment of the 20l. as for the arrears of the annuity; and a traverse of the usury; a special demurrer thereto. Wi. Entr. 288.

That the plaintiff lent the defendant 60l. and for the forbearance and giving a day of payment for one month, the bond was made for the payment of 62l. whereby and by force of the statute the bond was void; a replication that the defendant was indebted in 60l. for a just debt, and for the payment thereof he made the bond; and a traverse of the usury. Bro. Red. 335.

That the bond was made for the security of the payment of 30l. for a barrel of oil sold, that the defendant might have bought it for 25l. in money, and the true price thereof was 25l. a replication that the true price of a barrel of oil was 30l. and a traverse that the true price was 25l. Ra. Entr. 689.

The late statute against usury pleaded in bar; a replication *pro justo debito*; a rejoinder *quod fuit corrupte agreeat*, &c. and an issue. Lill. Entr. 183, 184.

The statute of Car. 2. of usury pleaded. Lill. Entr. 113.

To Bills.

The defendant pleads a deed of composition, whereby the defendant and other creditors agreed to accept 7s. for every pound, and to give a release upon the payment thereof, that the defendant offered to pay the money according to the composition, which the plaintiff refused. 1 Brown 190.

That after the bill exhibited, the defendant and other creditors gave the plaintiff a letter of license, and therein agreed that if either should sue or molest the defendant, and should not release him within a day after request, that then the letter of license should be deemed a release. Tho. 169. Clift 147.

References to Precedents

That the defendant was indebted upon account to the plaintiff in 32l. besides the 80l. upon the bill; and it was agreed between the parties, that the defendant should enter into a recognizance in the nature of a statute staple, for the payment of both the sums at such a day; which the defendant did, and the plaintiff accepted thereof; and the defendant afterwards paid, &c. a special demurrer thereto. *Wi. Entr.* 171.

The like if the plaintiff should not esteem two acres of meadow to be a good title before such a feast; a plea, that before the feast he enfeoffed the plaintiff of a meadow, by which the plaintiff esteemed the meadow to be a good title. *Pl. Gen.* 524.

To a bill to pay money when God should make the defendant able; a plea that he is not yet able. *Ash* 202.

To a bill to pay 5l. to the plaintiff, if he should go or run with such a weight between such days and hours, from such a place; a plea that the plaintiff did not go, &c. 3 *Brownl.* 127.

To a bill for the payment of foreign money; a plea, that he was ready at such a fair to pay so much English money as the foreign money amounted to, if the plaintiff had been there, and would have delivered the bill; and a traverse that the foreign money amounted to the sum in the declaration; and an issue thereon. *Ra. Entr.* 158.

By a Tender.

That at the day and place in the condition, the defendant was ready to have paid the plaintiff the money in the condition, and that neither the plaintiff, or any other person for him, came there to receive it; a replication that neither the defendant, or any other person for him, was there ready to have paid, &c. 1 *Brown* 173. 3 *Brownl.* 176. The like bar, with an allegation of being yet ready, &c. a replication denying the tender. *Pl. Gen.* 331. A plea of a tender and refusal, and being yet ready to pay. *Clift* 189. *Ash* 220.

To an action of debt upon a contract *nil debet per legem* as to part, and as to the residue an acknowledgment of the action, that he is yet ready, &c. a replication that the defendant had an imparlance, and the plaintiff demands judgment if the defendant ought to be admitted to say that he has been always ready; judgment for the plaintiff. 1 *Brown* 200.

To an action of debt, a plea of being always ready to pay, an estoppel, that the defendant appeared upon the distringas. 1 *Brown* 201.

In Actions of Debt.

To an action of debt for rent, that at the day mentioned in the indenture the defendant was ready, and offered to pay the money for rent; and that neither the plaintiff, or any person for him, came there to receive it; and that from that day he has been always ready to pay the money, and brings it into court; the plaintiff takes out the money, and for his damages, he replies, that on such a day he demanded the money, which the defendant refused to pay; a rejoinder denying the demand. Tho.

159.
To an action of debt upon an emisset as to part; the defendant acknowledges the action, and says he was always ready to have paid it, and yet is ready, and brings the money into court; to the residue he wages law, the plaintiff receives the money acknowledged out of court, and for his damages says that such a day he demanded the money, which the defendant refused to pay; a rejoinder denying the demand. Ra. Entr. 159. Vet. Intr. 126. 3 Brownl. 132. Ash 246.

To an action of debt upon a contract nil debet per legem as to part, and as to the residue that always, from the time of the account; the defendant was ready to pay the money, which he brings into court; and the plaintiff accepts it, and for his damages replies that on such a day he demanded the money; and the defendant refused to pay it; a rejoinder that at the time of the demand the defendant tendered the money, and the plaintiff refused to receive it; a surrejoinder that the defendant did not offer to pay it. Pl. Gen. 363. Ra. Entr. 159. Vet. Intr. 26.

That the defendant always from such a feast was ready to pay the money, which he brings into court; and the plaintiff accepts it, and replies for his damages that he demanded it; a rejoinder denying the demand. Bro. Red. 200.

That the defendant was always ready to pay the money which he brings into court; and the plaintiff receives it out of court. Pl. Gen. 255.

As to part of the debt, a tender at the day, and that he was always ready. Pl. Gen. 256. A replication denying tender. Id.

A plea that the defendant was always ready to pay; a replication that the plaintiff demanded the money, and the defendant refused to pay it; and a traverse that the defendant was always ready; and an issue thereupon. Pl. Gen. 317. Han. 110.

A tender pleaded at the day for the space of an hour before sunset; a replication with a traverse, and an issue thereon. Mo. Intr. 234.

The like as to part of the debt, and as to the residue, that the plaintiff brought his writ before it was due, with a profert of the money due into court; a replication denying the tender; an issue thereon. Bro. Va. Me. 504.

References to Precedents

To an action of debt upon a bond, with a condition to pay an annual rent at four feasts, or within ten days; a plea that upon every tenth day after every of the feasts, he was ready to pay the plaintiff the money; and that neither the plaintiff, or any person for him, was there to receive it; nor did any person demand the rent; a replication protesting, &c. for plea, that the plaintiff at one of the days, for the space, &c. was ready, and demanded the rent; a rejoinder that he was not ready, and a traverse of the demand; an issue thereon. Tho. 181.

[P* 416] A tender of rent pleaded, with an allegation of being always ready; a replication whereby the plaintiff accepts the money, but protestando that he did not tender; for plea to have his costs, that he demanded the money, *and the defendant refused to pay it; a rejoinder that he made no demand; an issue thereon. 2 Mo. Intr. 236.

A plea of tender, and an allegation of being always ready. Bro. Va. Me. 213. 1 Instr. Cl. 34. Replication thereto. Tho. 426.

To a condition to deliver lead at two days; a plea that he offered to deliver it, and no body came there to receive it; replication, that at one of the days the defendant did not offer to deliver it. Ash 244.

To an action of debt upon a bond for twenty marks, as to 26s. 8d. the defendant pleads he is ready to pay; as to eighteen marks residue, a bar by two acquittances, and an issue thereon; and a nil dicit as to the 26s. 8d. Ra. Entr. 179. Vet. Intr. 202.

To part of the debt upon a bond, a plea by a foreign attachment in London; to the residue, that he was always ready to pay, and the money brought into court; a replication that such a day the plaintiff demanded the money which the defendant refused to pay; a rejoinder that at the time of the demand the defendant tendered to pay, &c. and that the plaintiff refused it; a surrejoinder denying the tender to pay. Co. Entr. 141.

A tender pleaded to an action of debt for rent. Lill. Entr. 162.

By Acceptance of other Things.

To an action of debt upon two bonds; a plea to one of the bonds; a plea to one of the bonds, that the defendant paid at the day; to the other bond, that the defendant before the day in the condition delivered to the plaintiff such and so quarters of corn, in satisfaction of the said bond which the plaintiff accepted; a replication as to the first bond, denying the payment to the second, taking a protestation that the defendant did not deliver, &c. for plea, that he did not accept it full satisfaction. Ro. Entr. 196.

To an action of debt upon a bill penal; a plea, that at the day of payment the defendant delivered the plaintiff six co-

In Actions of Debt.

in satisfaction of the debt which the plaintiff accepted; a replication denying the delivery. Bro. Red. 169. 1 Brownl. 76.

To an action of debt upon a bond; a plea that the defendant being bound with T. by an agreement between T. and the plaintiff; the said T. with one R. delivered another bond to the plaintiff, for the security of the payment of the money in discharge of the bond wherein the defendant was bound, which the plaintiff accepted. Ro. Entr. 188.

The like plea; a replication that R. did not deliver any such bond; an issue thereon. Ro. Entr. 234.

To an action of debt upon a bond, with a condition that A. and J. should pay the plaintiff for the use of H. 36l. at such a day; that H. put himself apprentice to J. by indenture for seven years; that J. before the day of payment and the end of the term, discharged H. his apprentice, with his consent from his service, for the residue of the term, and delivered up to H. his indenture, in full satisfaction of the said 36l. which H. accepted; a demurrer thereto. Wi. Entr. 186.

To an action of debt upon a mutuatus, a plea that the plaintiff accepted of the defendant a treat in satisfaction of the debt; a replication that he received the treat for a pledge; and a traverse that he received it in satisfaction of the debt. Bro. Red. 202. 3 Brownl. 135.

To an action of debt upon a bond for the payment of 25l. a plea, that after the day of payment the defendant and one T. by a bill penal, became bound to the plaintiff for the payment of 28l. whereof the 25l. were part for the same debt; and 3l. for the damages which the plaintiff accepted in full satisfaction of the bond; a demurrer thereto. Bro. Red. 236.

That for the security of the money due, the defendant gave a bond. Cl. Aff. 117.

As to the mutuatus, that the defendant owes nothing, and that the plaintiff accepted two bonds in full satisfaction of the remainder of the debt, and an issue taken upon the acceptance. Ro. Entr. 192.

To an action of debt brought by an executor, a plea, that the defendant before the day in the condition gave and delivered to the testator ten loads of wood, in satisfaction of the money in the condition; a replication protesting that he did not acknowledge any thing in the plea to be true; for plea, that the testator did not receive ten loads of wood in satisfaction of the debt. 3 Brownl. 142.

The like of monies paid to the testator, in satisfaction as well of the money demanded, as of all other demands by agreement; a replication denying the payment in satisfaction. 1 Brownl. 111.

References to Precedents

Pleas by Heirs.

To an action of debt against a son and heir, a plea of nothing by descent. Pl. Gen. 345. 2 Mo. Intr. 222. Bro. Va. Me. 205, 503. Cl. Aff. 85. 1 Instr. Cl. 202. a replication thereto. Han. 107. Tho. 428. Ra. Entr. 172. Vet. Intr. 18. Ash 209.

Nothing by descent except such lands, and a reversion of a moiety of lands after the death of A. who is alive; a judgment thereon, and a replication that the defendant hath lands besides those pleaded. 1 Brown 182. 2 Mo. Intr. 222. 3 Brownl. 176.

The defendant acknowledges the writing to be his father's deed, but pleads nothing by descent, except such lands and a reversion. 2 Brown 97. Vid. 178. 3 Brownl. 176.

The like plea, except such and such lands and a moiety in B. and a reversion in D. in the county of B. judgment thereupon of the lands and moiety, and of the reversion when it incurs. Tho. 208.

To an action of debt against a brother and heir, a plea protesting that it is not the deed of his father; for plea, that he hath nothing by descent; a replication and issue. 2 Brown 72. The like plea by daughters and coheiresses, with a replication, and an issue. Tho. 180.

The like bar by a son and heir; a replication that the defendant was outlawed at the suit of the plaintiff; which outlawry was reversed for the insufficiency of the return of the writ of *exigi facias*, and that at the day of suing out the former original the defendant had lands by descent. Tho. 187.

A plea of nothing by descent, by a cousin and heir. 3 Brownl. 121. Bro. Red. 195. The like plea, except such and such lands; a replication that he had assets *ultra*. Ro. Entr. 210.

To an action of debt upon a bond against three heirs in gavelkind; a plea that one is within age, and appeared by guardian; therefore prays that the plea may be respited till he arrives at his full age. Bro. Red. 195. The like of a son and heir. Cl. Aff. 401.

Nothing by descent pleaded where the defendant pleads a fine levied of the lands descendable to him from his father. Bro. Va. Me. 203. A replication that the fine was not levied to the uses mentioned, and that the defendant had other lands by descent. Idem 264.

Nothing by descent pleaded by a brother and heir of a son and heir. Ash 201.

Nothing by descent except such lands; a replication that the defendant had lands *ultra*. Co. Entr. 126. Hern 312. Ra. Entr. 172. Plow. 439. Lill. Entr. 112, 180.

Nothing

In Actions of Debt.

Nothing by discent except a reversion and remainder of lands; and a judgment thereon. Ash 230.

To an action of debt against two husbands and their wives coheirs; a plea of nothing by discent, except lands in the county of G. and a moiety in the county of C. a judgment thereon. Ash 239.

To an action of debt against A. and E. his wife, and C. and T. his wife's sisters, and J. the son of S. another sister, coheir-esses; and G. pleads nothing by discent, except a third part of the tenements; the like by C. and T. J. pleads that his father is tenant by the curtesy; the reversion to him; a judgment thereon. Ash 232.

Pleas at the Suit of Executors and Administrators.

To a suit by an administrator upon a bill penal; a plea that the intestate was *felo de se*; demurrer thereto. Bro. Met. 224.

The defendant pleads that he paid the testator by the hands of another person before the day of payment; replication denying the payment, and an issue thereupon. Cl. Aff. 314.

To an action of debt upon a bond by an executor, that T. and W. together with the defendant were bound to the testator for the said debt; and the testator, when alive, recovered a judgment upon the bond in the king's bench against T. who was taken upon a *ca. sa.* and paid the debt and damages. 1 Brown 99.

To an action of debt by an administrator, upon administration having been granted by the bishop; a plea that the intestate, at the time of his death, had *bona notabilia* in several diocesses, whereby the archbishop granted a prerogative administration to A. who released to the defendant. 2 Brown 98. Bro. Va. Me. 449. 3 Brownl. 140.

To an action of debt by the executor of K. the executor of H. a plea that H. died intestate, and a traverse that H. made K. his executor; a replication, and an issue upon the traverse. Ro. Entr. 209.

That administration was never granted to the plaintiff. Bro. [P 417] Va. Me. 214. Cl. Aff. 117. Tho. 427. 3 Brownl. 138. Ash 254.

That administration was granted to another, and not to the defendant. Cl. Aff. 105.

That administration was granted to another after the death of the testator, and after the will proved. Bro. Va. Me. 471.

To an action of debt by an executor upon a bond, with a condition to pay monies to such persons as the testator should name by his last will; a plea that the testator did not name any persons to whom the money should be paid; a replication that the testator by his will made the plaintiffs his executors, who proved it; and the defendant had not paid it to them. Wi. Entr. 228.

To

References to Precedents

To an action of debt upon a bond by an administrator, a plea, setting forth another administration to have been granted to M. who gave the defendant a general release; a replication that the second administration was obtained by a fraudulent suggestion, and that the release was obtained by fraud; a rejoinder protesting, &c. for plea, that M. bona fide released to the defendant; and a traverse of the fraud, and issue thereupon. The court adjudged the issue to be idle, and the proceedings void; and a replender awarded for the plaintiff to set forth in his replication, and shew both the administrations, and that the administration granted to M. was by a declaratory sentence of the archbishop pronounced and made invalid, whereby the release became void; a demurrer thereto. *Wi. Entr.* 311.

To an action of debt brought by the executor of A. upon a bond made to him and B. a plea that D. survived A. *Pl. Gen.* 273. *Ra. Entr.* 323. *Vet. Intr.* 197.

To an action of debt by one executor, that the testator made another executor; and a traverse that the plaintiff is sole executor. *Bro. Red.* 200. 3 *Brownl.* 131. *Hern* 2.

To an action of debt upon a bond brought by an infant, after his attainment to his full age, where administration had been granted during his minority; a plea that the administrator, during the minority of the infant, released; a replication that the administration was granted for the sole use of the plaintiff; a rejoinder that it was granted to the proper use of the administrator. *Tho.* 141.

To an action of debt upon a bond brought by an executor, a plea, that the testator made the plaintiff and three others his executors, during the minority of J. who before the suing out of the original writ, came to his full age; and then the defendant delivered to him the goods and chattels of the deceased, which J. received, and took upon him the execution of the will as executor; and a traverse, that the defendant at the day of suing out the original writ, or at any time after was executor, or ever administered any of the goods of the testator; a special demurrer thereto. *Wi. Entr.* 353.

To an action of debt by an executor, a bar, that the testator afterwards made another will, and thereof appointed the defendant executor; a replication denying that he made another will. *Ra. Entr.* 323. *Vet. Intr.* 170.

To an action of debt by a widow executrix of R. against the executor of H. a bar, that the plaintiff after the death of R. married H. whereby the debt became extinct. *Ash* 224.

To an action of debt by the administrator of J. a plea that J. made a will, and the defendant his executor; and a traverse of J's dying intestate. *Ra. Entr.* 259.

In Actions of Debt.

Pleas by Executors and Administrators.

A plea that the defendant never was executor, Wi. Entr. 341.
Pl. Gen. 335. Bro. Va. Me. 215. Cl. Aff. 74. 1 Instr. Cl. 219.
Tho. 427. Co. Entr. 144.

That the defendant never was administrator; and a replication,
1 Instr. Cl. 219. 337.

That the defendant administered only about the funeral;
and a traverse that he administered as executor. Pl. Gen. 353.

To an action of debt against the ordinary; a plea that he
had not any goods, except goods to the value of 5*l.* for which
he acknowledges the action. 1 Brown 171.

A plea by an executor, that the testator died before the day
whereon judgment was obtained against him; a replication that
the testator was alive at the day when judgment was given; and
a traverse that he died before; an issue upon the traverse. Tho.
178.

To an action of debt against an executor, a plea, that T. died
intestate, and that administration was granted to A. and a traverse
that the defendant is executor, or administered as executor.—
Tho. 221.

To an action of debt against an administrator, a plea, that
the letters of administration were revoked; a replication,
that the defendant appealed from that court to the court of
Chancery; which appeal is yet pending undetermined, and that
the revocation, according to the civil law, is of no force, a demur-
rer thereto, with special causes. Tho. 221.

To an action of debt against an administrator, a plea, that
administration was never granted to him; a replication, and issue.
Mo. Intr. 186. Pl. Gen. 337.

To an action of debt against A. as administrator, a plea that
A. made the defendant and another his executors; and a traverse
that A. died intestate. Tho. 140, 433.

To an action of debt against A. as executor, a plea, that J.
is another co-executor not named in the writ; a replication shew-
ing that he is dead. Bro. Red. 199.

To an action of debt against the executor of J. a plea, that J.
died intestate, and that administration was granted to the defen-
dant; a replication that the defendant before administration gran-
ted to him, administered the goods of J. as executor; a demur-
rer thereto. 2 Ven. 178.

A plea by an administrator, of a verdict, and a judgment against
the defendant for 46*l.* upon plene administravit pleaded to a scire
facias brought upon a recognizance in chancery for 80*l.* and a
recognizance for 120*l.* in chancery, and that plene administravit;
a replica-

References to Precedents

a replication protesting, &c. that the defendant had paid 24l. in full satisfaction of the first recognizance, and that as to the recognizance of 120l. it was made for the security of the payment of 70l. which the intestate paid at the day, and that the judgment and recognizance remain uncanceled by fraud; a demurrer to the first plea, and an issue as to the other. *Wi. Entr.* 242.

By a statute-staple for 4000l. made to W. and by a statute-merchant for 7000l. made to C. a replication that the statute made to W. was for the performance of covenants which were never broken; and the like as to the statute made to C. and a demurrer thereto. *Wi. Entr.* 307.

Plene administravit. *Mo. Intr.* 185. *Pl. Gen.* 335. 2 *Saund.* 216, 306. 2 *Mo. Intr.* 241. *Bro. Va. Me.* 181, 215. *Cl. Aff.* 73, 166. *Tho.* 427. *Ra. Entr.* 202, 294, 323. *Vet. Intr.* 69. *Co. Entr.* 149.

To an action of debt upon a bill, an acquittance pleaded as to part, and plene administravit as to the residue. *Bro. Red.* 174. A replication that the defendant had assets. *Ibid.* 1 *Brownl.* 44.

To an action of debt against A. and W. executors; A died after the last continuance; W. pleads plene administravit. *Bro. Red.* 175. 1 *Brownl.* 87.

To an action against an executor, where there was another executor who had been outlawed; the defendant pleads that the testator made him executor who was outlawed, and that the defendant as his servant only sold the goods. *Bro. Red.* 196.

To an action of debt upon a bill brought against an administrator; the defendant pleads plene administravit; a replication that the plaintiff sued out an original in the common plea against the defendant and her husband, who died, whereby the writ abated; and afterwards exhibited a new bill for the same debt against the defendant, who had goods at the day of the original; a rejoinder that the plaintiff did not anew exhibit his bill. *Vid.* 274.

That the testator was outlawed in an appeal of robbery, and the defendant administered the goods which came to his hands after the outlawry; a replication that the defendant had assets. 1 *Brown* 164. *Tho.* 184. 2 *Brown* 100.

The like bar, and a replication, that the plaintiff brought a former original, whereupon the defendant was waived, and the waivary was reversed for insufficiency of the return of the writ; and that at the day of suing out the first original, the defendant had assets. *Tho.* 186. *Ash* 230.

Plene administravit except so much; a replication that the defendant had assets beyond, &c. 2 *Brown* 77.

By an executor, that the testator made a bond to the defendant, who retains money towards satisfaction of his own debt, and that he hath no assets besides; replication, that the defendant was executor of his own

In Actions of Debt.

wrong, and therefore ought not to retain. Tho. 156. the like bar a replication, a demurrer, and judgment for the plaintiff. Mo. Intr. 199. vide Ash 220.

The like plea of a retainer by an administrator; and a replication that the defendant had assets besides. Tho. 166, 184. 1 Saund. 333. the like plea, with a replication, that the intestate was not bound to the defendant. Vid. 188. Ash 253.

By an administrator, that after the plaintiff sued out his original, one E. sued an original against the defendant upon a bond for 200l.* and obtained judgement thereon, and that he had not assets ultra; a demurrer thereto. Wi. Entr. 188. [P* 418]

A plea by an administrator, by an outlawry after judgment against the intestate which is not reversed; the plaintiff replies an imparlance, and then demurs. Wi. Entr. 338.

The like plea, and further, that plene administravit, except such goods which by reason of the outlawry were forfeited to the crown; a special demurrer thereto. Bro. Red. 218.

A plea by an administrator, that the intestate was bound to an estranger who recovered against the administrator; a replication setting forth that the judgment was satisfied, but kept on foot by fraud. 1 Saund. 329. 2 Saund. 49.

A plea by an administrator of a judgment recovered in the common pleas against the intestate, and several judgments against the administrator and plene administravit præter. 2 Brown 87. Vid. 176. the like in the king's bench, with a replication that they were obtained by fraud. Ash 223.

A plea by an administrator of a judgment obtained against the administrator in the king's bench, and plene administravit præter. 2 Brown 96. Tho. 140, 215.

A plea by an administrator of several judgments in the king's bench, and a retainer of goods in his hands, towards payment of a debt due to the defendant upon a bond, and no assets ultra. 1 Brown 195. Wi. Entr. 258.

The like plea by an executor; a replication that he had assets ultra, and that the bond was entered into by fraud; rejoinder denying the fraud, and an issue. 2 Brown 73.

The like plea by an executor; a replication that the judgment was obtained by fraud. Tho. 149. the like plea, the like replication; a rejoinder in maintenance of the bar, and a traverse of the fraud, and an issue thereon. Tho. 179. Vid. 175.

A plea of several judgments in the common pleas against the administrator, and plene administravit præter, &c. replication that the administrator paid T. 306l. part of the 600l. in full satisfaction of that judgment, and that the judgment is kept on foot by fraud, a rejoinder that the judgment remains in full force; and a traverse of the fraud; a surrejoinder, and issue. Tho. 157. the like. 2 Mo. Intr. 238.

A plea

References to Precedents

A plea of a statute and several judgments against the testator, and a judgement against the executor; and plene administravit præter, &c. Tho. 164, 166. Han. 109.

A plea of a recognizance acknowledged to the chamberlain of the city of London by the testator, for monies belonging to the orphans of the said city; and plene administravit præter. Tho. 172.

A plea of judgement obtained in the king's bench against the executor; a replication that the defendant after the judgment recovered, paid 600l. in full satisfaction, and that the judgment is kept on foot by fraud; a rejoinder that the judgment is in full force, and a traverse of the fraud. Vid. 181

A plea of a recognizance to the Queen in the exchequer for 100l. by a statute staple for 800l. made to J. the like of 1000l. to M. the like of a 1000l. to A. the like of 1000l. to D. and plene administravit præter; a replication that the statute made to J. was for the security of payment of 400l. which the defendant had paid; and that the statute made to M. was for the performance of covenants none whereof are broken, and that the statute for 1000l. to A. was paid by the testator; the like of the 1000l. to D. and that the statutes remained uncanceled by fraud, and that the defendant hath goods beside the 100l. to satisfy the Queen; a demurrer thereto. Wi. Entr. 178. 9 Co. 108 the case.

That one of the defendants never was executor; and plene administravit by the other. Tho. 420.

Where one pleads that he administered only about the funeral and a traverse that he administered in any other manner; and the other pleads that he never was executor; a replication to the first, that he administered as executor; and paid debts, viz. to T. a rejoinder denying the payment to T. 1 Brown 200. Ra Entr. 322.

To an action of debt against two executors of W. a plea by one that W. died intestate, and that administration was granted to the defendant, and that one E. recovered a judgement against him in the common pleas for 20l. beyond which he had no goods; and the other pleads plene administravit generally; a demurrer to the first plea, and an issue to the other. Wi. Entr. 247. Co. Entr. 148.

To an action of debt against an administrator, by a joint administrator, to render an account of goods; a plea that no goods came to his hands; a replication that a silver cup came to his hands, but does not tender an issue; and therefore ill; the defendant demurs. 1 Saund. 101.

Where an administrator pleads several judgements in bar, and that the intestate was bound to the administrator, and that he has no goods beside 72l. which he retains in his hands, towards satisfaction of his own debt, and 100l. which are liable to the executor.

In Actions of Debt.

execution of the several judgments aforesaid; a replication that as to one judgement that the defendant paid it, and keeps it on foot by fraud; to the other judgment that satisfaction is acknowledged on record, and that the defendant hath assets ultra; to which the defendant demurs. 1 Saund. 329.

To an action of debt against executors on a bond of the testator, one pleads another action depending against him and his wife as heirs to the testator; which suit is yet depending; to which the plaintiff demurs. Lev. Entr. 54.

Where the defendant E. W. pleads plene administravit generally, the other executor F. C. pleads that she lives in M. and not in L. and had no notice of the suit (before such a day) and so pleads plene administravit besides assets to the value of 863l. 4d. to which she pleads payments in discharge of eight several judgments obtained against her; a replication as to E. W. that he had assets sufficient at the time of the action brought, and an issue thereon, and protestando that the judgments against F. C. were by fraud, and that she had notice of the plaintiff's action: pro placito, that on such a day she had assets sufficient; and an issue thereon. Bro. Va. Me. 181, 182. Cl. Aff. 349.

The like plea and replication; a rejoinder that the judgments were obtained bona fide, and an issue tendered; and as to his having assets at the time, &c. ultra & præter, he demurs; surrejoinder as to the issue tendered by the defendant; the plaintiff demurs; and joins in the defendant's demurrer. Bro. Va. Me. 256.

Several debts and judgments against the testator and executors pleaded in bar by the executors to an action brought upon the testator's bond, with a replication to some, that they were had by fraud, to others by satisfaction, &c. with rejoinder and surrejoinder, and issue. Bro. Met. 189. a replication that there was so much money paid in full satisfaction of one of the judgments, and goods and chattels, besides the other judgment. Id. 223.

As to 10l. demanded for the rent of a shop, the administrator pleads non demissu; and as to 55l. residue for tithes, plene administravit. Id. 242.

Where one executor pleads plene administravit, and the other a renunciation of the probate of the will. Cl. Aff. 133.

A judgment in covenants broken pleaded, and plene administravit præter so much which is not sufficient, &c. a replication that the judgment was by fraud; a rejoinder with a traverse of the fraud, and an issue. Clift 178, 181.

A plea by an husband and wife administratrix, by a judgment obtained against the wife when sole. Clift 182.

A special plene administravit that the testator was indebted to the king in his exchequer. Bro. Va. Me. 474.

Plene administravit except 60s. l. liable to a judgment pleaded, which the plaintiff does not deny; and prays judgment of the residue

References to Precedents

residue of the goods which shall remain after satisfaction of the debts pleaded in bar ; and it is granted to him. Bro. Va. Me. 471.

Plene administravit specially by one executor, and a demurrer thereto ; and plene administravit generally by another executor. Co. Entr. 148.

Where one pleads that he never was executor, and the other pleads non est factum. Ra. Entr. 322. that he never was executor pleaded by one, and plene administravit by the other. Ra. Entr. 151. 3 Brownl. 151. Ash 252.

To a scire facias against the executor of bail, a plea, by a judgement against a testator in London, and that the defendant paid a debt and damages recovered, and so much for the funeral expences, and the probate of the will ; and that the defendant plene administravit, except 4l. which he brings into court towards satisfaction of the plaintiff ; replication by nul tiel record. Moy 105.

A plea of several judgments in an inferior court ; a replication as to part that they were obtained by fraud ; to another part that the defendant paid part of the monies recovered in full satisfaction, and that the recoveror offered to release or acknowledge satisfaction, and that the judgment remained without satisfaction by fraud. 8 Co. 132. the like in the king's bench. Ash 228.

[P* 419] A judgment in debt confessed on a mutuatus in B. R. pleaded by an administrator. Lill. Entr. 58, 111. the like on an infinitum computasset in B. R. Ibid.*the like on a bond in the common pleas. Ibid. the like in debt for rent in arrear in the intestate's time in C. B. Ibid.

A judgment by original in C. B. recovered against the executor on a bond given by the testator ; and plene administravit præter 5l. Lill. Entr. 117, 119. replication, that the judgment is kept on foot by fraud. Lill. Entr. 120, 158, 159.

A retainer by an administratrix in satisfaction of her own debt. Lill. Entr. 215.

A judgment recovered in covenant on marriage articles pleaded in bar by an executrix to an action of debt upon a bond. Lill. Entr. 100, 102.

A plea by an administratrix that her intestate was indebted by a bond to J. S. and also a judgment recovered in B. R. against the administratrix on a simple contract by the intestate, and that she hath not assets ultra ; a replication that the bond and judgment are most part paid ; a rejoinder maintaining the plea. Lill. Entr. 59, 60.

To Actions of Debt for Rent.

Nil debet per patriam. Wi. Entr. 225.

Non detinet. Bro. Red. 170.

Non dimisit. Mo. Intr. 205. Ra. Entr. 152, 175, 176. Vet. Intr. 22. Lill. Entr. 478. As to part, no rent in arrear. Pl. Gen. 278. Vet. Intr. 42.

In Actions of Debt.

A plea of tender, and being always and now ready to pay, which the plaintiff accepted. Pl. Gen. 255. 2 Mo. Intr. 236.

To an action of debt for rent, the defendant pleads to one part nil debet, to the residue that the plaintiff entered into part of the premises, and drove out the defendant; a nolle prosequi as to the nil debet, and a demurrer as to the residue. 1 Saund.

To an action of debt for rent the defendant pleads the statute of 32 Hen. 8. that leases made to an alien are void. 1 Saund. 5.

The statute of non residence pleaded to an action of debt for rent; a replication that he did not absent himself from his benefice beyond the time specified in the act; and an issue. Tho. 25, 217.

As to part nil debet per patriam, as to the residue, that the defendant assigned the term to one whom the plaintiff accepted; a demurrer thereto. 2 Saund. 298. Bro. Red. 226.

To an action of debt by the grantee of the reversion against a fee for years; a plea that the defendant, before the grant of the reversion, surrendered the term to the lessor; a replication denying the surrender. 1 Saund 235. the like before such a feast, and the like replication. Pl. Gen. 254.

A plea that the reversion of the tenements, by a bargain and inrolled in the hustings of London, by the custom was granted to the defendant; a replication protesting that there is not such custom; for plea that S. sold the reversion of the tenements to the plaintiff, and a traverse that S. sold it to the defendant before; and an issue thereon. Tho. 203.

An extinguishment of rent by an entry pleaded. 2 Mo. Intr. 236. replication denying the expulsion. Pl. Gen. 278. the like in part of the premises, and a withholding of the possession till the end of the term. Tho. 173. Pl. Gen. 279. Tho. 220. Pl. Gen. 2150. an entry into part before any rent due. Bro. Red. 231.

That J. in his lifetime entered into one acre, part of the premises demised before any rent due, and occupied that acre all his life after; replication denying the entry. Ro. Entr. 235.

That the plaintiff before such a feast entered into the messuage, expelled the defendant; replication denying the expulsion. Red. 260. Pl. Gen. 252, 279.

A plea to rent, that it was not reasonably demanded according to the form and effect of the said indenture; a replication, rejoinder and issue. Cl. Aff. 403.

A plea of nonage, and a disagreement to the lease at full age. 149.

A plea that the plaintiff levied the rent by several distresses; a replication denying the levying, and an issue. 1 Brown. 200. 154. Pl. Gen. 253, 273. Han. 108. Tho. 428.

The

References to Precedents

The defendant pleads that the lessors had not a lawful right or interest at the time of the demise; the plaintiff demurs. *Lev. Entr.* 74. judgment for the plaintiff; the like bar, and issue as to part of the rent. *Pl. Gen.* 273.

As to part a plea that the plaintiff took goods for the rent, in the name of a distress, and does now detain them; replication that he did not take them. *Pl. Gen.* 278.

That the plaintiff had nothing in the tenements at the time of the demise; a replication that T. was seised of the tenements, who levied a fine to the use of the plaintiff for life; who being so seised, demised to the defendant; a rejoinder denying the seisin. *Tho.* 152. the like plea, replication, and issue. *Pl. Gen.* 256.

The like plea, with a replication that one T. having a title, demised the tenements to the plaintiff for forty one years; who being possessed, demised to the defendant; a demurrer thereto. *2 Ven.* 251.

That R. and E. seised of the lands, were disseised by the plaintiff, who demised to the defendant; that R. and E. entered upon the defendant before any rent due; a replication denying the disseisin. *Tho.* 191.

To an action brought against a tenant at will upon a parole lease for the rent of five quarters of wheat: the defendant pleads non detinet. *Bro. Met.* 181.

As to part, that before the plaintiff had any thing in the tenements, Q. Elizabeth was seised and granted to J. P. and his wife and E. their daughter, for their lives; that J. and his wife died, and that E. the daughter survived, who demised to J. N. and another for eighty years, if E. should so long live; that J. N. assigned to J. C. and S. upon whom the plaintiff entered, and demised to the defendant; that J. C. and S. re-entered, and before any rent due evicted the defendant; as to the residue, that M. having legal title entered upon the defendant and evicted him; a replication as to the first plea that J. C. and S. did not evict the defendant; to the other plea a demurrer. *Vid.* 163.

As to part, payment at the day, as to the residue, the defendant pleads the death of Cestui que vie before the day of payment. *Re. Dec.* 215. a replication, and issue upon the first part of the plea; to the other part of the plea that Cestui que vie is alive a rejoinder, and an issue on his death. *Ibid.*

As to part nil debet, as to the residue a disseisin by M. and S. and a traverse of the plaintiff's title. *Clift* 150.

As to part nil debet by the country, as to the residue that before the demise made to the defendant, the plaintiff demised the messuage with the appurtenances to one G. who before any rent due entered into the messuage, and expelled the defendant; a replication denying the expulsion. *Vid.* 153.

In Actions of Debt.

As to part, a payment at the feast; as to the other part that the defendant became bound by a bill obligatory for the payment thereof; as to the residue that one T. having a title before such a feast, entered into the tenements, and expelled the defendant; and with-held the possession till the feast, &c. a replication upon the first and second pleas; and as to the third a replication, by protestation, &c. for plea, that true it is that T. expelled the defendant, but that the defendant re-entered and occupied the tenements the whole term; and a traverse that T. held out the defendant till the said feast; a demurrer to the third replication. Wi. Entr. 176, 177.

That the plaintiff assigned over his interest before any rent due. Lill. Entr. 109.

An entry of the plaintiff into part before any rent due; a replication denying the entry, and an issue thereon. Lill. entr. 106.

*Nil habuit in tenementis pleaded to an action of debt for rent; a replication that the plaintiff is tenant by an elegit; a rejoinder setting forth a tenant by elegit prior to the plaintiff; a surrejoinder that the judgment was by fraud; a rebutter that it was for a just debt; a surrebutter, and an issue. Lill. entr. 168, 169, 170, 171, 172.

By and against Attornies and other Officers.

To an action of debt against a sheriff for monies levied upon a liberate in chancery; a plea as to part of the debt, Nil debet per patriam to the residue; the defendant pleads a special acquittance; a demurrer thereto. Wi. entr. 306. Hob. 206.

Nil debet per patriam to a declaration for an attorney's fees. Bro. Red. 176.

Comperuit ad diem in the King's Bench; Nul tiel record thereto. 3 Brownl. 137.

To an Action for the Arrears of an Annuity.

To an action by an administrator for the arrears of an annuity in the detinet only; a plea quod non detinet. Bro. Red. 170.

The like for counsel to be given; a plea that the plaintiff required the defendant to give him counsel; which he refused; and issue upon the request. Bro. Red. 190. The like plea, and a demurrer thereto. Pl. Gen. 274. [P 420]

To an action of debt for the arrearages of a rent charge against the defendant as Pernor of the profits; a plea by nil debet infra sex annos, but ill upon a demurrer, because he does not conclude to the country.

References to Precedents

Statutes pleaded to Actions of Debt upon Bonds.

To an action of debt upon a bond brought by an executor, the defendant pleads the statute of 5 Ed. 6. for the sale of offices, as a bar, and shews that the testator was the king's escheator for the county of W. and he sold it to the defendant for 200l. to be secured by the above bond, which is void by the statute; a demurrer thereto. Wi. Entr. 180. The like for the office of under-sheriff. Bro. Red. 216.

The statute of non-residence of 13 Eliz. pleaded to a bond. Tho. 217.

The statute of 30 & 31 Car. 2. for relief of poor prisoners. Lev. Entr. 65. The plaintiff demurs; the like. Bro. Met. 206. Clift 156.

The statute of 32 H. 8. of leases made to aliens. 1 Saund. 5.

The statute of labourers in bar of a retainer for a salary. Cl. Aff. 139.

The statute of W. 3. for compounding debts. Clift. 156.

The statute of 16 Car. 2. against gaming. Clift 187.

To an action of debt for an attorney's fees, that neither the testator in his life-time, nor the executor, gave the plaintiff any note or bill of the fees, according to the statute of Jac. 1. Clift 147. The like pleaded to part. Clift 198.

The statute of Hen. 6. that the bond was taken colore officii. Lill. Entr. 126.

The statute of 10 Annæ pleaded in discharge of the defendant's person only being a prisoner; a replication that he was not a true prisoner; and a traverse of his discharge; a rejoinder and issue. Lill. Entr. 108.

To Actions for an Escape.

That the auditors had not committed the prisoner to the defendant's custody of the gaol of C. there to be kept, as the plaintiff declares; and an issue thereon. 1 Brown 150.

That the defendant took the prisoner upon fresh pursuit. Co. 52. 1 Brown 159. Tho. 143, 151. Replication, and Rejoinder. Tho. 437. The like plea, with a replication, by way of protestation, &c. for plea, that the defendant permitted the prisoner to escape voluntarily, and to go at large; and a traverse of the taking upon fresh pursuit; and an issue thereon. Vid. 195, 198. The like plea, with a demurrer thereto. W. Entr. 172.

A plea that the defendant did not permit the prisoner to go at large; and an issue. 1 Brown 175. Pl. Gen. 237. Cl. Aff.

A plea by the marshal of the king's bench, that by a rule of court the habeas corpus was made de habendo corpus com-

In Actions of Debt.

justice' ad diem, &c. a replication maintaining the declaration, and a traverse that the defendant had the body before the justice, &c. an issue upon the traverse. 2 Brown 61. Hern 318.

That the sheriff discharged the prisoner out of his custody, by virtue of a superseas. Tho. 144.

To an action of escape against the marshal; a plea that the prisoner was committed to him in execution, and that he had and now hath him in his custody; and a traverse that he permitted the prisoner to go at large; and an issue thereon. Ro. Entr. 225.

The defendant pleads the statute of limitations to a declaration in an action of debt for an escape; the plaintiff demurs. 1 Saund. 35.

To an action of debt for an escape brought against the upper warden of the fleet; the defendant pleads nil debet, and an issue, with a special verdict; but no judgment. Lev. Entr. 58.

A plea that the prisoner broke out of prison, and was taken again upon fresh pursuit; a replication protesting, &c. that he did not break out of prison; for plea, that the defendant voluntarily permitted him to escape; a rejoinder maintaining the plea, and an issue. Bro. Va. Me. 516.

A plea that the defendant did neither take or arrest the person supposed to have escaped. Bro. Va. Me. 255.

A plea that the prisoner was taken for another cause; and a traverse of the cause set forth in the declaration. Ra. Entr. 172. Vet. Intr. 128.

A plea that the prisoner was permitted to go at large by the former sheriff. Dyer 66. A plea that the defendant did not permit the prisoner to go at large. 5 Co. 89. Bar by nultiel record of the recovery. Ra. Entr. 169.

To an action of debt against the marshal for an escape; a plea that the prisoner made a tortious escape, and that the defendant took him upon fresh pursuit; a replication that the defendant permitted him to escape, with a traverse of the prisoner's breaking the prison. Ra. Entr. 152.

To an Action of Debt upon an Emisset.

Nil debet per patriam. 1 Brown 166.

That the defendant gave a bond for the payment of the money; a replication denying it. Pl. Gen. 277.

To an action of debt against a prior upon an emisset by the predecessor; a plea that the things never came to the use of the prior. Ra. Entr. 252. Vet. Intr. 41.

References to Precedents

Upon a Mutuatus.

Non debet the money borrowed. Pl. Gen. 251. A plea that the plaintiff lent the defendant, to be paid when the plaintiff enfeoffed him of lands, which he had not done; a replication that it was borrowed generally; and a traverse that it was borrowed upon condition. Ra. Entr. 153.

A tender, and the money brought into court. Wilk. 269.

Upon a Computasset.

Plea quod non computavit. Pl. Gen. 250.

Nil debet per legem upon the arrears of an account, where the defendant's attorney is examined according to the statute. Pl. Gen. 257.

Nil debet per patriam. Ra. Entr. 149.

Payment of the arrears. Ra. Entr. 150.

By Foreign Attachment.

A plea of a foreign attachment in the mayor's court of London. Tho. 160. Vid. 168. Bro. Red. 231. Ra. Entr. 157. Vet. Intr. 113.

A replication thereto denying the custom; an issue upon the custom, and a certiorari awarded and certified by the recorder ore tenus; that there is not any such custom, as alledged by the defendant, but the custom thereof was in the schedule to the writ annexed. Tho. 177.

A plea of a foreign attachment in the court of the mayor and bailiffs of the city of Exon, and the custom pleaded. Bro. Red. 237.

To Actions of Debt upon Statutes.

Not guilty. Han. 82. Co. Entr. 160.

Nil debet per patriam. Wi. Entr. 198, 210, 212. Co. Entr. 165. Ash 89.

To a declaration for tithes; a plea that the lands were parcel of the late dissolved priory of M. and that the last prior, and all his predecessors, held the lands exempt from the payment of tithes, till the time of the dissolution; a replication that the tithes were payable within forty years next before the dissolution; and a traverse of the prescription; a rejoinder and issue. Tho. 137.

The like plea as to part, nil debet per patriam; and as to the residue, that the lands were parcel of the late dissolved hospital of St. John of Jerufalem, and that the defendant and his ancestors enjoyed, &c. and that the last prior, and his predecessors, held the lands exempt from the payment of tithes from the time of the dissolution, and from thence by several statutes &c. Wi. Entr. 344, 346.

In Actions of Debt.

To a bond with a condition, &c. a plea that the plaintiff was a bankrupt, and that the defendant paid the money due for rent to the assignees under the commission. Tho. 167.

To an action against a sheriff for a false return of two members of parliament, where one of them was not resident in the county; a plea by a residence at H. in the county of S. and a traverse that he was resident at P. in the county of D. Ro. Entr. 418.

*To an Action for an Amercement.

[*P 421]

To an action by the master, wardens and company of shipwrights, for a fine laid upon the defendant for non-appearance, &c. a plea that the defendant was a freeman of the city of London, of the fraternity of shipwrights, who have a court for the government of their fraternity; and as one of the fraternity he ought to be attendant there, whereby he denies himself to be a member of the plaintiff's company; judgment for the defendant upon demurrer. Ro. Entr. 207.

To an action brought by the master and wardens of the merchant taylors, for a fine laid upon the defendant for refusing to be of the livery; a plea that he was admitted free of the company; but by the constitution thereof no freeman is bound to observe the law, or to pay the penalties assessed upon him, unless he had been sworn for that purpose. Wi. Entr. 253.

By the mayor and goodmen, &c. for a penalty for the breach of a by-law, a plea, of the act 13 Car. 2. that no person should be chosen into any office, who within a year next before such election, had not received the sacrament of the lord's supper according to the rites of the church; and that the defendant had not received it, whereby he became incapable, and that the election was void; a demurrer thereto. 2 Ven. 244.

By Wager of Law, or Nil debet per legem.

Nil debet per legem instanter to part, to the residue, always and yet ready to pay; and an issue thereupon as to the residue. Pl. Gen. 363.

Per legem instanter which the defendant doth perfect. Han. 118, 119. 1 Instr. Cl. 343.

Nil debet per legem which the defendant does perfect at the day. Day. Han. 118, 120.

The like in proper person. Han. 109. Mo. Intr. 211.

Nil

References to Precedents

Nil debet per legem, and at the day the defendant is defective in making his law. Han. 109. Mo. Intr. 180. 1 Instr. Cl. 344. Tho. 427.

Nil debet per legem at the day. Mo. Intr. 179. The like as to part, and an issue as to the residue. Pl. Gen. 365.

Several Pleas.

To the bond non est factum, to the money lent, nil debet per patriam. 1 Brown 166. Pl. Gen. 357. Cl. Aff. 118, 125. Han. 109.

Non detinuit as to part, and nil debet per patriam as to the residue. Tho. 181.

As to part, that the several retainers were not made according to the form of the statute of labourers, 5 Eliz. whereby they were void; and as to the residue nil debet per legem, which the defendant compleateth; a demurrer to the other plea. Tho. 198.

As to the money borrowed Nil debet per patriam, and as to the retainer, and the goods bought, that the defendant delivered to the plaintiff two bonds, wherein one L. was bound with the defendant for the payment of 80s. in full satisfaction of the debt, which the plaintiff accepted; a replication protesting, &c. for plea, that the defendant did not accept it in satisfaction. Ro. Entr. 192.

To a bill penal solvit ad diem; to the nar' upon an emisset, Nil debet per legem at the day. Han. 74.

To three bonds, the defendant pleads an indenture and all covenants performed generally to one of the bonds, to the second and third conditions performed; a replication and a breach assigned in nonpayment of the money at the day in the indenture as to the first; and a demurrer thereto. Wi. Entr. 281.

That he was always ready pleaded to part, a plea in abatement to the other bond; the general issue as to the mutuatus. Pl. Gen. 256. A replication that he did not tender the money at the day, and an issue.

Non est factum as to the bond, and a wager of law as to the mutuatus. Pl. Gen. 355. Cl. Aff. 81. Ath. 191.

That he was always ready as to part, and nil debet per patriam as to the residue. Pl. Gen. 356. Cl. Cl. Aff. 119. Ro. Entr. 159. The like as to part, and nil debet per legem as to the residue. Ra. Entr. 159.

Nil debet as to the monies, and non detinet as to the chattel. Pl. Gen. 251. 1 Instr. Cl. 340.

Nil debet as to part, and as to the residue a surrender of the term before any rent in arrear. Pl. Gen. 253.

Nil debet as to part, and per minas as to the residue. Cl. Aff. 127. The like for an executor against an executor. Ibid. 127.

In Actions of Debt.

As to part an acquittance, and as to the rest plene administravit. Bro. Red. 173.

That one of the defendants died after the last continuance, and the other pleads plene administravit. Bro. Red. 175.

Nil debet per patriam as to part, and as to the residue nil debet per legem. Cl. Aff. 125. The like, and non demisit. Ra. Entr. 152. Vet. Intr. 42.

As to part nil debet, as to the residue an assignment and acceptance of rent from the assignee. Bro. Red. 226.

To a computasset, Mutuatus, and a nar' in the detinet, a bar by non debet nec detinet. Bro. Red. 259.

One executor pleads plene administravit, and the other a renunciation of the will, &c. Cl. Aff. 133.

As to part for a salary the defendant pleads the statute of labourers; as to the mutuatus nil debet. Cl. Aff. 139.

As to part the defendant demurs; as to the residue pleads nil debet. Cl. Aff. 152.

As to part conditions performed in the indenture; as to the residue that he was always ready to pay; a replication and issue. Cl. Aff. 325.

A tender as to part, and nil debet as to the residue. Han. 110, 111.

Conditions performed as to the bond, with a condition for payment of money at several days; non est factum as to the bill penal, and nil debet per patriam as to the emisset and mutuatus. Vet. Intr. 233.

Conditions performed as to the bond, non est factum as to the bill penal, and a wager of law as to the computasset. Ra. Entr. 170.

General Issues in Debt.

Nil debet per patriam. Bro. Va. Me. 168. Mo. Intr. 179. Cl. Aff. 72. Tho. 46.

Non detinet per patriam. 1 Instr. Cl. 340. Han. 108. Tho. 426.

Nil debet per legem. Mo. Intr. 179. Bro. Va. Me. 218, 220. 1 Instr. Cl. 211, 342. Clift 149.

Non detinet per legem. Bro. Va. Me. 218, 220. Bro. Red. 181.

Solvit ad diem. Bro. Va. Me. 220. 1 Instr. Cl. 341. Tho. 33.

Non dimisit. Cl. Aff. 78. 1 Instr. 210, 340.

Non est factum. Mo. Intr. 157. Pl. Gen. 333. Bro. Va. Me. 214.

Non est factum testatoris. Ibid. Cl. Aff. 71, 78.

DETINUE!

*Detinue.

A Declaration in Detinue for Chattels.

Lincolnshire, ff. **J.** S. late of (such a place) in the said county, grocer, was summoned to answer to **E. H.** of a plea that he render to him chattels to the value of ten pounds, which he unjustly detains to himself; and whereupon the said **E.** by **C. W.** his attorney, declares, that whereas he on the first day of August, in the year of our lord one thousand seven hundred thirty-four, at **E.** delivered to the said **J.** the chattels of the said **E.** following, (that is to say) two quarters of hempseed to the value of one hundred shillings, and two dozens of hemp to the value of one hundred shillings, to be re-delivered to the said **E.** when ever the same should be required: Nevertheless the said **J.** though often requested, hath not yet delivered the said chattels to the said **E.** but hitherto hath and still doth refuse to deliver the same; whereupon the said **E.** declares that he is injured and endamaged to the value of ten pounds; and thereof he brings proof, &c.

A Declaration in Detinue for a Bond.

Derbyshire, ff. **A. M.** late of (such a place) in the said county, gent. was summoned to answer to **J. C.** of a plea that he render to him a certain writing obligatory, which he unjustly detains to himself, &c. and whereupon the said **B. A.** by **E. B.** his attorney, declares, that whereas he (on such a day and year) at **S.** in the said county, delivered to the said **A.** the said writing, wherein it is expressed that one **J. S.** of **D.** in the said county, hofier, is held and bound to the said **A.** in twenty pounds, to be paid at a certain time contained in the same writing, safely to be kept and delivered to the said **A.** when thereto required: Nevertheless the said **J.** though often required hath not yet delivered to the said **A.** the said writing obligatory, but hitherto hath and now doth refuse to deliver the same; whereupon, &c. (as in the former).

A Declaration in Detinue for a Box with Charters, which came to the Defendant's hands by finding.

J. B. late of **D.** &c. was summoned to answer **J. P.** gent. of a plea that he render to him a certain box with charters, writings, and other muniments therein contained, which he unjustly detains to himself; and whereupon the said **J. P.** by **R. B.** his attorney, declares, that whereas he on (such a day and year) at **S.** was possessed of the said box, with charters, writings, and other muniments contained in the same box, (that is to say) one charter bearing date on the tenth day of *June*, in the year of

Detinue.

of our Lord one thousand seven hundred thirty-two, whereby one *W. P.* demised, enfeoffed, and by the same charter confirmed to one *J. A.* and *C. B.* all those lands and tenements, rents and services, with their appurtenances, called *N.* in the parish of *S.* in the said county. which the said *W. P.* together with *W. S.* deceased, lately had to them and their heirs, from the delivery and confirmation of one *P. E.* and *R. W.* to have and to hold all the said lands, rents and services, with their appurtenances, to the said *J. A.* and *G. B.* their heirs and assigns for ever, as in the said charter is more fully expressed; and also other charters, writings and muniments, (*to wit.*) rentals and court-rolls concerning the said lands and tenements called *N.* contained in the same box, as of the proper box, charters, writings, and other muniments of him the said *J. P.* and being so possessed thereof, he the said *J.* on the same tenth day of *June*, in the year and at the place aforesaid, casually lost the said box, with the charters, writings, and other muniments therein contained, and the same box, with the charters, writings, and other muniments therein contained, afterwards (that is to say) on the same tenth day of *June*, in the year and at the place aforesaid, came to the hands and possession of the said *J. B.* by his finding the same; whereby the said *J. B.* then was and now is possessed thereof: Nevertheless he the said *J. B.* (though often required) hath not yet delivered the said box with the said charters, writings, and other muniments therein contained to the said *J. P.* but hitherto hath, and still doth refuse to deliver, and now unjustly detains the same; whereupon, *Ec.* (*as in the former*).

And the said *J. B.* by *R. B.* his attorney, comes and defends the force and injury when, *Ec.* and he bringing here into the court the said box with the charters, writings and muniments therein contained, ready to be delivered to what person or persons this court shall here consider and adjudge, pleads that the same box with the charters, writings and muniments therein contained, long before the finding thereof as aforesaid, that is to say (*on such a day, year and place*) was delivered to him by *H. B.* and *T. B.* with their assent and consent, under certain conditions between them the said *H.* and *T.* to be fulfilled, to be safely and justly kept and delivered to them the said *H.* and *T.* or one of them, under those conditions; but whether those conditions, on the part of the said *H.* or on the part of the said *T.* are fulfilled or not, he saith that he is altogether ignorant, and prays that they the said *A.* and *T.* may be summoned, *Ec.* Therefore the Sheriff is commanded, that by honest, *Ec.* he cause it to be known to the said *H.* and *T.* that they must be here on the morrow of all-souls, to shew if they have or know, why the said box with the charters, writings and muniments therein

The Defendant brings the Box into Court, and pays Garnishment.

That the Box was delivered on Condition.

Prays they may be summoned to shew Cause.

Detinue.

**A Sci. fa.
awarded.**

**Idem Dies
dat.**

**Return of
the Sci. fa.**

**Testatum
awarded.**

[P* 423]

The return

**An Impar-
lance.**

**A plea in
Detinue of
a horse that
the Plain-
tiff deliver-
ed the same
to the De-
fendant to
depasture
at his own
peril; and
traverse
that he de-
livered to
be safely
kept, &c.**

**A plea as
to the De-
tinue of
chattels
upon an
Emisset,**

therein contained, may not be delivered to the said *J. B. &c.* The same day is given to the parties to be here, *&c.* at which day came here, as well the said *J. B.* in his own person, and the said *H. B.* and the said *T. B.* though solemnly summoned, came not; and the Sheriff hath returned, that he caused it to be known to the said *T. B.* by *A. B. C. D. R. T.* and *H. S.* honest, *&c.* to shew in the manner aforesaid, if, *&c.* and that the said *T. B.* hath nothing, *&c.* nor is it to be found, *&c.* whereas it is testified here in his majesty's court, that the said *J.* hath enough in the county of *B.* whereby it may be made known to him; and also that he lurks, wanders, and runs up and down in the said county of *B.* Therefore the said Sheriff of *B.* is commanded, that by honest, *&c.* he cause it to be made known to the said *H. B.* that he be here (on the day of another return) to shew if he knows, *&c.* why the said box with the charters, muniments, and writings therein contained, may not be delivered to the said *J.* in the manner aforesaid, if, *&c.* at which day came here, as well the said *J. B.* in his own person, as the said *J. C.* by his said attorney, and the said *H.* by *R. B.* his attorney, likewise came; and the said Sheriff of *B.* returned, that he hath caused it to be made known to the said *H.* to be here at this day, by *A. B. C. D. &c.* honest, *&c.* to shew in the manner aforesaid, if, *&c.* And thereupon the said *H.* prays leave to imparl thereto, (in eight days of *St. Martin*) and he hath it, *&c.* The same day is given as well to the said *J. C.* as to the said *J. B. &c.*

And the said *C.* by *Basil Herne* his attorney, comes and defends the force and injury, when, *&c.* and pleads that the said *A.* ought not to have or maintain his said action against him, because he saith (*on such a day and year*) at *M.* aforesaid, the said *A.* delivered the said horse to the said *C.* to be put into the pasture of the said *C.* in *M.* aforesaid, at the peril of the said *A.* to feed on the grass there growing; whereupon he the said *C.* did put the said horse into the said pasture as aforesaid. *Without that,* That the said *A.* delivered the aforesaid horse to him the said *C.* to be safely kept and delivered to the said *A.* when demanded in such manner and form as the said *A.* complains against him; and this he is ready to verify; whereupon he prays judgment whether the said *C.* ought to have or maintain his said action against him, *&c.*

And the said *C.* by *B. T.* his attorney, comes and defends the force and injury, when, *&c.* and pleads that the said *A.* ought not to have or maintain his said action against him, because he saith that after the bargain and sale aforesaid, of the said hundred quarters of oats, supposed to have been made in the manner aforesaid, and before the said day of delivery there

Detinue.

thereof, (that is to say) on such a day and year) at *H.* aforesaid) where the
 he the said *A.* commanded and required the said *C.* forthwith to defendant
 sell the said hundred quarters of oats, to whatever person or says that
 persons soever willing to buy the same, for the best price he the plaintiff
 could get, for the best profit and advantage of the said *A.* and after the
 to pay the money arising therefrom to the said *A.* By virtue of burgin
 which command and request, he the said *C.* afterwards, that is command-
 to say (such a day and year) at *H.* aforesaid, sold the same hun- ed him to
 dred quarters of oats to one *J. W.* for six shillings for each sell them.
 quarter; which said monies arising therefrom, he the said *C.*
 afterwards that is to say (such a day and year) at *H.* aforesaid,
 was ready to pay, and tendered to the said *A.* but the said *A.*
 then and there altogether refused to accept the said monies of
 the said *C.* and this he is ready to verify; whereupon he prays
 judgment whether the said *A.* ought to have or maintain his
 said action against him, &c.

And the said *A.* replies, that he, notwithstanding any thing Replicati-
 above alledged in the plea of the said *C.* ought not to be pre- on denying
 cluded from having and maintaining his said action against the the com-
 said *C.* because he the said *A.* saith, that he did not command mand and
 or require the said *C.* forthwith to sell the said hundred quar- request.
 ters of oats, as the said *C.* hath above alledged; and this he
 prays may be inquired of by the country, &c.

And the said *J.* by *T. F.* his attorney, comes and defends Judgment
 the force and injury, when, &c. and the said attorney says, that by non sum
 he is not instructed by the said *J.* his client, to give any answer informatus
 for the said *J.* to the complaint of the said *E.* and says nothing in detinue.
 further thereupon: whereby the said *E.* remains therein unde-
 tended by the said *E.* therefore it is adjudged that the said *E.*
 do recover against the said *J.* his chattels aforesaid, or the va-
 lue thereof; and the said *J.* at the mercy, &c. and the sheriff is
 commanded that he distrain the said *J.* by all his lands, &c. and
 of the issues, &c. so that he render to the said *E.* the chattels
 aforesaid, or the value thereof; and that by the oath of honest
 and lawful men of the said county, he diligently inquire what
 damages the said *E.* hath sustained, as well by reason of detain-
 ing the said chattels, as for his expences and costs by him laid
 out in his suit in this cause; and if the said *J.* should not render
 to the said *E.* the chattels aforesaid, then how much those chat-
 tels are worth, according to the true value thereof, and in what
 manner, &c. Let the sheriff make appear to our justices here,
 within three weeks from the day of St. Michael, under the seal, &c.
 and the seals, &c. The same day is given to the said *E.* to be
 &c. &c.

5 Mod. 193

An action of Detinue is a remedy to recover goods, chattels, charters, or writings, &c. the actual property of one person that are in the possession of another, whether by finding, delivery or bailment; and in this action, the things themselves are to be recovered, if they can be had; and if not, then the value or price thereof, as may be observed in *Bracton*, lib. 3. fol. 102. B. *If any one (says he) will claim any moveable thing, whether lent, pledged, or from whatsoever cause, he ought in this action to shew the price of it, and so declare in his action; because he of whom the thing is demanded, is not bound precisely to restore the thing itself, but disjunctively, either the thing itself, or the price of it.*

As Rolls and Mr. Danvers have in their Abridgments of this action treated of what things it lies, by and against whom to be brought we shall here only consider,

First, Of the Writ and Process.

Secondly, Of the Declaration.

Thirdly, Of the Pleadings.

Fourthly, Of the Trial, Verdict, Damages and Judgment.

Fifthly, Of the Execution.

First, Of the Writ and Process.

1. **T**HE writ may be *Vicountiel*, and sued before the Sheriff in the county, if the plaintiff please, or he may sue in the superior courts; for which see the forms in *Nat. Brew.* 13 and *New Nat. Brew.* 323.

2. In the Common Pleas it is *George the Second, &c. commands T. that he render to W. a certain charter, &c. which he unjustly detains to himself, as it is said; and unless he shall do, &c.* *Reg. Orig. Br.* 159.

3. The writ for deeds in a box, bag or chest, see *Reg. Orig. Br.* 159. *Vide Lib. Intr.* 209.

4. Where a man demands writings in a bag or chest, he must not make mention what they are. *Reg. Orig.* 160. A. because they were together, and entire; but if loose, 'tis otherwise.

5. *Ag.*

On Actions of Debt.

5. Agreed in 29 Ed. 3. 20. that *Detinue* lies for a bag, and
1001. in *eadem Bagga*, without saying it was sealed: Adjudged
18 Hen. 6. 20.

6. The writ may be *Bona & Catalla*, and he may count of
three tallies; but if he counts of a bond, the writ ought to be
special. 21 Hen. 6. 29.

7. If one sue for deeds in an inferior court without a writ, a
prohibition lies; for men must proceed as the law directs, and
they are compellable so to do. *Reg. Orig.* 159. *Nat. Brev.* 159.
C. New Nat. Brev. 323. C.

8. A. bails deeds, to rebail to him and his heirs; there the
heir need not mention that he is heir in the writ. 5 Ed. 3. 159.
pl. 24. for the action is grounded upon the bailment. 5 Ed. 3.
159. pl. 4.

9. By the common law the process was a distress infinite, *i. e.*
to distrain him by his goods and chattels until he appear. *Nat.*
Brev. 139. A. 14. *Han.* 6. 1. but by the 25 Ed. 3. cap. 17. a
Capias was given to arrest the body of the party to bring him
into court.

10. Whether process of outlawry lies in *Detinue* of *Charters*.
Dy. 223.

11. If *Detinue* be brought of a chest sealed with charters
therein, there, for that the court cannot be apprised by the writ,
whether they concern the realty or not, process shall be made
by *Capias*; but when the party appears, and counts, whereby
it appears to the court that the charters do concern the realty,
then he shall be permitted to appear by attorney. 29 Ed. 3. 19.
7 Hen. 4. 2. 21 Hen. 6. 42. 20 Ed. 4. 3. 2. pl. 12. 14 Hen.
6. pl. 1. 40 Ed. 25. pl. 28.

Secondly, Of the Declaration.

1. The count ought to name all things certain, as to the time
and place, and the value. 1 *Rich.* 3. 20. a. 3 *H.* 6.

2. If the count be of the bailment of spoons, you ought to
name the number. *Lib. Intr.* 211. *D. Sect.* 2.

3. If the count be upon a finding, then you say that such a
day and year the plaintiff was possessed of such goods, and lost
them, and that such a day and year they came to the hands of
the defendant by finding. *Lib. Intr.* 209. B.

4. The heir in a *Detinue* ought to count that the box was
locked or sealed, for otherwise it belongs to the executors. 36
Ed. 3. 27. pl. 36. 39 Ed. 3. 7. 8. 41 Ed. 3. 2. 11 *H.* 4. 9.

5. If one brings *Detinue* of a chest with charters, he ought to
count that the chest was locked; for otherwise he shall have a
general

Readings and Observations

general writ of charters. 39 *Ed.* 3. 7. *contra* 14 *H.* 4. 30. and if it be not locked, he ought to shew what the charters are specially. 11 *H.* 6. 9. 47. 14 *H.* 6. 4. see 14 *H.* 6. 1. the defendant came in upon the exigent, and the plaintiff counted of a chest, with charters, and of one charter in special; the defendant pleads to the charter *Non Detinet*, and to the residue wages his law instantly, and then was permitted to make an attorney.

6. The heir ought to count of the certainty of the lands, and also how it was conveyed to him, or else it cannot appear that the deeds belong to him. 3 *H.* 6. 19. *pl.* 31. he ought to count as heir, if he claim as heir. 7 *H.* 6. 31. *pl.* 25. But if he counts upon a bailment, to rebail to the ancestor and his heirs, he need not set forth a title to the land. 19 *Hen.* 6. 41. *pl.* 84. for there the action is merely founded upon the bailment and detainer.

7. If a feoffee with warranty makes a feoffment with warranty, his heir shall have *Detinue*, and count specially. 1 *Co.* 2. a. *Buckhurst's* case.

8. The heir counts that his father was seised in fee, and demands the deed of the estate in fee; and held good; for his father may discontinue, and take it again in fee, and therefore his count shall be presumed good. 38 *H.* 6. 24. *pl.* 11.

9. The plaintiff must take care in his count to lay damages enough for the thing detained, for he can recover no more than he declares for. *Jenk. Cent. Cases* 159, 288. *Case* 22.

10. An administrator may count of his own possession, though he was never possessed; for if the intestate at the time of his death was possessed, the law in that case casts a sufficient possession to maintain an action possessory. *Godb.* 34.

[P* 425] 11. If the writ be of *Bona & Catalla*, the count cannot be of charters, for *Bona & Catalla* are not proper words generally to express charters by, because they belong to the real, and not to the personal * estate; and goods and chattels are intended only personal things. 22 *Ed.* 4. *pl.* 32.

Thirdly, of the Pleadings.

1. *Non Detinet* is the general issue in this action, and a good bar, because it is directly contrary to the supposal of the writ, and a good issue tendered *Liber Intr.* 211. *D. Sect.* 1 & 3. *fol.* 112. *C. Sect.* 4. & 5. and this may be *per patriam* or *per legem*. *Liber Intr.* 211. *D. Sect.* 1. 112. *Sect.* 4. *cap.* 5. 22 *Ed.* 4. 29. *pl.* 10. 5 *Ed.* 3. 145. *pl.* 4. 27 *Ed.* 3. 83. *pl.* 6. 4 *Ed.* 3. 41.

2. And

On Actions of Debt.

2. And though the bailment be by deed, for the *Detinet* is the substance of the action, and not the bailment. 27 H. 8. pl. 14.

3. An accord is a good plea in *Detinue* of personal chattels, but not of real. 9 Co. 78. b. *Petoe's case*.

4. A plea that the goods were delivered to him, and attached, is a good plea by the custom of the city of London, *Lib. Intr.*

112. C Sect. 5. An attachment pending the writ, was held ill. Noy 52. See the manner of pleading an attachment in the City of London. *Godb.* 400, 401. *Latch.* 208.

5. It is a good plea to say that the goods were lent to deliver over, of which he had a deed. *Nat Brev.* 138.

6. It is a good plea for an executor to say that he had delivered the goods to him that had the right. 9 H. 6. 58. a.

7. It is no plea to say that the plaintiff gave him the goods, because he may wage his law, that the goods were not delivered to him to be redelivered. 22 Ed. 4. 29. pl. 10.

8. In *Detinue* for a horse it is a good plea that he strayed into his ground, and that he proclaimed him, and offered the horse to the owner, if he would pay for his meat; which he refused to do. *Lib. Intr.* 169. D. Sect. 2. for such a detainer is lawful.

9. It is a good plea to say that the horse was sick at the time of the demand, and could not be delivered without endangering his life. 21 Ed. 4. *Bro Detinue* 42.

10. If goods are delivered to keep, it is no plea to say they were taken away by thieves, for such an acceptance implies a warrant to keep them safe; otherwise where a man accepts goods to keep as his own, for there is no such warranty implied. 4 Co. 83. *Cro. Eliz.* 815.

11. A recovery in trespass is a good bar to an action of *Detinue*. 20 H. 7. 58. b.

12. It is no bar to say that the horse was sold in a market-over, unless you go further, and say it was tolled according to the statute.

13. The bailment is not traversable where the defendant may wage his law, for there his oath that he detains not, is sufficient; for if he detains not, there could be no bailment. 8 E. 4. 3. pl. 7.

14. In *Detinue* for deeds as heir, bastardy is a good plea; for if a bastard, he is no heir. 35 H. 6. 9. pl. 12.

15. A. bailed to B. to rebail, and dies, having two sons who make partition, he who had the land comprehended in the deed delivered, enfeoffs B. this is a good bar, for by the purchase the deed belongs to B. 17 E. 1. 3. pl. 45.

16. Warranty and assents is no bar against the issue in tail, in *Detinue*, for he comes in by the dower. 9 H. 6. 15. pl. 5. 4 H. 7. 10. pl. 4.

17. Rebailment in another county is a good bar, because he cannot wage his law. 22 H. 6. 15. pl. 27.

18. If

Readings and Observations

18. If corn be lent, it is no plea to say that it perished, for the borrower ought to make it good at his own peril. *Doct. & Stud.* 129. a.

19. If a horse be lent to a man, and it perishes, if he uses it not in any other manner than it was lent for, it is a good bar; otherwise if used contrary to the lending. *Doct. & Stud.* 129. a.

20. It is no plea for a carrier or bargeman to say he was robbed. 4 *Co.* 84. 2 *Hen.* 7. 11.

21. If an executor pays a debt of the bailor's, to the value of his goods, and dies; this is a good bar in *Detinue* brought against the surviving executor. 3 *Eliz.* *Dyer* 187. pl. 6.

22. It is a good plea for the defendant to say that the plaintiff pledged them for money, which is not paid; for then it could not be merely a bailment to redeliver. 34 *H.* 6. 42. pl. 13.

23. The defendant pleaded that after the bailment made to him by the plaintiff, she married the lord *Audley*, and he released all actions, &c. this plea was held not double, because he could not plead the release without the marriage. *Mod.* 25. *Dame Audley's case.*

24. The defendant pleads upon the *distringas* after judgment, that he after the judgment had delivered the goods to the plaintiff; and it seemed it was no plea without its being returned by the Sheriff, or without a deed shewing it. *Moor* 402. *Atkinson's case.* *Cro. Eliz.* 390. the same case.

25. A plea of a seizure and delivery, by a commission under the Privy Seal, held no bar. *Cro. Eliz.* 651. *Bregrave v. Watts.*

26. It is a good plea that a former action was brought for the same writings, by the name of so many bundles, &c. *Mod.* 87.

27. If *A.* bail the goods of *C.* to *B.* and *C.* bring *Detinue* against *B.* for them, *B.* may plead the bailment to him by *A.* to be delivered to *A.* and so bring in *A.* as garnishee, to interplead with *C.* and if *A.* bail goods to *C.* and after gives him the whole right to them to *B.* *B.* cannot maintain *Detinue* for them against *C.* because the special property that *C.* acquires by the bailment, is not thereby transferred to *B.* 6 *Mod.* 216. *R. v. Aldred.*

28. What held no plea in an action of *Detinue* against a Sheriff who pleads a levying the goods by a *fieri facias.* *Noy* 10. *Waller v. Weedale.*

29. Upon a demurrer to a plea, and a prayer of garnishment an objection was taken that it was after an imparlance, yet he good, and process awarded to the garnishee. 3 *Keb.* 738.

On Actions of Detinue.

30. A plea of justification for detaining goods as *Paraphernalia*, held good to an action brought by executors. 2 Leon. 166. *Case 201.*

31. In this action there is a term call'd *Garnishment*, which Of garnish-
 is, when the defendant in *Detinue* shews to the court by his ment.
 plea, that the charters, chattels, &c. were deliver'd to him
 by the plaintiff, and another to keep upon conditions; so
 that the *Garnisher*, to save himself from any other action,
 may pray *Garnishment*, which is a *Scire facias* against that
 other person, which is termed the *Garnishee*, for him to
 come into court, that the court may have the whole merits
 of the case before them; and then the court are to judge
 whether the conditions are performed or not; and if the per-
 son summoned, which is the *Garnishee*, does not appear
 upon the *Scire facias*, but makes default, a judgment will be
 had against him by *Nil dicit*, and the plaintiff will have
 judgment to recover the writings. *Rast.* 213. 1 *Brown* 147.
Lib. Intr. 217. *Señ.* 3. 40 *Ed.* 3. 11. *pl.* 24.

32. When the *Garnishee* appears to the *Scire facias*, and Of inter-
 pleads with the plaintiff, it is called an *Interpleader*; and these pleader.
 conditions need not be set forth in the plea. 3 *Hen.* 4. 18. for
 that it will appear upon the *Interpleader* of the parties. 3 *H.*
 18. and there shall be no *Interpleader* unless the defendant
 prays it. 18 *E.* 3. 22. *pl.* 3. for the *Interpleader* is to secure
 him against both parties; and if he does not desire such re-
 lief, the court will not put it upon him.

33. Where the *Scire facias* goes against the *Garnishee*, tho'
 no *Nilite* be returned against *A.* the plaintiff shall not have
 the writing deliver'd to him, for the defendant is not in
 fault; if the *Garnishee* appears, he cannot vary from the
 condition alledged by the defendant; for if he *varies, the [*P426]
 plaintiff shall have the deed by judgment against the defen-
 dant, and the *Garnishee* shall also have *Detinue* against the de-
 fendant if his allegation of the condition be false. *Jenk. Cent.*
pages 101. 12 *H.* 4. 15. 3 *H.* 6. 50. 21 *H.* 6. 85.

34. If the parties appear by attornies, an *Idem Dies dat.*
 shall be given over, because they cannot *interplead* but in
 person. 9 *Ed.* 3. 334. *pl.* 2. 24 *Ed.* 3. 24. *pl.* 3.

35. Upon several bailments there can be no *Interpleader*, for
 there is no privity between the parties. 19 *H.* 6. 2. *pl.* 6.

36. But if the defendant said that he was joint-tenant, and
 averred that the bailments were several, then it seems there
 shall be an *Interpleader*. 19 *H.* 6. 3. *pl.* 6.

37. In *Detinue* the defendant pleads another writ, pending
 against another person; and it was granted for the mischief that
 would ensue, that otherwise both might recover the deeds,
Vol. II.

Readings and Observations

and so the defendant be twice charg'd. 3 H. 6. 43. pl. 2. which is unreasonable; for *Nemo bis puniri debet pro uno delictummodo Delicto.*

38. If the defendant and the Garnishee do not agree in their plea, there can be no interpleader; for then the garnishment will be to no purpose to determine the question. 14 H. 6. 11.

As this proceeding is tedious, therefore people choose actions of trover; and therefore we shall not here treat further on this particular.

Fourthly, Of the Trial, Verdict, Judgment and Damages.

1. The judgment is, that the said *W.* do recover against the said *J.* the said eight quarters of wheat, or the value thereof, & *dampna sua.* Nov. Lib. Intr. 169. C. Sect. 1. Lib. Intr. 218. B. Sect. 4. and upon the return of the writ, if it appears that *J.* did not deliver the corn, then the judgment is for the value, with damages and costs. 17 Ed. 3. 45: 1 Rich. 3. 166. 2. 21 H. 6. 36. a.

2. In 7 H. 6. 31. pl. 25. 22 H. 6. 41. pl. 17. the judgment was that the plaintiff recover the deeds if they are found, and also damages for the detainer; and if not found, then all damages. 7 H. 6. 31. pl. 25. 22 H. 6. 41. pl. 17.—And tho' it is proved the defendant burnt the deed. 17 E. 3. 4. pl. 1.

3. 5 Ed. 3. 159. b. the heir in *Detinue* had judgment to recover one box, with as many of the writings contained therein, as belonged to him.

4. 21 H. 6. 36. a. Lib. Intr. 219. D. Sect. 17. 9 H. 6. 38. 13. 7 H. 6. 45. pl. 27. the judgment was, that the plaintiff recover the deeds against the defendant, & *haberet liberationem* against the Garnishee: This is a double judgment, viz. the right and possession.

5. But if judgment be given upon default of the Garnishee before appearance, no damages shall be given, because it is not the defendant's default. 20 H. 6. 4. pl. 27.

6. If the plaintiff and defendant make default, the Garnishee shall have judgment, and the plaintiff and defendant in *Miser cordia.* 40 Ed. 3. 39. pl. 15.

7. In an action of *Detinue* for a bond of 20l. where a verdict is found for the plaintiff, the judgment ought to be to recover the bond; or if the bond cannot be had for 20l. damages and costs; and not the bond, or the value of the bond, for that leaves it to the election of the sheriff. Cent. Cases 320. Case 24. Cro. Jac. 781. 2 Rol. 101. Cro. 219. Telv. 71. Cro. Eliz. 116.

On Actions of Detinue.

8. A judgment reversed, which appear'd to be for four pounds of money. *Moor* 394. *Banks v. Whetstone*.

9. A judgment reversed in *Detinue*, because the writ was *ad valentiam* 20*l.* and the declaration *ad valentiam* 40*l.* *Cro. Eliz.* 308. *Young v. Waisson*.

10. In *Detinue* for a bond of 200*l.* the defendant pleads that the obligor and obligee deliver'd the bond to him *sub certis conditionibus*, and prays garnishment; the plaintiff traverses that it was deliver'd *sub certis Conditionibus*; and this issue being found for the plaintiff, the issue was adjudged to be help'd by the statute of Jeofails. *Cro. Eliz.* 857. *Pursland v. Whytwin*.

11. Several objections to a judgment upon a special verdict in *Detinue*. 1. That the writ was *de placito Debiti*. 2. That the delivery appear'd not to be upon a bailment, but by bargain and sale. 3. That the jury did not find the parcels in the declaration to be the same as in the indenture; and for the last reason the judgment was reversed. *Cro. Eliz.* 366. *Bateman v. Elman*.

12. Judgment reversed in an action of *Detinue* of a box of charters, where the jury find 40*s.* if the deed may be deliver'd, and 7*l.* if not; and the *Ideo Consideratum* was, that the plaintiff recuperet 40*s.* or 7*l.* but doth not say *Si factum*, &c. *Palmer* 319. *Hayward v. Betters*. 2 *Cro.* 682.

13. If the jury omit finding the value of the deed, yet it may be supplied by a writ of enquiry. 1 *Keb.* 882.

Fifthly, Of the Execution.

1. Execution against the defendant was by distress, for the thing detain'd and recover'd. *Lib. Intr.* 169. *C. Sec.* 1. 20. 4. 3. pl. 13. *Nov. Lib. Intr.* 170. *D.* 17. a. 6 *Rich.* 2. execution.

2. But if the thing be not deliver'd to the plaintiff; then shall have execution for the damages, by *Capias*. *Lib. Intr.* 6. *B. Sec.* 6. 20 *Ed.* 4. 3. pl. 12.

3. For a *Capias* was given in the mesne process by 25 *Ed.* c. 17. and by the equity of the statute, a *Capias ad satisfaciendum* for the execution.

4. At common law the execution, as well for the chattels as for the damages, was by *Fieri facias*. *Lib. Intr.* 216. b. 8.

5. Where the plaintiff and defendant made default, the sheriff had judgment, and a *Distress* against the defendant. *Ed.* 3. 39. pl. 15.

6. A *Distress* issued forth in Execution. *Lib. Intr.* 215. *C.* 1. 20 *Ed.* 4. 3. pl. 12. 22 *H.* 6. 41. pl. 17. 7. But

Readings and Observations, &c.

7. But a *Capias* lies not. 5 *Eliz. Dyer* 223. *pl.* 24. 21 *H.* 6. 42.
8. If the deed concern lands. 8 *H.* 6. 29. *pl.* 24. 14 *H.* 6. 1. *pl.* 1.
9. But for the damages, if they will not deliver them, a *Capias* lies. 22 *H.* 6. 41. *pl.* 17. 20 *Ed.* 4. 3. *pl.* 12.
10. If deeds are in a box, then a *Capias ad satisfaciendum* lies in execution against the person. 7 *H.* 4. 2. *pl.* 8. 19 *H.* 6. 1. *pl.* 1. 40 *Ed.* 3. 25. *pl.* 28.
11. The party may have a *Levari facias*. 3 *Co.* 12. a. but that only within the year; for after the party was put to his action of debt, unless the suit had been continued, before the statute of *Westm.* 2. for by that statute, a *Sci. fac.* was given after the year to revive the judgment; and by *Westm.* 2. c. 28. an *Elegit* upon the lands; of which see hereafter *Tit. Execution in Debt*.
12. If damages be recover'd against the Garnishee, the execution shall be of the goods, and lands of the Garnishee. 7 *H.* 6. 45. *pl.* 27. 9 *H.* 6. 38. *pl.* 13. 19 *H.* 6. *pl.* 4. But not of his body, because he was not party to the writ upon which the action was brought, but comes in by garnishment. 7 *H.* 6. 45. *pl.* 27. 9 *H.* 6. 38. *pl.* 13.
13. But see *Lib. Intr.* 216. *B. Sect.* 6. a *Capias ad satisfaciendum* was awarded against the Garnishee.

REFERENCE

*REFERENCES [*P427]

T O

Precedents in Detinue.

OF chattels. Pl. Gen. 370, 371 Ro. Entr. 225. 1 Brown 355. Bro. Red. 259. 2 Instr. Cl. 380. Ra. Entr. 211. 21 Hen. 6. 30. Plow. 275. 1 Brownl. 119. Reg. 139. Co. Entr. 169. Vet. Intr. 177. Dig. 203.

The like where chattels casually came to the defendant's hands after the death of R. S. to whom the plaintiff delivered them to be safely kept. 1 Brown 149.

Against an attorney for detaining a pair of tables, with a fore-judger. 2 Instr. Cl. 284.

Of a purse of monies. Ra. Entr. 211. The like of monies in a bag, &c. Dig. 196. 18 H. 6. 20.

Of Charters and other Writings.

Of charters. Reg. 159. Dig. 154.—Of an acquittance. Reg. 159.—Of a will. *ibid.*—Of a deed of gift of goods. *ibid.*—Of a writing to deliver seisin. Reg. 160.—Of the chirographs of a fine. Reg. 159.

Of a box, with three bonds, sealed by the plaintiff or his father whose heir he is. Reg. 159.

By a son and heir for a box of charters concerning lands descended to the plaintiff, and which came to the defendant by finding. Ra. Entr. 213. The like of intailed lands. Ra. Entr. 213. Vet. Intr. 85.

By a remainder-man in tail, for a deed of gift in tail, which after the death of the former tenant in tail, who died without issue, came to the hands of the defendant by finding. 3 Brownl. 137.

Against husband and wife for a box with charters, whereof the plaintiff's brother being possessed and seised of the lands, lost the said box, &c. and died without issue, and the lands descended to the plaintiff, and the box came to the hands of the wife *dum sola*. Ra. Entr. 209.

For a box with charters, whereof J. being possessed, and seised of the lands, married M. and died, and the lands descended

References to Precedents in Detinue.

scended to the plaintiff as cousin and heir, and the box came to the hands of *M.* who married one of the defendants, and died; and the box after her death came to the hands of the defendant. Ra. Entr. 213.

For a box with charters, where *L.* being seised gave the lands in tail to *H.* and *E.* and gave them the box with the charters, &c. that *H.* and *E.* died, that the lands descended to the plaintiff, and the box came to the defendant's hands. Ra. Entr. 210. Vet. Intr. 27. Ash 164.

For four boxes with charters, where *W.* seised of a manor, granted to the plaintiff and others, deceased, in fee; and the boxes came to the defendant's hands. Ra. Entr. 213. Vet. Intr. 85.

For a box with charters, where *T.* seised of lands of the gift of *W.* enfeoffed the plaintiff thereof, and delivered to him the said box with charters, &c. which the plaintiff lost, and the defendant found it. Ra. Entr. 210.

Of a statute staple delivered to the defendant by the plaintiff, to be safely kept. Ro. Entr. 225. The like of a bond. 1 Brown 148. 2 Instr. Cl. 383.

Of a box with charters therein delivered to be safely kept, and re-delivered. 1 Brown 147.

Of a box with charters which the plaintiff lost, and the defendant found and detained. Pl. Gen. 374. 2 Instr. Cl. 388. Ra. Entr. 209, 210. Vet. Intr. 28, 84.

Of a box and a bag of writings therein specially set forth. 1 Brown 148.

For a wife of an heir for a box with charters which came to the defendant's hands after the death of the wife's father. 1 Brown 148.

Of things delivered to be safely kept.

Of an horse. Bro. Red. 259. 21 Ed. 4. 55.

Against an executor of chattels delivered to the testator by the plaintiff to be safely kept. Pl. Gen. 370. 2 Instr. Cl. 388. Ra. Entr. 212.

For an administrator against an executor for goods and chattels delivered to the testator by the intestate to be safely kept, as a pledge for monies lent, which the intestate afterwards paid. Pl. Gen. 371. 2 Instr. Cl. 381. Ash 108.

Of chattels delivered to the defendant by the plaintiff to be safely kept. Pl. Gen. 251, 262. Ra. Entr. 211. Vet. Intr. 21. 1 Brownl. 119. Ra. Entr. 150.

For chattels delivered by the plaintiff to *J.* to be safely kept.

References to Precedents in Detinue.

kept, who delivered them to S. who delivered them to the defendant. Ash 164.

Upon a Finding.

That the plaintiff was possessed of goods which he lost, and which came to the defendant's hands by finding. 1 Brown 147. Ash 173. Ra. Entr. 212.

For husband and wife against an executor for goods delivered to the testator by the wife *dum sola*, and to be re-delivered upon request; which after the testator's death came to the defendant's hands. Pl. Gen. 370.

By an executor for goods whereof the testator died possessed, and which after his death came to the defendant's hands by finding. Plow. 175. Ash 166.

Of Goods bought.

Of two quarters of hempseed. 1 Brown 147. Co. Entr. 169. Brownl. 185.

Of malt sold, where the defendant sold it to another, who sold it to the plaintiff. 1 Brown 148.

By an executor. 3 Brown 187.

Against husband and wife for barley bought of the wife *dum sola*. Ash 189.

For sheep-skins bought to be delivered from time to time, and the defendant killed the sheep. 3 Brownl. 186.

Interpleaders thereupon of Charters, &c.

A declaration by C. and the like by R. of writings delivered to be safely kept; the defendant as to both the declarations in one plea pleads, that the writings were delivered to him by both plaintiffs equally under certain conditions, of which the defendant is ignorant whether they were performed, and prays that both plaintiffs may interplead; which is granted; and thereupon one of the plaintiffs prays an imparlance, and the other pleads in bar that the writings were delivered under such conditions; a *Replication* that the writings were delivered as in the first declaration, and *Traverse* that they were delivered upon conditions. Ro. Entr. 226.

The like declaration; and the defendant after an imparlance brings the writings into court, and pleads that the writings were delivered to him by the plaintiff, and one N. equally under certain conditions, which he knows not whether performed or not, and prays that N. may be summoned; and thereupon

References to Precedents in Detinue.

thereupon a *Scire facias* is awarded to *N.* who prays an imparlance, and has it, &c. 1 Brown 147.

Where the defendant brings the box into court, and pleads that the box was delivered to him by *H.* and *T.* under certain conditions, which he knows not whether performed or not; and prays that *H.* and *T.* may be summoned, and it is granted, &c. and the sheriff returns a *Scire feci* as to *T.* who makes default, and a *Nichil* as to *H.* whereupon a *Teslatum Scire facias* is awarded against him, who upon a *Scire feci* returned prays an imparlance. Pl. Gen. 355. Ra. Entr. 218. Vet. Intr. 106.

Where the defendant brings a bond into court, and pleads as above. 2 Instr. Cl. 386. Another where the Garnishee appears. 2 Instr. Cl. 386.

Another; and an interpleader upon two bonds upon two declarations. *Idem* 308.

For other precedents of interpleader, see Raft. 213, 214, 215, 216, 217, 218. 1 Brownl. 121. Ash 171. Vet. Intr. 28, 96, 106.

Bars in Detinue.

That he does not detain *per patriam*. Pl. Gen. 314.

The like *per legem*. 1 Brown 355.

The action acknowledged as to part, and that he does not detain as to the residue *per legem*. Pl. Gen. 372.

The like *per patriam*. 3 Brownl. 186.

That he was and is ready to deliver the charters. *Tho* 128.

In detinue of an horse, a bar that the plaintiff delivered an horse to him to depasture at his peril, and a traverse of the delivery for safe keeping. A replication that he delivered it for safe keeping, and an issue thereupon. 1 Brown 149.

In detinue of chattels, upon an *Emissor*, the defendant pleads that the plaintiff after the bargain, commanded him to sell them. A *Replication* denying the command, and an issue. Brown 149.

In detinue of sheep, the defendant pleads that he always was, and now is ready, and prays a day to deliver them; for that they are *Feræ Naturæ*. Bro. Va. 497. 1 Brown 149. The plaintiff, in order to have his damages, replies that the defendant refused to deliver them; the defendant rejoins as before, that he tendered, &c. An issue thereon.

[P*428] The defendant pleads *Non Detinet* as to part, and to the residue pleads * that his wife, while sole, pledged it, &c. keep *quousque*, &c. *Replication* that the plaintiff was possessor

References to Precedents in Detinue.

of the gold ring, and lost it, and the defendant found it, and traverse that the wife pledged it, and an issue thereon. Cl. Aff. 142.

In detinue against *N.* and *A.* the defendant pleads a pledging to one *C.* &c. Bro. Va. 483. The like 505, 514. Judgment in detinue for the value. Han. 135, 136. By *Non Sum Informatus* in detinue. 1 Brown 147. The like of a bag with 30l. contained therein. 2 Tho. Judgment 85.

In detinue for value of malt. Pl. Gen. 449. Judgment that the plaintiff have a delivery of the bond against the Garnishee by default. 2 Instr. Cl. 386.

Judgment that the plaintiff have a delivery of the bond against the Garnishee by default. 2 Instr. Cl. 386.

Damages in detinue assessed by the court. 2 Instr. Cl. 390.

Another upon acknowledging the action on the original *Disfringas* awarded, and judgment for the value, damages and costs. *Ibid.* 391.

The defendant brings the charter into court, which the plaintiff accepts, and the defendant is acquitted, &c. Cl. Aff. 118.

Judgment for the plaintiff upon a verdict in detinue of chattels. 2 T. Jud. 82. The like where the verdict was part for the plaintiff, and part for the defendant. *Ibid.*

The postea continuing the process, and a verdict at bar for an indenture detained, and judgment for the plaintiff. *Ibid.* 83.

Judgment for the plaintiff upon an inquiry. *Ibid.* The like where some are delivered, and some not; and the sheriff returned upon the *Disfringas*, that the defendant *Nihil habet.*

Idem. 84. The like for the plaintiff, upon an inquiry, where the sheriff returned that the defendant is distrained. *Ibid.*

The like to recover monies for the value of chattels detained. *Idem.* 85.

Judgment for the plaintiff with a *Relicta verificatione* as to the barley. *Idem.* 86, 87.

Where the defendant relinquishes his plea, and by the plaintiff's consent, pleads *Non Detinet per patriam.* 3 Brownl. 186.

A plea that the horse, at the time of the delivery, was unsound, and had several distempers, and afterwards died; a *Replication* that the horse was found, and traverse that he was unsound. &c. 21 Ed. 4. 55.

That the plaintiff pawned the chattels to *J.* for monies, that *J.* died intestate, and administration was granted to the defendant, who took the chattels and detained them the monies due, &c. and *Traverse* that the plaintiff delivered the

References to Precedents in Detinue.

the said chattels to *J.* to be safely kept, and to be re-delivered upon demand. Ra. Entr. 212.

That the bishop, &c. seised of a hundred, had estrays there, and the defendant, as the bishop's bailiff, seized the mare; whereupon she was cried; and the plaintiff on the Ninth of October came and claimed the mare, but refused to pay for her pasture; wherefore he detains her, &c. A *Replication* that on the Tenth of June the plaintiff claimed the mare, and offered the defendant 3s. 4d. for the pasture, and *Traverse* that the mare remained as an estray from the Twenty-ninth of May to the Ninth of October. *Rejoinder*, maintaining the bar, and *Traverse* that the plaintiff tendered the 3s. 4d. for the pasture. Co. Entr. 169. 3 Brownl. 189.

That *S.* seised of a manor, had the goods of waifs there and the defendant, as bailiff of the manor, took the goods waived by a person unknown. A *Replication* that one *W.* stole the goods from the plaintiff, who took him upon fresh pursuit, and he was indicted, and found guilty, and writ awarded to the bailiff of the manor, to restore the goods and traverse that they were waived by a person unknown. Ash 173.

Non Detinet per Legem as to part, as to the residue that the defendant levied a plaint against the plaintiff, in the sheriff's court of London, and the chattels then in the defendant's custody were attached, and after four defaults the defendant was condemned. *Replication*, no such record. Ra. Entr. 212.

To detinue brought by an executor, a plea that before the probate of the will, administration was granted to *J.* who sold the goods to the defendant; a demurrer thereto. Plow. 275. Ash 167.

Pleas concerning Charters.

In detinue, by an administrator of *J.* for a bag with writings, a *Plea* that *J.* made the defendant his executor, and *Traverse* of the dying intestate. Ra. Entr. 209.

A *Plea* that the plaintiff lost the writing, and *J.* found to whom the plaintiff released, who thereupon was possessed of the writing as his own, and gave it to the defendant. Ra. Entr. 209.

That the writing was delivered to the defendant, on condition to perform an award, which was not done. Ra. Entr. 215. Ash. 172.

That there was a discourse between the plaintiff and the defendant concerning the box, &c. and that *B.* and the plaintiff delivered the defendant the said box, on condition that

References to Precedents in Detinue.

should direct the defendant to deliver the box to the plaintiff, then it was to be delivered to him, and not otherwise; and that *B.* hath not directed, &c. *Replication*, that the box was delivered to the defendant to be re-delivered to the plaintiff, upon demand; and a *Traverse* of the delivery upon condition. Ra. Entr. 214.

That the boxes were delivered to the defendant equally, by another and the plaintiff, upon condition that if he should pay the plaintiff such a day 100l. the boxes should be delivered to him; and that he offered to pay the plaintiff the monies, which he refused to accept. A *Replication* that he did not offer, &c. Ra. Entr. 215.

That the lands descended to the defendant as cousin. A *Replication* that the lands descended to the defendant as cousin; and a *Traverse* that he hath a brother called *S.* Ra. Entr. 213.

That *G.* seised of a manor, and possessed of charters, gave the manor to *T.* in tail, and delivered to him the charters, that the manor descended to *J.* as son of, &c. that the plaintiff entered after the death, &c. and found the charters there, which he afterwards lost; and the defendant found them; a *Replication* that *J.* had not a son called *W.* Ra. Entr. 210.

That *W.* seised, &c. enfeoffed the defendant and *S.* whom the defendant survived, and was seised until *R.* disseised him, and gave the lands to the plaintiff. *Replication*, denying the disseisin. Ra. Entr. 214.

Detinue by one in remainder in tail; upon a finding of the gift in tail, a plea that the prior tenant in tail made a feoffment to *J.* and suffered a recovery to uses in fee; and he made a feoffment to the use of himself for life, remainder to the defendant in tail, and delivered him the writings for the support of his estate in remainder in tail. A *Replication* that the tenements were not contained in the recovery. Brownl. 178.

Declarations.

Where Debt and Detinue are joined.

Ra. Entr. 250. Vet. Intr. 41. Ash. 181. 1 Brownl. 104. 139, 140. Pl. Gen. 251, 262. Mo. Intr. 149. Br. 186, 259.

Pleas

References to Precedents in Detinue.

Pleas thereto.

Non Debet nec Detinet per patriam. Br. Red. 259. Pl. Gen. 251. Mo. Intr. 205.

Non Debet nec Detinet per legem to part. Pl. Gen. 273.

Nil Debet per patriam as to part, and the action acknowledged as to the chattels. Pl. Gen. 255.

Judgments thereon.

The action acknowledged for part of the chattels, and judgment thereupon, and a writ of inquiry of damages awarded. Pl. Gen. 372.

The action acknowledged for all the chattels; and like judgment thereon. *Idem* 255.

Debt and detinue in *London*, whereupon there is judgment by *Non sum Informatus* as to part of the debt, and for the retaining and several issues joined as to the other part of debt, continuances of the *Venire facias* and *Distringas*, a verdict and judgment for the plaintiff after an inquisition for detinue of the cow. 2 T. Jud. 87.

An action of debt and detinue, where the defendant relinquishes his plea and acknowledges the action. *Idem* 88.

An action of debt and detinue, where the defendant pleads *Non Debet nec Detinet per legem*; and at the day given by court, the defendant as to part of the debt and goods, relinquishes his plea by the consent of the plaintiff, and acknowledges the action; and as to the residue compleats law. *Idem* 89.

In debt and detinue *Nil Debet per legem* as to part of debt, as to the residue *Non Debet nec Detinet per patriam*; the defendant makes default at the day given to wage law, and the plaintiff enters a *Nolle prosequi* upon the writ and judgment for the money and chattels against the defendant. *Ibid.*

Prohibition.

* HOUBLON against MILNER.

(*P353)

Hillary Term, the Third of King William III.

BE it remember'd, that the eleventh day of February this same term comes here into court *Richard Houblon*, gent. by *J. P.* his attorney, and gives this court to understand and be inform'd, that whereas the city of *London* is an ancient city, and that within the same city there is and hath been, time out of mind, such ancient and laudable custom us'd and approv'd of, (that is to say) that if any married woman residing and dwelling within the same city hath committed adultery, such woman being lawfully convicted thereat at any sessions of the peace within the same city, shall undergo corporal punishment (that is to say) be carted and whipp'd within the same city, and that during all that time, any woman falsely and maliciously hath call'd any other woman within the same city, whore, such woman, during that time, hath us'd and been accustom'd to have a proper remedy for the same by an action upon the case, in his Majesty's court of Record in the said city of *London*: And wherefore, by the laws and statutes of this kingdom of *England* writ, bill and declaration, and every other matter, on the part of any person or persons complaining in any of his Majesty's courts of Record, before any of his Secular Judges: also every libel on the behalf of any person or persons lying in any of his Majesty's courts before Commissioners of the said Sovereign Lord the King, in causes Ecclesiastical, in any other court whatsoever, before any Spiritual Judge, against any person or persons whatsoever, for any causes, matters, pleas or things, moved, informed, exhibited or founded, hath been accustomed, and of right ought to be retained, as well in the matter therein contained, as in the nature of the same, and not dubious, nor in an ambiguous sense

Suggestion to have a prohibition for words.

Lut. 1039.

Stiles 69.

229. 245.

3 Lev. 137.

3 Mod. 74.

3 Lev. 119.

Custom of London to punish whores by carting and whipping.

Prohibition.

(*P354)

sense, but such as the party or parties, defendants or appellees, named in the same, may certainly, perfectly and fully make answer thereto, without any exception, doubt or hesitation: And whereas the subjects and liege people of our Sovereign Lord the King, and his Progenitors, Kings and Queens of *England*, ought not, nor in times past have they used to be drawn into a suit in any court of Record before any Justices, or Spiritual and Ecclesiastical Judges, of, for or concerning the speaking or publishing any words not scandalous or defamatory (but those which sometimes are to be taken in a milder * sense, and refer to different subjects, or may have a different construction) nor of words or sentences not having a certain plain and manifest sense or signification; nor of words that don't seem plainly to be spoken of the subject matter, or applicable to the thing or person they are intended for; but that may be interpreted and received in a doubtful and uncertain sense; nor by the law of the land ought to be compell'd to answer to such insufficient and uncertain information, bill, plaint or libel exhibited or propounded; but should remain free and quiet from all such disturbance, vexation or expences, by occasion of such like controversy; nor have they been or ought to be conven'd or cited before any Justices or Judges whatsoever: And whereas also all pleas and controversies concerning the expounding and interpreting of whatsoever words and sentences intended for, arising from, and representing any subject matter whatsoever, and also the sense of words and sentences, and the validity, certainty and sufficiency of such bills, plaints and libels, or any of them, which regard the right, inheritance, tranquility or quiet of the commonwealth, and of the affairs of the subjects of our Sovereign Lord the King, that they may not be unjustly disturbed or grieved with suits and controversies, do specially belong and appertain to our Sovereign Lord the King and his Royal Prerogative, to be heard and determined in his said Majesty's courts of Record, before his Temporal Judges, and ought not, nor hitherto, in times past, have they been, by any means, tried, determined and discussed in any Ecclesiastical courts, before any Spiritual or Ecclesiastical Judges: Nevertheless, one *Eliz. Milner*, wife of one *John Milner*, of the parish of *St. Mary Woolnoth, London*, not being ignorant of the premisses, but contriving and maliciously intending unjustly to grieve, oppress and vex the said *Richard Hebblethwaite*, contrary to the laws of this kingdom, and the customs thereof said; and also to disinherit our Sovereign Lord the King of his crown and dignity, and to draw the consueance of a plea which belongeth and appertaineth to our Sovereign Lord the King.

Prohibition.

King, his crown and dignity, to a different sort of trial in the Court Christian, and to put the said *Richard* to great expenses, by colour of a certain libel exhibited against him by the said *Elizabeth* in the Court Christian, to require the said *Richard* to appear before the worshipful Sir *Henry Newton*, doctor of laws, vicar in spirituals, general and principal official to the reverend Father in God, *Henry*, by divine permission, lord bishop of *London*, lawfully constituted, or his surrogate, or some proper Judge for that purpose, impleaded the said *Richard Houlton*, for and concerning the speaking and publishing the English words hereunder mention'd, by craftily and subtilely libelling against the said *Richard* in the said Court Christian, that the same *Richard* had spoke, pronounced and published some scandalous, injurious, opprobrious and defamatory words, sounding and tending to the infamy, wounding, blackening and diminishing of the said *Elizabeth Milner* in her condition, name and good character and reputation, or other words to the same effect, that is to say, *you are a whore, and I'll prove you such, and you deserve to be carted; and such women as you never have any children.* And that by the words speaking and declaring the same words, the said *Richard* intended * and meant, that the said *Elizabeth* had committed the crime of adultery or incontinency with several, or at least, with one person: And that the person then present, and hearing the said words, did understand and take them in such sense; whereas, in fact, the said *Richard* saith, that the said English words contained and specify'd in the said libel were spoken, published and pronounced in the parish of *St. Mary Woolnoth* in the city of *London*, and the aforesaid *Elizabeth* then was, and long before had been, and now is married to the said *Jonathan Milner*, and then did, and long before had, and now doth, reside and dwell in the said parish of *St. Mary Wolnorth*, in the city of *London*. And the same *Richard* then and long before did, and now doth reside within the said parish. And altho' the same *Jonathan* and *Elizabeth* by their action upon the case might have a proper remedy in His Majesty's court of Record, within the same city of *London*, if by the speaking the said words the crime of adultery was charged upon the said *Elizabeth*; and altho' the said libel be uncertain, doubtful and insufficient in law, and the English words therein contained supposed to have been spoken by the said *Richard*, may be taken and understood in a doubtful sense, meaning nothing in themselves, (or, at least,) not having a certain interpretation, for which said causes the said *Richard* is under no necessity, nor by the law of the land, or by the Ecclesiastical laws of this kingdom of England, was in any

Note, The words in Lutwich are you are a common woman, and such women as you never have any Children.

(*P355)

Averted to be spoken in London.

Prohibition.

any manner bound to make answer to the said libel in the said manner and form framed and exhibited. And altho' the said *Richard* alledged and pleaded, and offer'd to prove in his discharge in this suit all and singular the premisses on his part above suggested and alledged, with undeniable testimony, to be true, in the aforesaid Court Christian, before the said Spiritual Judge: Nevertheless, the same Spiritual Judge did, and doth yet refuse, to admit or receive the aforesaid plea, allegation and proof. And the said *Jonathan* and *Elizabeth* with all their might endeavour and daily contrive to have the said *Richard* be condemn'd in the said Court Christian, of and concerning the premisses, in contempt of his present Majesty and his laws, and to the manifest damage, prejudice, impoverishment and injury of him the said *Richard*; and this the said *Richard* is ready to verify; wherefore in an humble manner imploring the aid and assistance of this honourable court, he prayeth relief, and his Majesty's writ of prohibition to be directed to the aforesaid Spiritual Judge, or any other Judge whatsoever, competent in this particular, to prohibit him from holding plea before him, or taking any further cognizance of the premisses. And it is granted to him accordingly, and so forth.

In this case, after three motions, a prohibition was denied, because it was held that the custom of London to have an action, for words extendeth only where a woman is directly called whore, and not for words from whence may be collected that she was an ill woman; and therefore I have put in the words in this precedent as they should be, to gain a prohibition.

Note, That in the precedent from whence this suggestion was taken, it was said, that if the words were spoken, they were spoken in London; whereas it ought to have been expressly averred, that the words were spoken in London. And so it is resolved in the * case of *Day and Pitts*. Ven. 10. For which reason I have averr'd here the words to have been spoken in London.

(*P356)

Hicks against WOODSON.

Mich. 6. W. & M. 13. B. R.

Attachment
upon a pro-
hibition.
4 Mod. 324.

Somerset (to wit). *Nicholas Hicks*, who sueth in this case well for our Sovereign Lord the King as for himself, complaineth of *Samuel Woodson*, clerk, rector of the parish church of *Huntspill* in the county of *Somerset* aforesaid, in the custody of the marshal of the *Marshalsea* of our Sovereign Lord and Lady, the King and Queen (being present) before

Prohibition.

the King and Queen themselves, of a plea, wherefore he is still prosecuting a suit in the Court Christian contrary to a royal prohibition to him before directed and delivered to the contrary, for this cause (that is to say) That whereas the parish of *Huntspill* in the county aforesaid is an ancient parish; and whereas the aforesaid *Nicholas* by the space of five years last past and upwards, hath been, and now is an inhabitant within the parish aforesaid, and during all that time held and occupy'd forty acres of meadow and pasture, with their appurtenances, being parcel of the manor of *Huntspill*, in the said county of *Somerset*, within the parish aforesaid, and the borders, limits and titheable places thereof; and whereas also within the same parish, the borders, limits, and titheable places thereof, there are, and time out of mind, have been such customs and modes of tithing of and concerning the tithes of lambs falling, year'd and increasing, and of and concerning the tithes of milch'd cows and heifers kept and depastured within the parish aforesaid, the borders, limits and titheable places thereof, and of and concerning the tithe of calves, within the parish aforesaid, the borders, limits and titheable places thereof, falling, brought forth and increasing within the parish aforesaid, the borders, limits and titheable places thereof, and of and concerning the tithes of colts falling, brought forth and foled within the parish aforesaid, and the borders, limits and titheable places thereof, and of and concerning the tithes of hay growing, renewing and increasing within the said parish, the borders, limits and titheable places thereof, and of and concerning the tithes of gardens and orchards being within the said parish, the borders, limits and titheable places thereof, and of and concerning the payment of offerings of all men and women inhabiting within the said parish, the borders, limits and titheable places thereof. That is to say, that every occupier of any lands or tenements within the said parish, the borders, limits and titheable places thereof, who in any year kept any milch'd cow or heifer, cows or heifers, within the parish aforesaid, and the borders, limits and titheable places thereof, hath used, and during all the time aforesaid hath been used and accustomed to pay, to the rector of the parish-church of *Huntspill* aforesaid, his farmer and deputy of the rectory for the time being, for every such milch'd cow three pence of lawful money of *England*, and for every such milch'd heifer three pence of like lawful money, in every such year, and no more, for and in lieu of all tithes of the milk of such cows and heifers, in the same * year; and that every such occupier, as aforesaid, who in any year had any lamb or lambs

That *Huntspill* is an ancient parish.

The plaintiff an inhabitant and landholder in the said parish.

A modus of tithing set forth.

(*P357)

Prohibition.

under the number of seven fallen and yeaned within the said parish the borders, limits and titheable places thereof hath paid, and during all the time aforesaid, used, and hath been accustomed to pay to the rector of the parish church of *Huntspill* aforesaid, his farmers, or deputy of the said rectory for the time being, in the same year, one halfpenny of like lawful money for every such lamb, under the number of seven, brought forth and yeaned as above, in lieu, full satisfaction and payment of all tithes of lambs. But if the same occupier, in any such year, had more than the number of seven lambs brought forth and yeaned within the parish aforesaid, the borders, limits and titheable places thereof, then such occupier hath render'd and paid, and during all the time aforesaid hath used and been accustomed to pay to the rector of the parish church of *Huntspill* aforesaid, his farmer or deputy of that rectory for the time being, one of the same seven lambs, in such year, in lieu, full satisfaction and payment, and in the name and stead of all tithes of the same seven lambs, and two lambs for the number of seventeen; and for every calf one halfpenny, if there should be less than seven calves; and if more than seven, then one calf, and if seventeen, two calves; and one penny for every colt, and two pence for every acre of hay, and two pence for every orchard and garden; and for every man of the age of sixteen years two pence, and for his wife two pence for offerings. And whereas the Hundred of *Huntspill* and *Puriton* within the said county of *Somerset* is, and time out of mind hath been an ancient Hundred, within which said Hundred the parish of *Huntspill* now is, and time out of mind hath been; and whereas within the same Hundred of *Huntspill* and *Puriton* there now is, and time out of mind hath been, an ancient custom, during all that time, used and approved of, that all the inhabitants within the said Hundred occupying any lands meadow or pasture, within the said Hundred should be free exempt and discharged of and from the payment of any tithes of or for the depasturing of any cattle not milch'd or used in the plough, by them depastured in any lands, meadows or pastures being within the Hundred of *Huntspill* and *Puriton* aforesaid; and whereas the aforesaid *N.* for the space of seven years next before the exhibiting of the bill of the said *Nicholas* in this court was, and now is, an inhabitant within the Hundred aforesaid, and within the said parish of *Huntspill* and during the said seven years did possess and occupy diverse lands, meadow and pasture, within the Hundred and parish aforesaid, and depastured upon the same lands, meadow and pasture, within the Hundred and parish aforesaid, and elsewhere

That *Huntspill* and *Puriton* is an ancient Hundred. That the parish of *Huntspill* is within that Hundred. Custom for the inhabitants within a Hundred to be discharged of tithes of meadow and pasture for barren cattle. Custom for cattle not milch'd, and not employ'd to the plough or plough not to be tithable. The plaintiff an inhabi-

Prohibition.

elsewhere, within that time, divers cattle not employ'd to
 plough or pail, to wit, cows, heifers and colts. Neverthe-
 less, the same *Samuel*. not being ignorant of the premisses, but
 contriving and maliciously intending unjustly to trouble,
 grieve, oppress and vex the said *Nicholas*, contrary to due
 form of law, and contrary to the form and effect of the said
 modes of tithing, and the custom aforesaid, and unjustly to
 violate the customs and prescriptions of the manner of tith-
 ing, and also to disinheret our Sovereign Lord the King * of (*P 258)
 his crown and dignity, and to draw the consufance of a plea
 which belongeth and appertaineth to our said Sovereign Lord
 the King, his crown and dignity, to a different trial, im-
 pleaded the said *Nicholas Hicks* in the Court Christian, be-
 fore the worshipful *Richard Hely*, doctor of laws, furrogare
 (lawfully constituted) to *Edwin Sandys*, clerk, archdeacon of
 the archdeaconry of *Wells*, his lawful deputy, or some other
 Judge competent in that behalf, of and for substraſſing and
 non-payment of tithes of lambs fallen, yeaned and brought
 forth within the parish aforesaid, and the borders, limits and
 tithable places thereof in the years of our Lord 1689, 1690;
 and also in the months of *March, April, May and June*, in the
 year of our Lord 1693, and every of the said months and
 years, or some of them, and for substraſſing and non-pay-
 ment of tithes of calves fallen, calved and brought forth
 within the parish aforesaid, and borders, limits and tithable
 places thereof, and (*so on, changing what should be changed, as*
the case requires, as to colts, cows, heifers, hay, gardens and
orchards) possessed by the said *N. H.* and of and for substraſſ-
 ing and not paying of offerings for all men and their wives
 inhabiting within the parish aforesaid, the borders, limits
 and tithable places thereof, for the years and months afore-
 said, and every of them, by craftily and subtilly libelling in
 the same Court Christian against the said *N. H.* in and by a
 certain libel and schedule to the same subscribed and annexed,
 exhibited in the same Court Christian against the said *N. H.*
 in manner and form following, that is to say, *Imprimis, (so*
go on with the libel) as by the copy of the libel and schedule
 brought and read in this court, among other things, more
 fully may appear; and the said *Samuel Woodson* compell'd the
 said *N. H.* to appear in the said Court Christian before the
 said Spiritual Judge by occasion of the premisses, and to
 make answer to the said *S. W.* therein, and although the said
N. H. every year of the aforesaid years, in which the said
Nicholas had any lambs, calves, colts, milch'd cows or hei-
 fers, or any hay, gardens or orchards within the said parish,
 the borders, limits, or tithable places thereof, increasing, re-
 newing

tant and
 landholder
 within the
 Hundred,
 and fed cat-
 tle there.
 That the
 defendant
 not being ig-
 norant of the
 premisses,
 drew the
 plaintiff into
 a suit before
 the Ecclesi-
 astical
 Judge,

For non-
 payment of
 tithes.

The libel.

Prohibition.

renewing or growing, or that he dwelt within the said parish, offer'd, and was and now is ready to pay the said *Samuel*, the said several sums of money for the tithes of lambs, calves, colts, milch'd cows and heifers, gardens and orchards, and for the offerings aforesaid, according to the form and effect of the said several modes of tithing; and altho' the same *N.* pleaded and alledged in his discharge, and often offer'd to prove all and singular the premisses, with undeniable testimony, to be true, in the said Court Christian, before the said Spiritual Judge, yet the said Spiritual Judge altogether refused to receive or admit the said plea, allegation and proof, and the aforesaid *R. H.* with all his might is endeavouring and daily contriving to condemn the said *N.* by a definitive sentence of the said Court Christian, for and concerning the premisses contained in the said libel and schedule, and to compel him to pay the tithes demanded in form aforesaid, in contempt of our Sovereign Lord and Lady, the King and Queen, their crown and dignity, and to the great and manifest damage, prejudice and impoverishment of the said *N. H.* and contrary to the due form of the * law of this kingdom, and the prescriptions, customs, and modes of tithing aforesaid: And altho' the said *N. H.* the last day of *August*, in the fifth year of the reign of their present Majesties, at *Huntspill* aforesaid, in the county aforesaid, delivered to the said *S. W.* their Majesties writ of prohibition at *Huntspill* aforesaid, in the county aforesaid: Nevertheless, the same *S. W.* desisted not from prosecuting the said *N.* but further prosecuted the said *N.* notwithstanding the said writ of prohibition in contempt of our Sovereign Lord and Lady the King and Queen, and contrary to the prohibition aforesaid; whereof the said *N.* as well for our Sovereign Lord and Lady, the King and Queen, as for himself, saith, he is rendered worse in his circumstances, and hath sustained damage to the value of 20*l.* and therefore as well for our Sovereign Lord and Lady, the King and Queen, as for himself, he brings this suit, and so forth.

(*P359)

The court in this case granted a consultation, saying it would be difficult to shew a non decimando for any tithes besides those of wood; for all the cases that incline to such a custom are put severally, to wit, that a County or a Hundred may thus prescribe, but don't mention what tithes are in question: As to the tithes of wood, tho' they are yearly renewing, yet they yield no annual profit; and tithes of common right are due only for such things as arise by annual profit; therefore, tho' tithes are due for such things as do not arise by annual profits, they must be paid by custom. But here this custom not being good, a consultation was granted.

JUSTIN

Prohibition.

JUSTIN against BALLAM.

Pleas before our Sovereign Lady the Queen, at Westminster, of the Term of St. Michael in the first year of the reign of our said Sovereign Lady Anne, Queen of England, and so forth. Rot. 223.

BE it remember'd, that on *Friday* next after three weeks of *St. Michael*, this same term, comes before our Sovereign Lady the Queen at *Westminster*, *Nicholas Justin*, in his proper person, and gives this court here to understand and be inform'd, that whereas by a statute made in the parliament of his late Majesty *Richard II.* late King of *England*, held at *Westminster* in the county of *Middlesex*, in the thirteenth year of his reign, among other things it is enacted and ordained by the authority of the same parliament, that the admirals and their deputies from thence and ever after should in no wise have cognizance of any suit for any matter or thing, unless the same should be done upon the high seas, as had been duly observed and used in the time of the then late Sovereign Lord *Edward*, grandfather of his said late Majesty *Richard II.* as in the same statute (among other things) it is contained. And whereas also by another statute made in the parliament of the said late King *Richard II.* in the fifteenth year of his reign, held at *Westminster* aforesaid, in the county aforesaid, (amongst other things) it is declared, ordained, and established, that the court of Admiralty should have no cognizance, power or jurisdiction of any contracts, pleas or complaints, of or concerning any * thing done or arising within the body of any county, whether by land or water; and also for or concerning the wreck of the sea. But that all such contracts, pleas and complaints, and all other matters arising within the body of any county, whether by land or water, as aforesaid, should be determin'd, try'd, discuss'd and regulated by the law of the land, and not before any admiral or admirals, nor before any of his or their deputy or deputies in any manner howsoever, as in the same statute (among other things) doth plainly appear. And whereas also by an act made in the parliament held at *Westminster* in the second year of the reign of our Sovereign Lord *Henry IV.* late King of *England* (amongst other things) it is ordained and enacted, that the aforesaid statute of the late King *Richard II.* should be kept and observed, and that due execution should be thereof required, as in the said statute (amongst other things) it is contained. And whereas all, and all manner of pleas and matters touching and concerning the validity, explanation, interpretation, the Statutes

Suggestion setting forth the Statute of Rich. 2. whereby the admiralty had no cognizance of any thing done upon the land. Salk. 740.

Also another Statute of Rich. 2. to the same purpose.

(*P360)

Another Statute of 2 H. 4. confirming the former.

That the exposition of the Statutes

Prohibition.

belongs to
the temporal
courts.

Breach.

By process
out of the
Admiralty
for goods and
labour.

(P*361)

Libel set
forth.

interpretation, construction or exposition of any statute made in whatsoever parliament of our Sovereign Lord the King or his progenitors, late Kings and Queens of *England*, and all and all manner of pleas, and cognizance of pleas, for any trespasses, contracts and trespasses upon the case, for the taking detaining or converting any goods or chattels, or for any other cause whatsoever, whether by land or water, happening, arising or issuing within the body of any county within this kingdom of *England*, or any where on shore, have and do specially belong and appertain to our Sovereign Lord the King and his royal prerogative, and by the laws and statutes of this kingdom of *Great Britain* ought, and always from times past hitherto have been accustomed to be tried, determined and discussed in some of the King's temporal courts of record before the King himself, or before his temporal Justices or Judges, and not in any manner howsoever, before the lord high admiral of *England*, or before any person or persons holding the office of high admiral of *England*, his or their deputy or deputies whatsoever. Nevertheless, certain persons, that is to say, *John Ballam* and *William Hart* not being ignorant of, or unacquainted with, the premises, but contriving unjustly to trouble, grieve, vex and oppress the said *Nicholas Justin*, and contrary to the due course of the law of this kingdom, and contrary to the form of the aforesaid statutes, have unjustly drawn the cognizance of a plea that belongeth and appertaineth to our Sovereign Lord the King and his royal prerogative, to a different manner of trial, before the worshipful Sir *Charles Hedges*, kn. doctor of laws, supreme judge of the court of Admiralty, his deputy or surrogate, or some other competent judge in that behalf; by virtue of a certain process issuing out of the said court of Admiralty, for prosecuting the said *Nicholas Justin*, owner of a ship call'd the *Swan of Norway*, with its tackle and furniture, of which *Berent Gertson* late was, but *John Ord* now is, master, for and concerning the sale and delivery of divers wares and merchandizes sold and delivered to and for the use of the said ship, and for and concerning work and labour done by the said *J. B.* and *W. H.* to and for the use of the said ship, out of the jurisdiction of that court, by craftily and subtilly libelling and suggesting against * the said ship, and the said *N. J.* in the same court of Admiralty (amongst other things) as followeth, that is to say, *Imprimis*, that in the month of *November*, in the year of our lord one thousand seven hundred and thirty, and for several months before and after, the said *Berent Gertson* was the master of the ship the *Swan*, and had the care and government of her as master,

Prohibition.

and was put in and appointed master of her by the owner, who was then an inhabitant of *Norway*, and a subject of the King of *Denmark*, but is since dead; and so much the said *J. B.* hath confess'd and declar'd; and this was and is true, public and notorious, and he propoundeth jointly and severally for every thing (and here go on with the libel) also that all and singular the premisses were and are true and notorious, as by a true copy of the said libel had, read and heard, here in this honourable court (amongst other things) more plainly may appear: Whereas in truth the said wares and merchandizes sold and delivered as aforesaid, and the said work and labour done and perform'd as aforesaid for the said ship, were sold and deliver'd, done and perform'd in the river of *Thames*, (to wit) in the parish of *Shadwell*, in the county of *Middlesex*, and not upon the high seas, nor within the jurisdiction of the said court of Admiralty, as by the aforesaid libel above is supposed; to all and singular which matters and things the said *J. B.* and *W. H.* unjustly compell'd the said *N. J.* to appear in the said court of Admiralty before the said judge, and to make answer to the said *J. B.* and *W. H.* of and concerning the premisses; and altho' the said *N. J.* in the said court of Admiralty, before the judge of the said court, pleaded and alledged, and offer'd to prove, with undeniable testimony, in his discharge, all and singular the premisses to be true: Nevertheless, the same spiritual judge of that court altogether did, and yet doth refuse to admit such plea, allegation and proof; and the aforesaid *J. B.* and *W. H.* are daily contriving to compel the said *N.* to make answer of and concerning the premisses, and with all their might endeavour to cause the said *N.* to be condemned therein, by a definitive sentence and decree of the said court of Admiralty, in contempt of our Sovereign Lord the King, and to the disinheriting him of his crown and dignity, and to the manifest damage, impoverishment and grievance of the said *N.* and against the laws and customs of this kingdom, and also contrary to the form and effect of several statutes in that case made and provided. And this the said *N.* is ready to verify. Wherefore the said *N.* in humbly imploring the aid and assistance of this honourable court before the King himself, prayeth to be relieved, and that he may have his Majesty's writ of prohibition to be directed to the said judge of the said court of Admiralty, or to any other judge for that purpose, to prohibit him or them from taking any further cognizance of the said plea before him or them touching or concerning the premisses. And it is granted to him accordingly, and so forth.

Averment
that the
goods and
work were
for a ship in
the river of
Thames.

Plea in Ad
miralty.

JOHNSON

Prohibition.

(P*362)

* JOHNSON against LEE.

Hillary term, 8 W. 3.

5 vol. Mod.
Rep. fol. 231.

Declaration
in prohibi-
tion,

Setting forth
that pleas of
debt, or upon
a contract,
or upon the
case for fees,
are to be
tried in the
King's secu-
lar courts
and not in a
Court Chris-
tian.
Setting forth
the act of
parliament
of 23 H. 8.

That no
person should
be summon-

Berks (to wit). Be it remembered, that lately (to wit) in *Easter* term last past, before our Sovereign Lord the King and the late Queen *Mary*, at *Westminster*, came *William Johnson*, gent. (who in this case sueth as well for his Sovereign Majesty and the said Queen as for himself) by *Thomas Chadwick* his attorney, and then brought his bill in this court against *Godfrey Lee*, gent. in custody of the marshal, and so forth, of a plea of trespass and contempt against those who prosecute their pleas in a Court Christian after his Majesty's prohibition to them directed and delivered to the contrary thereof, and there are pledges of prosecuting (to wit) *John Doe* and *Richard Roe*, which said bill followeth in these words (that is to say) *Berks* (to wit) *William Johnson*, gent. who sueth in this case as well for our Sovereign Lord and Lady the King and Queen, as for himself, complaineth of *Godfrey Lee*, gent. in custody of the marshal of the marshalsea of their said Majesties the King and Queen, before themselves, of a plea of trespass and contempt against those who prosecute their pleas in a Court Christian after their Majesties royal prohibition to them before directed and delivered to the contrary thereof, for this cause (that is to say) whereas according to the laws and customs of this kingdom of *England* all manner of pleas and conusance of pleas happening or arising upon any debt, contract, trespass upon the case for expences or lees within this kingdom of *England*, and of any pleas, or conusance of pleas especially belong and appertain to their said Majesties the King and Queen. and their royal crown, and ought and always have been used and accustomed to be tried, determined or discussed by the common law of this kingdom, and not in any Court Christian by the ecclesiastical laws or censures there used; and also whereas by a certain act of parliament made and provided in the twenty-third year of the reign of the late King *Henry VIII.* (amongst other things) it was enacted by the authority of the same parliament, that no persons should be cited, summoned, or otherwise called to appear by him or themselves, or by any proctor before any ordinary, archdeacon, commissary, official, or any other spiritual judge whatsoever, out of the diocese or peculiar jurisdiction, where the same person who should be so cited, summoned, or otherwise called to be, should be at the time of the

Prohibition.

the awarding or suing out the same citation or summons, unless it be by, in or upon certain causes in the same act particularly mentioned and expressed, and that no archbishop or bishop, ordinary, official, commissary, or any other substitute or officer of the said archbishop, bishop, archdeacon, or any other person, holding any spiritual jurisdiction at any time from the feast of *Easter* next following after the making the said act, should ask, demand, take or receive any sum or sums of money for sealing of any actions or other citations awarded or obtained after the said feast, other than three pence sterling, upon the pains and penalties in the same act contained and limited, as by the same * act (relation being thereunto had) it doth more fully appear; and also whereas the said *William Johnson* now is, and by the space of two years last past hath been residing and dwelling at the parish of *Hungerford*, in the said county of *Berks*, within the peculiar jurisdiction of the deanery and diocese of *Sarum*, and is not, nor within the space of two years last past hath been residing or dwelling within the city of *London*, or the suburbs of the same city, nor any where within the diocese of *Canterbury*; and also is, and for the whole time of his life hath been a liege person of this kingdom, by reason whereof he ought to enjoy all and singular the liberties, privileges and free customs of this kingdom used and approved of, as other liege persons of our said Sovereign Lord the King and his progenitors, Kings and Queens of *England*, have and ought to enjoy: Nevertheless, the said *Godfrey Lee* not being ignorant of the premises, but wickedly contriving to oppress the said *W. J.* contrary to the due form of the laws of this kingdom, to the disinheriting their said Majesties, (and to draw the consuance of a plea which belongeth to their Majesties courts of law, from thence to a different trial in a Court Christian) the first day of *September*, in the fifth year of the reign of their said Majesties, at *Hungerford*, in the said county of *Berks*, and within the peculiar jurisdiction of the dean, and within the diocese of *Sarum*, caused the said *William Johnson* to be cited to appear before the worshipful *George Oxenden*, doctor of laws, principal official of the Court of Arches of *London*, or his surrogate, or other spiritual judge competent for that purpose, in the hall called *Doctors Commons*, situate within the city of *London*, the second day of *October* from thence next following, at which said day and place (the said *William* then appearing to the said citation) the said *Godfrey Lee* then and there before the said spiritual judge demanded of the said *William Johnson* for fees and expences several sums of money amounting in the whole to fifteen pounds

ed out of the diocese where he lives.

(*P363)

That the plaintiff is an inhabitant within the peculiar jurisdiction of the diocese of *Sarum*.

That he was no inhabitant at *London*, nor within the diocese of *Canterbury*.

The Gravamen.

Prohibition.

The libel.

(*P364)

That it appeared to the judge that he was within age, and itno' he would have proved all the premisses to be true;

pounds four shillings and eight pence, mentioned in a schedule or libel hereto annexed (to wit) for expences the sum of five pounds and eight pence, and for fees ten pounds four shillings, by craftily and subtilly libelling against the said *W. J.* that he the said *Godfrey Lee* was and is a proctor of the consistory court of the bishop of *London*, and that in the vacation of the last *Trinity* term, in the year of our Lord 1683, or *Michaelmas* term next after, the said *W. J.* then was a minor of the age of twenty years and a half, and not having compleated his age of twenty-one years, for that reason was not a person capable to abide by the judgment to recover the legacy left and given to him by his late grandfather *William Johnson*, he chose one *Margaret Christian* to be his guardian; and the same *Margaret* accepted and took upon herself the said office and the burthen thereof; and the same *Margaret Christian* and the said *W. J.* or some other friend of the said *W. J.* the grandson used to make the said *G. Lee* their proctor, for prosecuting in a legal manner one *Richard Price* and *Thomas Battle*, executors of the last will and testament of *W. J.* deceased, to compel them to exhibit an inventory, and render an account of the goods and chattels of the said *W. J.* deceased, and employed the said *G. L.* as a proctor in the said cause; so that the said *G. L.* in the vacation * before the term of *St. Michael*, in the year of our Lord one thousand six hundred and ninety-three, and in the said term sent a citation to the said *R. P.* and *T. B.* as executors of the testament of the said *W. J.* to exhibit an inventory, and render an account of the goods and chattels of the said *W. J.* deceased, and to answer to the said *W. J.* the younger, by *Margaret Christian*, assigned to be his guardian, under the seal of the consistory court of the bishop of *London*, in a cause for substracting the legacy aforesaid, and personally took care to pursue the said *R. P.* and *T. B.* by proper ways and means, and procured them to be excommunicated for their contumacy in not appearing in the said consistory court of the bishop of *London*, according to the tenor of a certain decree (and so go on with the libel). And although it manifestly appeared to the said spiritual judge, that the said *W. J.* was within the age of twenty-one years when the said *W. J.* was prosecuted against the said *R. P.* and *T. B.* by the said *G. Lee*; and also although the said *W. J.* in the said Court Christian before the said spiritual judge in his discharge, and to be dismissed from thence in the premises, pleaded, alledged and offered with uncontestable testimony to prove the truth of all and singular the premises by the said *W. J.* above suggested and alledged: Nevertheless, the same spi-

Prohibition.

ritual judge altogether refused to admit such plea, allegation yet the said
and proof: And the said *G. L.* as much as in him lies, is judge refused to admit
daily contriving to compel the said *W. J.* to pay to the said the allegati-
G. L. all and singular the fees and expences in the said sche- on and proof,
dule or libel annexed mentioned, to the contempt of the said Gravamen.
King, and to the great damage, prejudice, grievance, and
manifest impoverishment of the said *W. J.* and against the
form of the said statute: And altho' their said Majesties writ
of prohibition in contradiction thereto was directed and deli-
vered to the said *G. L.* in this cause, on the tenth day of
March, in the sixth year of the reign of their present Majes-
ties, at *Hungerford*, in the county aforesaid; yet the said *G.*
afterwards (to wit) the fourteenth day of *March*, in the
sixth year aforesaid, at *Hungerford* aforesaid, in the said
county of *Berks*, notwithstanding their Majesties writ of pro-
hibition directed and before delivered to him to the contrary
form aforesaid, continued to proceed and prosecute his said
plea, in contempt of their Majesties the King and Queen,
and to the manifest damage, prejudice, impoverishment and
grievance of him the said *W. J.* wherefore he saith he is ren-
der'd worse in his circumstances, and hath sustained damage
to the value of forty pounds; and therefore in this cause as
well for our Sovereign Lord the King and Queen, as for him-
self, hath brought his suit, *and so forth.*

And now at this day (to wit) *Wednesday* next, after the oc-
currences of *St. Hilary* that same term, till which day the said
Godfrey Lee had leave to imparle to the said bill and then to
answer, *and so forth*, (before which day the said late Queen The death of
Mary departed this life) came before our Sovereign Lord the the Queen.
King at *Westminster* as well the said *William* by his attorney,
the said *Godfrey* by * *John Lee* his attorney, and the said (*P365)
defends himself against the force and injury, contempt and
damages, and whatever else he ought to defend, when this
Court will please to take the same into consideration, and
saith, that he did not prosecute his plea in the said Court
Christian after a royal prohibition to the contrary directed and
delivered to him, as the said *William*, who as well (*and so*
forth) in manner and form aforesaid, hath above complained
against him; and of this he puts himself upon his country:
and the said *William Johnson*, who as well (*and so forth*) like-
wise doth the same. But by a writ of consultation of our
Sovereign Lord the King issued in this cause, the said Consultation.
Godfrey in protesting that the said *W. J.* did not plead or al-
lege in the said Court Christian abovementioned, that he Plea.
the said *William* had not undertaken to pay to the said *G.* the
fees or expences in the schedule or libel annex'd menti-
on'd

Prohibition.

on'd, or any part thereof, at any time within six years before the day of exhibiting the complaint or libel of the said *Godfrey*, as the said *W. J.* hath above alledged, for plea, the said *G.* saith, that in the same act in the declaration of the said *W. J.* mention'd it was enacted, that no person should be cited, summon'd, or otherwise call'd to appear by him or herself, or by any proctor, before any ordinary, archdeacon, commissary, or any other spiritual judge, out of the diocese or peculiar jurisdiction, where the same person who should be so cited, summoned, or otherwise call'd, should be dwelling at the time of the awarding or suing out the same citation or summons, under the pains and penalties in the said act mentioned, except it be in a case that any bishop, or other inferior judge, having under him a jurisdiction in his own right and title, or by commission should make request or instance to the archbishop, bishop, or other superior ordinary, to treat, examine or determine the matter before him or his substitute, and that only to be done in cases where the civil or canon law doth affirm such request or instance of jurisdiction to be lawful or tolerable, and in some other cases in the same act specified, as in the same act more fully may appear: And the said *Godfrey* further saith, that he for the space of twenty-four years and more now last past hath been, and now is, one of the proctors of the Consistory Court of the bishop of *London*, and that he the said *G.* the twenty-seventh day of *October*, in the year of our Lord one thousand six hundred and eighty-three at *London*, in the parish of *St. Benedict*, near *Pauls Wharf*, in the ward of *Castle Baynard*, was retained as proctor for them the said *Margaret* and *W.* in the same Consistory Court in the cause before mentioned, and then and there, at the instance and request of the said *Margaret* and *William*, caused a citation under the seal of the Consistory Court of the bishop of *London* to be sued out against and personally executed on the said *R. S.* and *T. B.* executors of the testament of the said *W. J.* deceas'd, grandfather of the said *William*, who as well (and so forth) to exhibit an inventory and account of the goods of the said *W. J.* deceas'd, and to answer to the said *W. J.* the now plaintiff, by the said *Margaret* his guardian (assigned by the said court in the said cause) for the subtraction of a legacy given to him by the said *W. J.* deceas'd, and procured the said executor in due course of law to be excommunicated for his * contumacy in not appearing according to the tenor of the same; and that all and singular the fees and sums of money specified in the said schedule became justly due to the said *Godfrey* for his fees in the controversy or suit aforesaid, and because the said *W. J.* the now plaintiff

That in the above recited act it was further enacted, that no person should be cited before any ordinary out of the diocese where the person lives. Except in case that a bishop or other inferior judge having under him jurisdiction in his own right make request to any archbishop, &c. That the defendant is one of the proctors, &c.

At the request of the guardian to the plain iff brought a citation against the executors of the plaintiff's grandfather.

Caused the said executor to be excommunicated.

(*P 366)

Prohibition.

plaintiff, and the said *Margaret*, altho' often requested, had refused, and did then refuse to pay the said *Godfrey* his said fees and expences, he the said *Godfrey* purposed and endeavoured to sue the said *W. J.* the now plaintiff, for recovery thereof in the court of the peculiar jurisdiction of the dean of *Sarum*; but *Robert Woodward*, doctor of laws, dean of the Cathedral Church of *Sarum*, judge of the said court of the said peculiar jurisdiction, having jurisdiction there in his own right, by his certain writing sealed with his seal, which the said *Godfrey* brings here into court, bearing date the twenty-fifth day of *February*, in the year of our lord one thousand six hundred and ninety-two, requested the worshipful the said *G. Oxenden*, doctor of laws, and judge of the gracious court of *Canterbury*, to call him the said *William Johnson*, by the name of *William Johnson of Hungerford*, in the county of *B.* into the peculiar jurisdiction of the said dean, before him the said *George Oxenden*, or some other competent judge of the said court, to answer to the said *G. L.* in a cause of subtraction of fees, and that the said cause was heard and determined in the same court according to law and justice, as by the same writing it doth and may more fully appear: And the said *G.* further saith, that the canon or civil law affirmeth the execution of such request or instance of jurisdiction to be lawful or tolerable; whereupon the said *G.* caused the said *W. J.* to be cited to appear before the said *George Oxenden*, doctor of laws principal official of the court of *Archies of London*, or his surrogate, or some other competent judge in the hall call'd *Doctors Commons*, situate within the city of *London*, the second day of *October* now last past, and in the same court, before the said prohibition was delivered to the said *Godfrey*, commenced a suit against the said *William* the now plaintiff, and there impleaded the said *William* the now plaintiff for his said fees and expences, as it was lawful for him to do; and those fees and expences then and still are due and unpaid to the said *G.* which is the same impleading of the said *W.* whereof the said *W. J.* hath above complained; and this he is ready to verify. Wherefore he prayeth judgment, and his Majesty's writ of consultation to be granted to him, and so forth.

and because she refused to pay, the defendant endeavoured to get his money by suit in the peculiar jurisdiction of *Sarum*. That the dean of *Sarum* made request to the judge of the prerogative court of *Canterbury*.

That the cannon law affirmeth the execution of such request.

That the said defendant commenced the suit before the prohibition came to his hands.

By protestation.

And the said *William Johnson*, who in this case sues as well for our Sovereign Lord the King, as for himself, saith, that any thing above in pleading alledged by the said *G.* his Majesty's writ of consultation ought not to be granted in this cause to the said *G. Lee*; because in protesting that the said *G. L.* was not retained by the said *Margaret* and *William Johnson*, to be their proctor to prosecute the said *T. P.* and *T.*

Prohibition.

That the civil or canon law doth not affirm the execution of (*P367) the said request.

Plaintiff demurs.

Joinder in demurrer.

T. B. as he the said *G. L.* in pleading hath above alledged and also in protesting that the civil or canon law doth not affirm the said *G. Oxenden's* holding the said plea in the pleading of the said *G.* mentioned to be lawful or tolerable. Nevertheless, for his defence the said *W. J.* saith, * that the plea made by the said *G. L.* as to the request of the said *R. Herbert Woodward* Dean of the Cathedral Church of *Sarum* to the said *G. O.* to call the said *W. J.* before him or any other competent judge of the said court of *Canterbury*, to answer to the said *Godfrey* in the said cause for with-holding of fees, and which was not determined in that cause in manner and form above pleaded, and the matters in the same contained are sufficient in law for the said *Godfrey* to have his said Majesty's writ of consultation to issue in this cause, to which the said *William* need not, nor by the laws of the land is he otherwise obliged to make reply; and this he is ready to verify wherefore for want of a sufficient answer in this cause, the said *W. J.* prayeth judgment, and his said damages to be adjudged to him, for the reasons aforesaid, *and so forth.*

And the said *Godfrey* saith, that the said plea by the said *Godfrey*, as to the request made by the said *R. W.* the said dean of the Cathedral Church of *Sarum*, to the said *George Oxenden*, to call the said *W. J.* before him the said *G. O.* or any other competent judge of the said court of *Canterbury*, to answer to the said *Godfrey* in the said cause, for with-holding and non-payment of the said fees; and which was determined in the said cause, in the same court of *Canterbury*, was terminated in manner and form above pleaded, and the matters in the same contained are good and sufficient in law for the said *G.* to have his said Majesty's writ of consultation to issue in this cause to issue; which said plea and the matters therein contained, the said *Godfrey* is ready to verify and prove, the court shall please to direct; and because the said *W.* doth not answer to the said plea, nor hath in any wise denied the same, the said *Godfrey*, as before, prayeth judgment, and his said Majesty's writ of consultation to be granted to him in this cause, *and so forth.*

B. S.

And because the court of our said Lord the King now here is not yet thoroughly consider'd of their judgment to be given of concerning the premises; therefore a day is given to the said parties before our Sovereign Lord the King at Westminster until Wednesday next after (the day of the return) for the hearing of their judgment to be given of and upon the premises; for the said court of our said Sovereign Lord the King here are now and so forth.

CROUCH

Prohibition.

CROUCHER against COLLINS.

Mich. 19 Car. 2. Roll 382.

Southampton (to wit): Be it remember'd (that lately, that is 1 Saund.
to say) in the term of the Holy Trinity last past, came Henry 136.
Croucher of the parish of Corhampton in the county aforesaid,
Esq; who sues in this case, as well for our Sovereign Lord
the King, as for himself, by Charles Ballat his attorney, and
brought here into court his bill against William Collins, Esq;
proprietor (as he * asserted) of the rectory of the parish (*P368)
church of Corhampton aforesaid, in the custody of the marshal 2 Keb. 319.
of the Marshalsea of our Sovereign Lord the King of a plea 1 Ventr, 61.
of trespass and contempt, and there are pledges of prosecuting
(to wit) John Doe and Richard Roe; which said bill followeth
in these words (that is to say) Southampton (to wit) Henry
Croucher of the parish of Corhampton in the county aforesaid,
Esq; who sues in this case, as well for our Sovereign Lord
the King, as for himself, complaineth of William Collins,
Esq; proprietor (as he saith) of the rectory of the parish
church of Corhampton aforesaid, in the custody of the marshal
of the Marshalsea of our Sovereign Lord the King, before the
King himself, of a plea; wherefore he prosecutes a suit in
the Court Christian after his Majesty's prohibition, before di-
rected and delivered to him to the contrary thereof, for this
cause (that is to say) that whereas within the parish of Cor-
hampton aforesaid there are, and time out of mind have been,
as well a rector and vicar, as a rectory and vicarage of the
parish church of Corhampton aforesaid, which said rectory is,
and time out of mind hath been, a rectory impropriate: And
whereas within the parish aforesaid, the borders, limits and
tithable places thereof, there is, and time out of mind hath
been, a great number of arable land amounting to the num-
ber of forty acres, with its appurtenances: And whereas also
within the parish aforesaid, the borders, limits and tithable
places thereof, during all the time aforesaid, tillage hath
been, and now is, much used and exercised, and by reason
of such tillage a great quantity of corn yearly and every year
hath been reapt, had and received within the parish aforesaid,
the borders, limits and tithable places thereof; which
said corn never would have been received and had, unless by
the labour and industry of such persons using and exercising
tillage in the parish aforesaid, in form aforesaid, by making
hedges and fences about such arable lands where the said corn
grew, for the safety and defence of the same: And whereas
moreover the tithe of such corn yearly growing and arising
within have been if

75.
1 Sid. 443,
447.
Cro. Fliz.
493, 763.
1 Mod. 50.
Moo. 483.
530.
1 Rolls
Rep. 3.
2 Mod. 320.
2 Co. 44.
Hob. 296.
1 Jones 387.
Hard. 315.
The memo-
randum.
Declaration
in prohibi-
on setting
forth, that
time out of
mind there
hath been a
rector and
vicar, a rec-
tory and vi-
carage of the
parish church
of Corhampton,
that
there hath
been and is
a great deal
of arable
land there.
That there
has been a
great deal of
corn reapt
there, which
would not
have been if

Prohibition.

the hedges and fences had not been kept up. That the tithes have been paid to the rector, his farmer or deputy. That there is a custom for the tithes of frith wood. That the wood being used in repairing the hedges.

(*P369)

That the farmer should be encouraged to exercise tillage; and that the hedges might be kept in good repair; by which the rector has a larger share of tithes,

which were set out and taken in kind by the rector, &c.

within the parish aforesaid, the borders, limits and tithable places thereof, during all the time aforesaid, hath been payable, paid and render'd to, and had and received by the rector or proprietor of the rectory of the parish church of *Corhampton* aforesaid, his farmer or deputy of the said rectory, or of the tithes thereof: And whereas there is, and time out of mind hath been within the parish aforesaid, the borders, limits and tithable places thereof, the following custom for and concerning the tithes of frith or wood being under the growth of twenty-one years, sprays and twigs cut down, cropt, lop'd or top'd off and from any trees growing within the parish aforesaid, the borders, limits and tithable places thereof, to be apply'd to or used about the erecting, making and repairing of the hedges ruinous and in decay, within the parish aforesaid, the borders, limits and tithable places of the same, for the safety of the corn there growing, and not sold or otherwise disposed of (that is to say) that every person or persons having or possessing any such trees, who should cut down, crop, lop, or top the same, or any parcel thereof, and should apply and make use of the same for the erecting, making and repairing of the hedges of such person or * persons, ruinous and in decay within the said parish, the borders, limits and tithable places thereof, for the safety of the corn or grain there growing by reason that the family of such person or persons so exercising and using tillage within the parish aforesaid, the borders, limits and tithable places of the same, should be encouraged and the better able and willing to exercise and use such tillage for the repairing and obtaining the corn and grain aforesaid. Moreover, that by reason and means of such erecting, making and repairing of such hedges as aforesaid, being ruinous and in decay, the corn and grain of such person or persons might be the better defended, kept safe and preserved from being spoiled, destroyed and consumed by cattle that might otherwise break in for that purpose; and as the tithe of the corn and grain growing within the parish aforesaid, belonging to the rector or proprietor of the rectory of the parish church aforesaid, is much greater and made more profitable to such rector or proprietor of the said parish church, and the rather for that the tithe or tenth part in kind of such corn and grain growing, arising happening and increasing within the parish aforesaid, the borders, limits and tithable places thereof, during all the time, hath been severed and divided out from the other nine parts thereof, upon the lands where such corn and grain grew, to the use of, and been had, received and taken, by the rector or proprietor of the rectory of the parish church aforesaid

also per
qu
as
unc
lan
cut
the
of t
scrib
prop
farm
afore
perfo
tithes
cropt,
above
several
dred
three,
the gr
said A
the bo
apply
to in
decay,
with w
parish,
safety
custom
as by a
and, h
second
and esta
compell
ands, t
armes
was wer
which
did act
enthere
of the p
ant of t
be law o
of the sai
justly
and also
Vol. I

Prohibition.

aforesaid, his farmer or deputy; and on that occasion such person or persons, time out of mind, hath and have been acquitted and discharged of and from the payment of any tithes in lieu of all tithes of the trees aforesaid, as of such frith or wood being said frith or wood. under the growth of twenty-one years, growing in and upon the lands and tenements of such person or persons, and by them cut down, cropt, lopt or topt, and employ'd and apply'd to the uses for that purpose above specify'd, which said tithe of the corn and grain in the form above for that purpose described so defended, kept safe and preserved for the rect'or or proprietor of the rectory of the parish church aforesaid, his farmer or deputy, have been every year, during all the time aforesaid, accepted, received and had from such person or persons in full content, lieu, satisfaction, and stead of all tithes of the aforesaid premisses cut down, cropt, lopt, or topt, being apply'd to and us'd about the several purposes above mention'd in form aforesaid: And whereas also in the several and respective years of our Lord one thousand six hundred and sixty-two and one thousand six hundred and sixty-three, twenty loads of frith and wood, and no more, under the growth of twenty-one years, had been cut down by the said Henry on his said premisses within the parish aforesaid, the borders, limits and tithable places thereof, and had been apply'd to and us'd about the erecting and repairing of hedges to inclose his said forty acres of arable land then in great decay, in those several years sown with grain (that is to say) with wheat, rye, barley, peas, beans and oats, within the said parish, borders, limits and tithable places thereof, for the safety of the corn and grain there growing, according to the custom aforesaid, and not otherwise disposed of: And whereas by an act of parliament of Edward VI. late king of England, held at Westminster * in the county of Middlesex, in the second year of his reign, (amongst other things) it is enacted and established, that no person should be sued, or otherwise compelled to render, give or pay any tithes for any manors, lands, tenements or hereditaments, which by the laws and statutes of this kingdom, or by any privileges or prescriptions were not chargeable with the payment of any such tithes, or which had been discharged by any composition, as by the said act (amongst other things) more fully may appear. Nevertheless, the said William Collins, proprietor of the rectory of the parish church of Corhampton aforesaid, not being ignorant of the premisses, contriving contrary to the due form of the law of this kingdom, and contrary to the form and effect of the said statute, and the custom and prescription aforesaid, unjustly to vex, oppress and grieve the said Henry Crowcher, and also to deprive our Sovereign Lord the King, his crown

That in the years 1662, and 1663, eighty load of frith had been cut, &c.

and had been used and applied to the repairing the hedges.

Sets forth the act of parliament of 2 R. 6.

(*P370)

The grievance.

Prohibition.

and dignity, of the consance of a plea which belongeth to our Sovereign Lord the King, and not to the Court Christian, and to bring the same to a different trial in the said Court Christian, impleaded the said *Henry* in the said Court Christian before the worshipful and excellent *Giles Sweet*, doctor of laws, lawful official of the court of Arches, for and concerning the substracting of the tithes of the wood aforesaid in the aforesaid years cut down, apply'd to and employ'd by the said *Henry* about the purposes aforesaid, and for non-payment of the treble value of the tithes of the said wood in the said years supposed to be unpaid to and substracted from the said *William* by him the said *Henry*; and the aforesaid *William* on that occasion unjustly compell'd him the said *Henry* to appear before the said spiritual judge, and to make answer to the said *William* of and concerning the premisses; and altho' the said *William* had and received in those years the tithes of the said corn and grain in kind growing, cut down, reapt and taken within the parish aforesaid in those years, in and upon the said forty acres of arable land, to his own use and behoof; which could not have been had or taken in those years, without the labour and industry of the said *Henry*, so as aforesaid exercising tillage in the said parish, in full and intire contentment, payment, satisfaction, lieu, discharge, and stead of all tithes of frith growing in and upon his said premisses, cut down, crompt, lopt or topt in the said years, within the said parish aforesaid, borders, limits and titchable places thereof, and apply'd to and us'd about the purposes in manner and form above specify'd, according to the custom aforesaid; and altho' the said *Henry* before the said spiritual judge in the said Court Christian pleaded and alledged, and offer'd to prove in his discharge from the premisses all this matter with undeniable testimony to be true; nevertheless the same spiritual judge did altogether refuse to admit the said plea and allegation; and the aforesaid *William* doth endeavour and daily contrive to procure him the said *Henry* to be condemn'd in the said premisses in the said Court Christian, and by a definitive sentence of the said Court Christian to compel him to pay the tithes to the said *William*, by him demanded as above, in contempt of our Sovereign Lord the King; and altho' his present Majesty's writ of prohibition in this cause to the contrary had been directed and delivered to the said spiritual judge on the tenth day * of June, in the nineteenth year of the reign of his present Majesty at *Southampton* aforesaid, in the said county of *Southampton*. Nevertheless, the said *William Collins*, after his said Majesty's prohibition first directed and delivered to the contrary in form aforesaid, (that is to say) the twentieth day of June, in the nineteenth

(*P371)

Prohibition.

nineteenth year aforesaid, at the said parish of *Corhampton* in the said county of *Southampton*, proceeded further in prosecuting the said plea against the said *H.* notwithstanding his said Majesty's writ of prohibition first directed and delivered to him to the contrary, in contempt of our Sovereign Lord the King, and to the damage, prejudice, impoverishment and manifest injury of the said *Henry*, and contrary to the form and effect of the said customs and statutes. Wherefore the said *Henry*, who sues in this case as well for our Sovereign Lord the King, as himself, saith, he is thereby injur'd, and hath sustained damage to the value of forty pounds; and therefore as well for our Sovereign Lord the King, as for himself, brings this suit, *and so forth.*

And now here at this day (to wit) on *Wednesday* next after *Impar lance.*

St. Michael this same term (until which day the aforesaid *William* had leave to imparl to the aforesaid bill, and then to answer, *(and so forth)* before our Sovereign Lord the King at *Westminster*) come as well the said *Henry*, *who as well (and so forth)* by his said attorney, as the said *William* by *Thomas* *Coward* his attorney; and the said *W.* defendeth himself *on.*

Plea that he
doth not pro-
secute after
a prohibiti-
on.

against the force, injury and contempt, and the damages, and whatever else he ought to make a defence to, when the court will please to take the same into consideration, and saith, that he is not prosecuting the said *Henry Croucher*, *who as well (and so forth)* in the aforesaid Court Christian contrary to a royal prohibition to him for that purpose directed, as the said *Henry*, who as well *(and so forth)* by his declaration doth above suppose; and of this he puts himself upon his country, and the aforesaid *Henry Croucher* doth likewise the same; but in order to have a consultation in this cause, the said *William Collins* insisteth, that the declaration aforesaid in manner and form aforesaid made and declared, and the matters therein contained, are not sufficient in law for him the said *William Collins* to be precluded from having the tithes aforesaid demanded against the said *Henry* in the said Court Christian, and that he is under no necessity, or any ways bound by the laws of this kingdom in any manner to make answer thereto, in the manner and form aforesaid made and declared. Wherefore, for want of a sufficient declaration of the said *Henry Croucher* in this cause, the said *William Collins* prayeth the judgment of the honourable court, and his Majesty's writ of consultation to be granted to him in this cause, *and so forth.* A joinder in Demurrer.

Note; *The grand exception in my Lord Chief Justice Saunderson's reports, from whence this case is taken, was, that the suggestion did not in that case set forth, that the plaintiff was to use his own hoppings of the trees about fencing his own lands, nor that the corn which was inclosed with those hedges was his own corn.*

2 Inst. 653.

2 Co. 44.

Hard. 101,

315.

Cio. El. 512.

Mo. 483.

But 530.

Prohibition.

Popham *but only that eighty loads of frith, in the years one thousand six*
 1 Jones 360. *hundred and sixty-two, and one thousand six hundred and sixty-*
 (*P372) * *three, were cut and used in fencing an hundred acres of arable*
 1 Roll's Abr. *land within that parish, which said the counsel, and so held by*
 654. *the court, is an unreasonable custom; for by that the rector might*
 2 Roll's Rep. *be defrauded of all his tithes of the frith thro' the whole parish:*
 252. *For suppose one person in this parish to have three hundred or more*
 1 Jo. 13, *acres of wood, he might, as the custom is here laid, lop his trees,*
 368. *and give the loppings to others in the parish to inclose their corn;*
 Cro. Jac. 608, *therefore I have here alter'd this, as I conceive a prohibition will*
 544. *be granted.*
 Hob. 296,
 309.
 Bridge. 33. Popham 156. 157. Lat. 89. Paresley 137. 2 Salk. 655. 1 Roll's Abr. 641.
 pl. 36. lb. 644. pl. 9, 10. 1 Ventr. 75. 3 Cro. 499, 609.

MOORE against FAWCETT.

Cooke.

Mich. Term, 5 W. & M.

Suggestion to have a prohibition for defamatory words. Lut. 1037. *England (to wit): Be it remember'd, that the twenty-eighth day of November this same term, Nathaniel Moore and Eleanor his wife come here into this court by R. H. their attorney, and give this court here to understand, that the English words hereafter specify'd are only words of passion, and not grievous, dangerous or scandalous, for the speaking and publishing of which any action, citation or prosecution, by the law of this kingdom of England, ought or have been used or accustomed to be maintained in any Court Christian. Nevertheless Sarah, the wife of one Richard Fawcett, well knowing the premisses, contriving and maliciously intending unjustly to trouble, oppress, vex and disquiet the said Eleanor, contrary to the due form of the law of this kingdom of England, drew the said Eleanor into a suit in the Court Christian, before the worshipful John Cartwright, M. A. commissary in and through the whole archdeaconry of Richmond, in the diocese of Chester, of and for the speaking and publishing of the same Sarah certain words in the libel hereafter specify'd, and in libelling the said Eleanor in the said Court Christian, by reason of the premisses, set forth, that there was and is a certain provincial ordinance of this kingdom of England, beginning by the authority of Almighty God, whereby all and every the subjects of this kingdom of England are held and bound, in which said ordinance it is contained, that all those who for the sake of gain, hatred or thro' favour &c, or any other*

Linwood's provincial title, sententia excommunicatio- nis, p. 346. *† It may seem a little odd, and perhaps be objected to me, that I have elsewhere mistranslated the precedent or the precedent itself is wrong in this word thro' favour; but the provincial ordinance is so, and Linwood's notes run thus f. favoris. Potest enim esse quod nec propter lucrum nec propter odium aliquis alteri crimen imponat, sed ratione favoris vel amicitie quam gerit ex cordantis, ob amorem sui amici, & ut eum supportet per criminis obiectum denigrare vel dampnificare, & sic eum a suo proposito reprimere.*

cause

Prohibition.

cause whatsoever, maliciously impose a crime upon any person, whereby such person is defamed amongst good and great people, so that at least he might be sentenced to make purgation, or shall in any other manner be grieved, shall be and are in fact liable to the sentence of the greater excommunication: Also it is objected and articulated, that all and all manner of persons, who being inflamed with hatred or malice propense, contrary to good manners, and the brotherly rule of charity do at any time speak, utter and publish any reproachable or reviling language or * scandalous or injurious words against any one, which in any manner howsoever tend to the infamy or blackening the good character of any person whatsoever, they have been, and are, and ought to be, restrained and punished according to the tenor of the laws of the church for that purpose, and by the ecclesiastical censures are to be deterr'd and constrained, that they may for the future desist from speaking any such injurious words: Also it is objected and articulated, that the said Sarah, wife of the said R. Fawcett, was and is a very honest and unspotted woman in her life, character and conversation, and that she hath been in no wise aspersed, defamed or blacken'd with any crime (at least notorious) (except by the words underneath spoken) and for and as such hath been and is commonly called, held, reputed and taken to be within the parish of *Polton* aforesaid, and other neighbouring places: Also it is objected and articulated, that notwithstanding the premises the said E. Moore being guided by a wicked and malicious spirit, and having a mind inflam'd with a desire of injuring the said Sarah, in the months of *June* and *July* one thousand six hundred and ninety now last past, and in every, one or other of the said months, in the parish of *B.* in the county of *Lancaster*, defamed and injured the said Sarah, wife of the said Richard, and contrary to the rule of charity, christianity and good manners published, spoke and pronounced certain scandalous, opprobrious, outrageous, contumelious, injurious and defamatory words to or of the said Sarah F. and especially these English words following, or others to the same effect (that is to say) the said Eleanor Moore said, affirmed and reported, (although falsely) that the said Sarah Fawcett, wife of R. F. was a whore, and that the said R. F. her husband was a cuckold; and that she brought up her husband's daughter to follow the same trade, and to be a whore like herself; meaning thereby that she the said Sarah F. had committed the sin of adultery or fornication with some other person besides her husband, and caused her daughter to commit the like detestable sin of adultery or fornication: Also it is objected and articulated, that the said Eleanor Moore before credible witnesses had oftentimes, or

(*P373)

The words.

at

Prohibition.

at least once, confessed and acknowledged, that she had spoke, pronounced and published such scandalous words to or of the said *Sarah*: Also it is objected and articted, that by reason of speaking such defamatory and injurious words, the condition, good fame and character of the said *Sarah* was much injured with good and great people, and she greatly lessen'd in the good opinion and esteem of those to whom she had been formerly known: Also it is objected and articted, that the aforesaid *Eleanor Moore* was and is of the parish of *Bolton* aforesaid, in the archdeaconry and diocese aforesaid, as by a copy of the libel read here in this court more fully may appear; and although the said *Eleanor* pleaded and alledged in the said Court Christian before the said judge there, all and singular those matters and things by the said *Nathaniel* and *Eleanor* above suggested, in her discharge, of and from the premises mentioned in the said libel, and offered to prove the truth thereof with undeniable testimony; Nevertheless the same spiritual judge did then and yet doth entirely refuse to admit the said plea, allegation and proof; and the aforesaid *S. F.* doth with all her might endeavour and daily contrive to have the * said *Eleanor* condemned of and concerning the premises by a definitive sentence of the said Court Christian, and to compel her to pay to the said *Sarah* her expences and costs, to be taxed in that suit, in contempt of our Sovereign Lord and Lady the King and Queen, and to the damage, prejudice, impoverishment and manifest grievance of the said *Nathaniel* and *Eleanor*, and contrary to the law of this kingdom of *England*; and this the said *Nathaniel* and *Eleanor* are ready to verify. Wherefore they the said *N.* and *Eleanor* in humbly imploring the aid and assistance of this honourable court, pray speedy relief, and their Majesties writ of prohibition to be directed to the said spiritual judge, or to any other competent judge in this behalf, to prohibit them, and every of them, that they hold no farther plea whatsoever in the said Court Christian before them, or any of them, touching the premises. And it is granted to them accordingly.

Grievance.

(P* 374)

LEE against CORBUT and others.

Suggestion by the husband, that the wife ought not to make a will without his assent.
Billy, 321.

Be it remembered, that on *Monday* in three weeks of the *Holy Trinity* this same term, cometh before our Sovereign Lord the King at *Westminster*, Sir *Charles Lee*. Knt. in his proper person, and giveth to the court of our Sovereign Lord the King now here to understand and be informed, that whereas, according to the law of the land and customs of this kingdom of *Great Britain*, time out of mind had and used within this same kingdom, no married woman is at li-

berty

Prohibition.

berty to make her last will, or give or distribute by any tes-
 tament to any person or persons whatsoever, in any manner
 howsoever, any part of her estate, without the express con-
 sent of her husband, at the time of making or consummat-
 ing the same, or the allowing or ratifying thereof by her
 said husband after the making such testament; and although
 the exposition and discussion of the laws and customs of this
 kingdom of *Great Britain* belongeth to the temporal courts of
 our Sovereign Lord the King to be expounded, and ought
 not, nor have they time out of mind been accustomed to be
 tried, determined or discussed in any manner howsoever in
 the ecclesiastical court, or by the ecclesiastical laws or cus-
 toms: notwithstanding which one *Rachel Corbut*, spinster,
 and Sir *John Bowes*, Barr. contriving unduly to vex, oppress
 and grieve him the said *Charles*, contrary to the laws and
 customs of this kingdom of *Great Britain*, and also to disin-
 herit our Sovereign Lord the King of his crown and dignity,
 and to draw away the consance of a plea which belongeth
 to our Sovereign Lord the King, and not to the Court Chris-
 tian, to a different trial in the said Court Christian brought
 the aforesaid *Charles* into a plea in the prerogative court of
 the archbishop of *Canterbury*, before Sir *Richard Lloyd*, Knt.
 surrogate to Sir *Lionel Jenkins*, Knt. keeper, or master, or
 commissary of the prerogative court of *Canterbury*, or before
 some other judge competent for that purpose, alledging that
Sarah viscountess Corbut of *Linslade* in the county of *Bucks*,
 deceased, made her pretended last will and testament in
 writing, and ordained the said *Rachel* executrix thereof;
 whereas in truth and in fact the said viscountess, at the time
 of making the said pretended testament, was a * married
 woman, and wife of the said *Charles*; and in as much as
 they the same *Rachel* and *John* have not alledged or any
 ways pretended in their allegation aforesaid, that he the said
Charles gave his consent at the time of making the said tes-
 tament, or was in any wise privy thereto, or at any time
 afterwards in any manner ratified or confirmed the same,
 but on the contrary he the same *Charles* always before the
 making such pretended will, and ever afterwards hitherto
 hath disagreed to and disallowed the same; and the said
Charles for his answer to the allegation of the said *Rachel*
 and *John*, exhibited in the said Court Christian, protested
 against the said pretended will, and totally disallowed and
 disapproved of the same, and by his answer prayed that the
 said viscountess his late wife might be declared to have died
 intestate, and that letters of administration of all the goods
 and chattels, rights and credits of the said viscountess might
 be committed to the said *Charles* as husband to his said late
 wife:

The griev-
ance com-
plained of.

Allegation
that the
wife made
a will.

(*P375)

That the
husband did
not assent,

and prayeth
letters of
administra-
tion.

Prohibition.

wife: and although a pretended will of any married woman is of no force or effect in law without the assent of her husband thereto: and although the said viscountess, at the time of making her said pretended will, was married to the said *Charles* her husband; and although the said *Charles* never gave his assent to such pretended will; for which reason the said pretended will ought not to be approved of in the said ecclesiastical court; and although the same *Charles* hath alledged and pleaded all and singular the premises in the aforesaid Court Christian in his discharge against proving the said will, and offered to prove the truth thereof with undeniable testimony; Nevertheless the same spiritual judge altogether refused to admit such plea, allegation and proof, and resolved to proceed to prove the said pretended will of the said viscountess; and the aforesaid *Rachel* and *John* with all their might endeavour, and from day to day contrive, by a definitive sentence of the said court in the premises, to have the said *Charles* to be condemned, in contempt of our Sovereign Lord the King, and to the great damage, prejudice and manifest impoverishment of the said *Charles*, and contrary to the laws of this kingdom of *Great Britain*. Wherefore the same *Charles* in humbly imploring the aid and assistance of our Sovereign Lord the King, prayeth relief, and his Majesty's writ of prohibition to be directed to the said spiritual judge, or to any other judge whatsoever, competent for that purpose, that he hold no further plea before him in any manner howsoever touching the premises. And it is granted to him accordingly.

Prohibition
prayed.

THOMPSON against DAVENPORT.

Suggestion
for a prohibition to the
spiritual
court, that
customs
ought to be
tried at common law.
(*P376)
Lut. 1059.
That customs belong
to the temporal courts
of law.

England (to wit): Be it remember'd that the twenty-third day of *January* this same term, cometh here into court one *John Thompson* of *Kirton* in the county of *Nottingham* and diocese of *York*, by *Richard Booth* his attorney, and giveth this same court here to understand and be informed, that all and all manner of pleas and businesses arising and springing from any lawful customs or prescriptions, within this kingdom of *England* used and approved of * time out of mind, and all manner of pleas of such prescriptions or customs of any validity in law, and the cognizance of the same specially belong to our Sovereign Lord the King that now is, and his royal prerogative, and not to the ecclesiastical court, and hitherto ought and have been accustomed to be tried, determined and discussed by the common law of the land of this kingdom of *England*, in the King's temporal courts of record before the King himself or his justices of the common bench.

Prohibition.

or other temporal justices or judges, and not by any ecclesiastical laws or customs in any Court Christian. Nevertheless one *John Davenport*, clerk, perpetual vicar of the perpetual vicarage of the parish church of *Clinton* in the county of *Derby* and diocese of *York*, well knowing the premisses, but contriving and fraudulently intending unduly and unjustly to vex, oppress and grieve the said *John Thompson*, contrary to the due form of the law of this kingdom, and to deprive the said king of his crown and dignity; and of the cognizance of a plea which belongs and appertains to our said Sovereign Lord the King, his crown and dignity, to bring the said *John Thompson* into a different manner of trial in the Court Christian, hath drawn the said *John Thompson* into a plea before the worshipful *Henry Watkinson*, doctor of laws, lawfully appointed principal official of the consistory court of *York*, or some other judge competent for that purpose, of and concerning a certain pretended ancient custom or prescription used and approved of within the parish of *Clinton* aforesaid, that every woman inhabiting within that parish, and taking to husband any man there or elsewhere with a licence for dispensing with publishing the banns of matrimony, such woman used, and of right ought, by their respective husbands, at their respective celebrations of matrimony, soon after to pay the sum of five shillings to the vicar of the vicarage aforesaid for the time being, by craftily and subtilly libelling against him in the same Court Christian in form following: That is to say, that for ten years last past or more the said *John Davenport*, clerk, had been, as he then was, lawfully constituted perpetual vicar of the perpetual parish church of *Clinton* in the county of *Derby*, and rightfully and lawfully instituted and inducted into the same vicarage, with all and singular its rights and appurtenances, and had been during all that time in full and quiet possession, or that which amounted to a possession of the said vicarage, (except hereafter excepted) and during all that time had been and then was called, held, accounted, named and reputed as the vicar openly, publicly and notoriously within the parish of *Clinton* aforesaid, and other neighbouring places. That for these twenty, thirty, forty, fifty and sixty years last past and more, and for and during the time whereof man's memory doth not extend to the contrary, there hath been, as still there is, an ancient and laudable custom or prescription inviolably used and observed within the said parish of *Clinton*, by which custom or prescription every parishioner or inhabitant within or of the said parish being a woman, and marrying there or elsewhere with a licence to dispense with the publication of the banns

That the defendant libelled the plaintiff, setting forth that there had been and then was a custom to pay five shillings for marrying without licence.

That the defendant was vicar.

The libel.

of

Prohibition.

(*P377) of matrimony, have paid (the grievance in this cause only excepted) and so ought to pay by their respective * husbands at the celebration of their respective marriage, or soon after, to the vicar of *Clinton* aforesaid for the time being, the sum of five shillings of lawful money of *England*, for and as the accustomed duty and fee belonging to the vicars aforesaid, for and in respect of the said marriage; and that in the several months of the year one thousand six hundred and ninety-nine, one *Martha Waterhouse* was a parishioner and inhabitant of and within the said parish of *Clinton* in the month of *October*, or thereabouts, in the year of our Lord one thousand six hundred and ninety-nine, she the said *M. Waterhouse* married to him the said *John Thompson*, and then had a licence to dispense with the publication of the banns of matrimony, and that the said *John Thompson* hath not paid or satisfied to the said party *John Davenport*, clerk, the said sum of five shillings; but though the same had been required and demanded by the said *John Davenport* before the commencement of this suit, the said *John Thompson* hath hitherto with-held and refused, or at least hath unjustly deferred the due payment of the same; and that the said *John Thompson* had been, and then was, of the parish of *Kirton*, in the county of *Nottingham* and diocese of *York*, and as such under and subject to the jurisdiction of the same court, and that there had been and then was a publick discourse and fame of and concerning all and singular the premises within the parish of *Clinton* aforesaid, and other neighbouring places, as by a copy of the libel in this court read more fully and plainly appears: and the same *John Davenport* unjustly constrained the said *John Thompson* to appear before the said spiritual judge in the said Court Christian, and to answer to the said *John Davenport* of and concerning the premises; and although the said *John Thompson* in his discharge of and from the payment of the aforesaid sum of five shillings demanded by the said *John Davenport* as aforesaid, in the said Court Christian often pleaded and alledged all and singular those things by him above suggested, and offered to prove the same with incontestable evidence; Nevertheless the same spiritual judge altogether refused to admit or receive such plea or allegation; and the aforesaid *John Davenport* endeavours with all his might, by a definitive sentence of the said Court Christian, to procure the said *John Thompson* to be condemned of and concerning the premises, and to compel him to pay to the said *John Davenport* the said five shillings, as above demanded, in contempt of our Sovereign Lord the King, and to the manifest damage and injury of the said *John Thompson*, and contrary to the law of the land

Prohibition.

of this kingdom; and this the said *John Thompson* is ready to verify. Wherefore the said *John Thompson* in imploring the aid and assistance of this his Majesty's court of Common Bench now here most humbly prays, that he may be relieved, and have his Majesty's writ of prohibition directed to the said spiritual judge, or his surrogate, or any other judge whatsoever in that case competent to prohibit them and every of them, lest they or any of them take any further cognizance of the aforesaid plea, in any manner howsoever, before them or any of them. And it is granted to him accordingly, and so forth.

* Upon this a prohibition was granted, the court thinking the (*P378)
 as unreasonable. Lut. 1062.

MACHIN against MAULTON.

Hill. 13 W. 3. C. B.

Nottingham (to wit): *W. M.* clerk, rector of the parish church of *South Collingham* in the county of *Nottingham* aforesaid, was attached to answer to *J. M.* who in this case sues as well for our Sovereign Lord the King, as for himself, of a plea by he prosecutes suit against him the said *J. M.* in the Ecclesiastical court, to the prejudice of our Sovereign Lord the King, his crown and dignity, and contrary to his Majesty's prohibition before directed and delivered to him (and so forth). And thereupon the same *J. M.* who as well (and so forth) by C. his attorney complains, that whereas he the said *J. M.* the year of our Lord one thousand six hundred and sixty-eight was, and always from thence unto the end of the year our Lord one thousand six hundred and ninety-three hath been, an inhabitant within the parish of *S. C.* aforesaid, the orders, limits and titheable places thereof, and a possessor and occupier of divers parcels of land, with their appurtenances lying and being within that parish. And that the aforesaid *W. M.* now is and for many years last past (that is to say) for the space of twenty-nine years and upwards hath been the rector of the parish church aforesaid, and that long before the same *W. M.* had any thing of and in the said rectory, with its appurtenances, one *W. B.* was rector of the said church, and seised of the said rectory, with its appurtenances, in his demesne, as of a fee in right of his said church; and being so seised, it was agreed the last day of November one thousand six hundred and fifty at *S. C.* aforesaid, between the said *W. B.* on the behalf of himself and his predecessors of the one part, and the proprietors and tenants

Prohibition to the spiritual court for tithes, upon a suggestion of an ancient parcell agreement between the predecessor of D. and the proprietors and tenants of the parish of, &c. and to which he hath agreed.

The agreement between the predecessor of and the de-

Prohibition.

seignants the
tertenants.

of the same parish of the other part, that the lands lying in the said parish should be inclosed with hedges and fences at the expence of such proprietors and ter tenants for the better manuring such lands, and that the said *W. B.* and all his successors, rectors of the parish church aforesaid for the time being, should have the tenth acre of land titheable, lying and being within the parish aforesaid, the borders, limits and titheable places thereof, there separated and inclosed from the residue of the said land, to the sole use and benefit of the said *W. B.* and his successors, rectors of the said rectory for the time being, in full satisfaction and discharge of all tithes, oblations and ecclesiastical rights whatsoever yearly growing, renewing, arising and happening within the parish aforesaid, the borders, limits and titheable places thereof; and that in pursuance of the said agreement all the lands lying within the said parish aforesaid have been inclosed according to the said agreement, and ten titheable acres have been separated and inclosed within the same parish for the aforesaid *W. B.* And the said *W. B.* hath accepted and held the same for himself and his successors, in full satisfaction of all tithes, oblations and ecclesiastical rights, according to the said agreement, during all the time that the said * *W.* remained rector of the said church of *S. C.* and after the death of the said *W. B.* (that is to say) the last day of *February* one thousand six hundred and sixty-eight the aforesaid *W. M.* was instituted and inducted into the said rectory, and from thence hitherto hath been and still is rector of the said church, and then agreed with all the proprietors and ter tenants to all things contained in the said agreements, and in pursuance thereof enter'd into the said tenth acre of land inclosed, as aforesaid, for the said rector, and then did, and ever since hath, and now doth occupy the same according to the said agreement; and the aforesaid proprietors and ter tenants during all that time that the said *W. M.* hath been rector of that church, have been discharged from the payment of all tithes, offerings and ecclesiastical rights, according to the same agreement, until the said *W. M.* impleaded the said *J. M.* in the said Court Christian before *H. W.* doctor of laws, hereafter mentioned, by libelling as hereunder is specify'd. And whereas all and in manner of pleas whatsoever for contracts, bargains and compositions between any subjects of this kingdom of *England* for any tithes, goods or chattels whatsoever arising and happening within this kingdom of *England*, and concerning the validity of the same in law, and such other pleas and matters do belong and appertain to our Sovereign Lord the King, his crown and dignity, (and not in any wise to the ecclesiastical or spiritual courts) and ought and always hitherto have been

(*P379)

Prohibition.

tried, determined and discussed in his Majesty's courts of record before his justices and other secular and temporal judges, and not in a Court Christian before any spiritual judge, or elsewhere: Nevertheless the said *W. M.* not being ignorant of the premisses, but contriving and fraudulently intending to oppress and grieve the said *J. M.* and to disinheret our Sovereign Lord the King of the prerogative of his crown and dignity, contrary to the form and effect of the aforesaid composition and agreement, and to draw the consufance of a plea which belongs to our Sovereign Lord the King, his crown and dignity, to a different trial in the Court Christian, impleaded the said *J. M.* in the said Court Christian before *H. W.* doctor of laws, principal official lawfully constituted of the gracious Consistory Court of *York*, or some other judge competent in that behalf, of and for substracting of tithes in the libel hereafter mentioned, growing, increasing, renewing and arising from and out of his tēpements within the parish aforesaid, the borders, limits and titheable places thereof, contrary to the form of the composition and agreement aforesaid by craftily and subtilly libelling against the said *J. M.* in the Court Christian, and so forth.

And then he sets forth the libel, and alledges that he hath pleaded all the matters above in that court, and the defendant traverses the agreement and issue thereupon, and judgment for the plaintiff. After several debates in arrest of judgment the plaintiff had judgment for him in Trinity Term the first of Queen Anne, by the opinion of the whole court.

* ADAMS against OAKES.

(*P380)

Hill. 7 W. 3.

Be it remember'd, that on *Wednesday* next after the *Utas* of *St. Hillary* this same term before our Sovereign Lord the King at *Westminster* cometh *John Adams* of the parish of *W.* in the county of *Stafford*, yeoman, in his proper person, and giveth this court to understand and be informed, that whereas all and all manner of pleas and businesses of and concerning prescriptions and customs of this kingdom of *England* and the cognizance of the same belong and appertain to our Sovereign Lord the King, his crown and dignity, and ought and always hitherto have been accustomed to be tried and discussed in the courts of record of our said Sovereign Lord the King, and not in any Ecclesiastical Court: And whereas within the parish of *Hansworth* in the county of *Stafford*, the borders, limits and titheable places of the same, there hath been time out of mind, and now is a custom and mode of titheing, that all

A suggestion for a modus of tithes.

A modus to pay a penny and for a milch

Prohibition.

cow, and a
half-penny
for every
calf.

The grie-
vance.

(*P381)
The libel.

For tithes of
the herbage
of cattle.

and every proprietor of any lands, meadows or pastures within the parish of *Hansworth* aforesaid, their farmers or occupiers, have been used and accustomed to pay yearly to the rector of the rectory and parish church of *Hansworth* aforesaid, for the time being, or to his farmer thereof, for every milch cow had, kept and depastured within the parish of *Hansworth* aforesaid, one penny, and for every calf, to the number of seven, generated and nourished within the parish aforesaid, one half-penny, in lieu and in full payment, satisfaction and discharge of all tithes of the herbage of such cows, and of milk, butter, cheese, and such victuals, in what manner soever happening, growing, renewing or increasing, from the aforesaid cows; which said several sums of money payable and paid all and singular the rectors of the aforesaid church for the time being, or their farmers thereof, for all the time aforesaid, have yearly accepted, received and had of every occupier in full lieu and satisfaction of all and singular the aforesaid tithes happening, renewing and growing. And whereas the same *John* now doth, and for five years last past hath held, occupied and enjoyed certain parcels of land and meadow called the *Little Park Meadow*, within the parish of *Hansworth* aforesaid; and during that time the said *John* hath kept and depastured in and upon the same parcels of land and meadow, two milch cows, of which said two milch cows two calves have been yearly generated and nourished within the parish aforesaid: Nevertheless one *Thomas Oakes* being rector of the rectory and parish church of *Hansworth* aforesaid, well knowing the premisses, contrary to the due form of the law of this kingdom, and contrary to the custom aforesaid, in order to grieve and oppress the said *John Adams*, and to draw the cognizance of a plea which belongeth to the courts of our Sovereign Lord the King to a different trial in a Court Christian, hath craftily and subtilly impleaded the said *John* in the Court Christian before the worshipful and excellent Sir *Richard Raines*, Knt. doctor of laws, principal official of the Consistory Court of the bishop of *Litchfield* and *Coventry*, * or his surrogate, by libelling against the same *John* in the said Court Christian (amongst other things) that from an ancient and laudable custom used, approved of and observed within the parish of *Hansworth* aforesaid, and the borders, limits and titheable places thereof, every foreigner dwelling out of the parish of *Hansworth* aforesaid, and occupying any land and so forth, lying and being within the said parish of *Hansworth*, depasturing land with beasts and cattle hath been accustomed, of right ought, and is obliged to pay to the rector of the rectory of the parish church of *Hansworth* aforesaid for the time being, his farmer or collector of tithes according

Prohibition.

according to the annual value or rent of the said lands lying or being within the said parish of *Hansworth* the sum of two shillings of good and lawful money of *England*, for every pound sterling as the said lands were yearly worth, for and in consideration and lieu of the tithes of the herbage (*and so forth*) of the said lands, and of the pasturing the beasts and cattle in and upon the same; and that in the months of *March* one thousand six hundred and ninety-two and one thousand six hundred and ninety-three, and in the months of *March* in the year of our Lord one thousand six hundred and ninety-four, and every of them, the aforesaid *John Adams* was a foreigner, and dwelt out of the parish of *Hansworth* aforesaid, (that is to say) in the parish of *Westonwith* aforesaid, and occupied lands within the parish of *Hansworth* aforesaid, the borders, limits and titheable places thereof, of the yearly value or rent of three pounds, which he depastured and fed with beasts and cattle during all that time, or a great part thereof, and on that occasion unjustly compell'd and constrained the said *John* to appear before the said spiritual judge, and to answer to the said *Thomas Oakes* of and concerning the premises: Whereas in truth he the same *John* in the months aforesaid never kept, fed or had any beasts or cattle within the parish of *Hansworth* aforesaid, of or upon the said parcel, land or meadows called *Little Park Meadow*, or in any other place within the said parish of *Hansworth*, except the two milch cows after mention'd, and two calves, yearly, during the time aforesaid generated and nourished from the same cows: And altho' the same *John Adams* always was ready at *Hansworth* aforesaid, and offer'd to pay to the said *Thomas Oakes* yearly, and every year of the said years, two pence for the aforesaid two cows depastured within the said parish, and one penny for the two calves yearly generated and nourished from the said cows according to the form of the custom and mode of titheing aforesaid: And altho' the same *John* hath pleaded all and singular the premises contained in this suggestion, and offered to prove the same in his discharge in the said Court Christian with undeniable testimony to be true: Nevertheless the said spiritual judge altogether refused to admit or receive the said plea, allegation and proof aforesaid, and with all his might endeavours and daily contrives to compel the said *John Adams* to pay the said money specify'd in the said libel, in contempt of our Sovereign Lord the King, and to the damage, prejudice and manifest oppression of the said *John*, and contrary to the due form of the law of this kingdom, and the prescriptions and customs aforesaid; and this he is ready to verify. Wherefore * the said *John* hum-

An averment
that he of-
fer'd to pay,
&c.

That the
judge refus-
ed to admit
the plea.

(*P382)

Prays a pro-
hibition.

prayeth

Prohibition.

prayeth relief and his Majesty's writ of prohibition directed to the said spiritual judge, or to any other judge whatsoever competent in that behalf, to prohibit him that he shall not any further hold plea before him touching or concerning the same premisses in any manner howsoever, and that he shall not presume or attempt any thing further therein. And if by reason of the premisses he hath thunder'd out his sentence of excommunication against the said *John Adams*, then that he altogether under a penalty incident thereto absolve the said *John*, or cause the said sentence to be revoked and annulled. And it is granted to him accordingly.

OLDHAM against PEPPER.

A suggestion
for a prohibition that the
Court Christian refuseth
the now
plaintiff a
copy of the
libel.
Lilly 321.

Be it remember'd, that on *Wednesday* next after fifteen days of *Easter* this same term cometh here, before our Sovereign Lord the King at *Westminster*, *John Oldham* in his proper person, and giveth this honourable court here to understand and be informed, that whereas one *Robert Pepper*, doctor of laws, principal official of the Consistory Court of the bishop of *Norwich*, caused the said *John Oldham* to be cited to appear before the said official, or his surrogate, or some competent judge in that particular, in the Cathedral Church of *Norwich*, the seventh day of *December* last past, there to answer to certain articles taken or interrogated by virtue of his said office of official, at the promotion of *John Houghton*, Esq; and *A. N. Gent.* churchwarden of the parish church of *St. George Tombland* in *Norwich* aforesaid, objected and administered against the said *John*: And altho' the same *John Oldham*, according to the aforesaid citation at the aforesaid day assigned as aforesaid, appeared before the said official, and being requested by the said official to answer to the premisses, prayed a copy of the libel or articles, in order that he might answer the premisses according to the form of the statute of his Majesty *Henry V. King of England*, made in the second year of his reign, to be delivered to him: Nevertheless the said official not esteeming or regarding the said statute, but contriving, contrary to the form of the same, unjustly and unduly to oppress, vex and grieve the said *John Oldham*, refuseth, and still doth refuse a copy of the libel or articles of the premisses to the said *John Oldham*; and nevertheless the said official pronounceth the said *John Oldham* contumacious in not answering to the articles aforesaid, and by means of such contumacious sentence of excommunication was unjustly decreed against the said *John Oldham*, to the great damage of him the said *John Oldham*, in contempt of his said Majesty, and against the form of the said statute; and this he is ready to verify.

Wherefore

Prohibition.

Wherefore the said *John Oldham* humbly imploring the aid and assistance of his present Majesty, prays relief, and his said Majesty's writ of prohibition directed to the said spiritual judge, or other competent judge in that behalf, to prohibit him from holding any plea in the premisses before him, and from any ways proceeding therein until he cause to be delivered to the said *John* a true copy of the libel or articles exhibited in the said Court Christian against the said *John Oldham*, and that the said spiritual judge, if sentence * should be pronounced against the said *John* for his contumacy in not answering to the articles aforesaid, may release and totally absolve him the said *John* from the same. And it is granted to him accordingly. (*P383)

Be it remember'd, that the *Tuesday* next after the month of *Easter* in this same term *W. C.* cometh before the King at *Westminster* in his proper person, and informeth his said Majesty, that whereas *M. W.* late prioress of the late priorship of *P.* in the county of *W.* was of late seized of and in the same late priorship, of and in one orchard, one close called the *Barn-Yard*, containing by estimation half an acre of meadow, and pasture of one close and meadow called *Mott Meadow*, containing by estimation sixteen acres of pasture in *P.* in the said county, lately belonging to the said late priory, and parcel of the possessions thereof, and from the time of which the memory of men had not been to the contrary, until the time of the dissolution or suppression of the same, she the said prioress for herself, her farmers or tenants thereof for the time being (amongst other things) had, held and occupied discharged of and from the payment of any tithe of hay of, in or upon these tenements, with the appurtenances, or any parcel thereof yearly in whatever manner by the whole time aforesaid, growing, renewing, happening, coming forth or increasing; and the said late prioress being so seized of the said late priory, and of the said tenements with the appurtenances, held the same discharged from the payment of the tithes of hay thereupon growing, renewing or taken, the said late priory, and all the lands, tenements and hereditaments hereunto belonging, by force of an act of parliament made at *Westminster* in the county of *Middlesex*, and publish'd in the twenty-seventh year of the reign of *Henry VIII.* late King of *England*, came to the hands of the said late King, by virtue of which the said late King was seized of and in the said late priory, and the said tenements, called *M. Meadow* and *R. Close*, in his demesne as of fee, in right of his crown of *England*. And whereas in the statute in the parliament of the said late King *Henry VIII.* held at *Westminster* aforesaid the twentieth day of *April* in the thirty-first year of his reign

Suggestion that the tenements whereupon the libel is had were parcel of a priory.

The stat. of 27 H 8. for suppression of monasteries and lands belonging to religious houses.

Statute of 31 H. 8. c. 31. for the discharge of

Prohibition.

their lands
from the
payment of
tithes.

(*P384)

That King
Hen. 8. by
letters patent
granted the
premises,
&c. to the
said W. C.

(amongst other things) it was firmly ordained, that as well the said late King, his heirs and successors, as all and every such person and persons, their heirs and assigns, who then had, or from thenceforth afterwards should have any monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friars, and other ecclesiastical houses or places, sites, circuits and precincts of the same, or any of them, or any manors, messuages, parsonages appropriate, tithes, pensions, portions, or other hereditaments whatsoever they were, which before that time had belong'd or appertain'd, or which then did belong or appertain unto the said abbies, monasteries, priories, nunneries, colleges, hospitals, houses of friars, or other religious and ecclesiastical houses, or places, or unto any of them, should have, hold, retain, keep and enjoy as well the said parsonages appropriate, tithes, pensions and portions, as the said monasteries, abbathies, priories, nunneries, * colleges, hospitals, houses of friars, and other religious and ecclesiastical houses and places, sites, circuits, precincts, manors, messuages, lands, tenements, and other hereditaments whatsoever they were, and every of them, according to their estates and titles, discharged and acquitted of payment of tithes as freely, and in as large and ample manner as the said late abbots, priors, abbesses, prioresses, and other ecclesiastical governors or governesses, or any of them, should have held, occupied, possessed, used or enjoyed the same, or any parcel thereof, at the days of their dissolution, suppression, renouncing, relinquishing, forfeiture giving up, or coming to the said late king, of such monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friars, or other religious houses or places, or at the day of dissolution, suppressing, renouncing, relinquishing, giving up or coming to the said late King, of any of them, the said act, or any thing in the same contained, to the contrary thereof notwithstanding : By force of which said statute, or of the rest of the premises, the said late King Henry VIII. by himself, his farmers and tenants thereof, had and held the said premises with the appurtenances, called *M. Meadon* and *R. Close*, discharged from the payment of the tithe of hay, growing, increasing and renewing of, in and upon the same tenements, with the appurtenances, or any part thereof, yearly, in whatsoever manner growing, renewing, coming or happening ; and being so seised thereof, the said late King afterwards (that is to say) the thirtieth day of *March* in the thirty-fourth year of his reign, at *Westminster* in the county of *Middlesex*, by his letters patent sealed with his great seal of *England*, and in due manner executed, bearing date the same day and year, gave and granted the said tenements, with the appurtenances

Prohibition.

appurtenances, called *M. Meadow* and *R. Close*, with the appurtenances, unto the aforesaid *W. C.* to have to him and his heirs for ever, to hold of the same late King, as of his crown, by virtue of which said letters patent the said *W. C.* enter'd into the said tenements, called *M. Meadow* and *R. Close*, with the appurtenances, and was thereof seised in his demesne as of fee, and being so seised thereof, held the same tenements, with the appurtenances, by himself, his farmers or tenants, discharged from the payment of any tithe of hay yearly growing, renewing, happening and increasing of, in or upon the said tenements, called *M. Meadow* and *R. Close*, or any parcel thereof, by virtue of the said act, and of the rest of the premisses: And whereas also in the statute in the parliament of the said late King *Henry VIII.* held at *Westminster* aforesaid, in the thirty-first year abovesaid, it was enacted, that no person or persons should be sued or constrained to render, give or pay any tithes for any manors, lands, tenements or hereditaments, which by the laws and statutes of this kingdom of *England*, or by any privilege or prescription, were not chargeable with the payment of tithes. And further, whereas in the statute of the late King *Edward VI.* in the second year of his reign (amongst other things) it is contained, that no person should be sued or otherwise compelled to render, give or pay tithes for any manors, lands, tenements or hereditaments, which by the laws and statutes of this kingdom of *England*, or by any privilege or prescription were not chargeable with the payment of any such tithes of hay * thereupon growing, taken or had, but by that whole time were, and every part and parcel thereof was altogether discharged from the payment of such tithes as aforesaid. And whereas also such causes controversies and pleas of tithes, demanded contrary to the form of the aforesaid acts and statutes, and the cognizance of the same, do not appertain to the Ecclesiastical court in any manner howsoever. Nevertheless, the said *W. S.* farmer of the rectory of *R.* in the said counties of *Warwick* and *Diocese of Worcester*, not being ignorant of the premisses, and intending unjustly to grieve, oppress and molest the said *W. C.* against the due form of the law of this kingdom of *England*, and against the form and effect of the said statutes; and also to deprive the now King and his royal prerogative, of the cognizance of a plea which belongs to the said King and his regal crown, and not to the Court Christian, and to draw the same to a different manner of trial into the Ecclesiastical Court, caused the said *W. C.* to be cited before the worshipful, &c. (here mentioning the judge of the Ecclesiastical Court) of and for the taking away and non-payment of the tithe of hay by the said *W. C.* had grown, increased, and taken

The act of
31 H. 8.
that no person should be
sued or constrained to
pay tithes,
where by
privilege or
prescription
the lands
were not
chargeable.

The stat. of
Ed. 6.

(*P385)

The grievance.

Prohibition.

off, in and upon the said tenements, with the appurtenances, in the year of our Lord one thousand seven hundred and thirty; and the said *W. S.* unjustly compell'd him the said *W. C.* to appear in the Court Christian aforesaid, to make answer before the said spiritual judge relating to the premisses: And altho' the said *W. C.* in the said Court Christian before the said spiritual judge, in his discharge from the premisses, had pleaded and brought undeniable testimony to prove all the matters above contained in this suggestion to be true. Notwithstanding the said judge altogether refused to admit the said plea, allegation and proof; and the said *W. S.* with all his force is endeavouring and daily contriving to procure the said *W. C.* to be condemn'd in the premisses, and thereby to compel him the said *W. C.* by the definitive sentence of the said Court Christian, to pay the said tithes of hay, in contempt of his present Majesty, and to the damage, prejudice, impoverishment and manifest grievance of him the said *W. C.* and against the force, form and effect of the said statute; and this the said *W. C.* is ready to prove. Whereupon the said *W. C.* most humbly beseeching the aid and assistance of this court, and to be relieved in the premisses, prays his said Majesty's writ of prohibition to be directed unto the said spiritual judge, or any other competent judge whatsoever in this behalf, that they or any of them may not hold any further plea touching the premisses, or any part thereof, in any manner howsoever. And it is granted to him accordingly.

Prohibition
to the court
of Stannaries
in the coun-
ty of Corn-
wall, for
holding plea
of matters
which con-
cern the
Stannaries.

(*P386)

Be it remember'd, that the twentieth day of November the same term came here into court *J. L.* in his proper person, and gives this court here to understand, that whereas by the laws and statutes of this kingdom of *Great Britain*, it is provided that the keeper of the stannaries of our Sovereign Lord the King, and of the stannaries within the counties of *Devon* and *Cornwall*, or keeper or keepers of his place for the time being, may and shall not hold any pleas before him in the court of stannaries aforesaid, unless such as arise between stannators while they work in the stannaries, and between them and any other foreigners, of any * trespasses, plaints, contracts made within the places wherein they work within the stannaries. Nevertheless, one *J. C.* gent. administrator of the goods and chattels of *J. C.* his father, not being a stannator in any of the stannaries aforesaid, well knowing the premisses, but endeavouring and intending very much to grieve and oppress the said *J.* against the laws of this kingdom, revived a plaint against the said *J. L.* in the stannary court of our Sovereign Lord the King of *F.* in the said county of *F.* before the sub-steward of the stannary court aforesaid, or

depo

Prohibition.

deputy or keeper of his place in the court aforesaid, or one of them, in a certain plea of account, upon a supposition that the said *L.* had been a receiver of the monies of the said *J. C.* the father, and as such to have received of the monies of the said *J. C.* the father, in his life-time, (*viz.*) twenty pounds of one *J. M.* to render an account thereof to the said *J. C.* and unjustly constrained the same *L.* by arresting of his body, to appear in the said Stannary Court of *F.* aforesaid, by occasion of the premisses, and to answer the said *C.* of and concerning the premisses, against the law of the land of this kingdom of Great Britain; whereas in truth the said *J. L.* or the said *J. C.* have not, or either of them, at the time of levying of the said plaint, or at any time afterwards, hitherto hath been tinner working in any stannary work within the said county of *D.* And whereas in truth the account aforesaid doth not concern any tinner, or matter or matters belonging to the said stannaries; and altho' the same *J. L.* in his discharge before the said warden, sub-warden and steward, often pleaded and alledged in the Stannary Court aforesaid, and offer'd to prove, with undeniable testimony, the matters above by him alledged to be true: Nevertheless the said warden, sub-warden, steward, deputy or keeper of the place, would not admit of such plea, allegation and proof, but altogether refused so to do; and the same *J. C.* notwithstanding such plea, allegation and tender of proof of the said *J. L.* as aforesaid, in the said premisses, is endeavouring and daily contriving to procure the said *J. L.* to be condemned before the said warden, under-warden, steward, deputy or keeper of that place, in the plea aforesaid, in contempt of our Sovereign Lord the King, and to the manifest damage, injury and impoverishment of the said *J. L.* and against the laws of this kingdom of Great Britain; and this he is ready to verify. Wherefore the said *J. L.* humbly beseeching the aid and assistance of this court, prayeth relief, and his Majesty's writ of prohibition to be directed to the said warden, under-warden, and to the said *J. C.* his counsellors, attornies and solicitors in this behalf whatsoever, to prohibit them, and every of them, that they, or any of them, proceed no further in the said cause, or in any thing that concerns the premisses in the court aforesaid, before the said warden, (*and so forth*) or presume to attempt any thing more in the same, in the said court, which may tend to the damage of the said *J. L.* or to the prejudice of the law of this kingdom, or in contempt of his present Majesty, his crown and dignity. And it is granted to him accordingly.

Be

Prohibition.

(P*387)

Suggestion
for a prohi-
bition on the
admiralty,
for that it
holdeth plea
for words.

* Be it remembered, that (*the first day of the term*) before our said Sovereign Lord the King at *Westminster*, *J. O.* comes in his proper person, and gives this court to understand, That whereas after the conquest by a statute made and published in the parliament of his late Majesty *Richard II.* late King of *England*, at *Westminster* in the county of *Middlesex*, in the thirteenth year of his reign, (amongst other things) it was enacted, That the admirals or their deputies should not meddle from thenceforth with any thing done in this kingdom, but only upon the sea, as in the time of the then late noble prince King *Edward*, then late grandfather to the said King *Richard II.* had been duly used: And whereas also in a statute made in the parliament of the late King *Richard II.* held at *Westminster* aforesaid in the fifteenth year of his reign, (amongst other things) it is ordained and firmly established, that the said admirals of all manner of contracts, pleas and quarrels, and all other things arising within the bodies of counties, as well by land as by water, and also of the wreck of the sea, should in no ways have the cognizance, power or jurisdiction; and that all such contracts, pleas and quarrels, and all other things done, rising within the body of the county, as well by land as by water, as aforesaid, and also the wreck of the sea, should be tried, ended and discussed, and remedied by the laws of the land, and not before or by the admiral or his deputy, in any manner whatsoever. And whereas also, all and singular pleas of whatsoever trespasses, speeches, and publishing of scandalous *English* words whatsoever, touching or concerning the bankruptcy, insufficiency or poverty of any person being a merchant at the time of the speaking or publishing the same scandalous *English* words, and all other such pleas and matters, do not belong to the jurisdiction of the Court of Admiralty, nor ought in any manner whatsoever to be tried, ended and discussed before the admiral, or him or them holding the said place, but the same do specially appertain and belong to our Sovereign Lord the King and his royal crown, and ought, and time out of mind have been used and accustomed to be tried by the common law of *England*. Notwithstanding which one *J. Rayner*, merchant of the city of *London*, well knowing the premises, cunningly devising and intending, contrary to the laws of this kingdom of *England*, unduly to grieve, oppress and molest the said *J. O.* and to deprive our said Sovereign Lord the King of his royal prerogative in this behalf, and also to draw the cognizance of a plea which belongeth to our said Sovereign Lord the King, and not to the Court of Admiralty, before the worshipful and excellent (*the name of the judge*) doctor of laws, chief president of the Court of Admiralty,

Prohibition.

his lawful deputy, or some other competent judge in this behalf, of and for the protestation of the poverty of the said *J. Raynes*, a merchant, and of his insufficiency to pay his just debts, by speaking, publishing and affirming the *English* words following (that is to say) (*here mention the words*) and so forth, as by the libel of him the said *J. R.* exhibited and preferred against him the said *J. O.* and brought here into this * court, more plainly may appear; whereas in truth (P³⁸⁸) the speaking, publishing and affirming of the said scandalous words, and the aforesaid protestation by the said *J. O.* before in the said libel specified, if any, or whatsoever the like or any other speech, promulgation, affirmation or protestation of words, were had, made and done, the same were had, made and done at *Guilford* in the county of *Surrey*, and not upon the high seas, or within the maritime jurisdiction; and the said *J. R.* is with all his force endeavouring and daily contriving to compel the said *J. O.* to make answer to the said *J. R.* in the said Court of Admiralty of and concerning the premisses, and to cause the said *J. O.* to be condemned in the said Court of Admiralty: And although the said *J. O.* in his discharge often pleaded, alledged and brought undeniable testimony, to prove all and singular the premisses in the said Court of Admiralty before the said judge to be true; nevertheless the said judge of the Court of Admiralty altogether refused to admit such plea, allegation and proof, in contempt of our Sovereign Lord the King, and to the manifest damage, prejudice and impoverishment of him the said *J. O.* and this the said *J. O.* is ready to prove. Whereupon the said *John* here most humbly beseeching the gracious aid of this court, prayeth relief, and his Majesty's writ of prohibition to be directed to the judge of the said Court of Admiralty, to prohibit him that he in no wise should any further hold the aforesaid plea of the premisses, depending before him, in any manner howsoever, &c. And it is granted unto him accordingly, &c.

Readings

Readings on Prohibitions, with an Abridgment of the Cases in the Reports.

A WRIT of *prohibition* is a writ granted by the King's superior courts at *Westminster*, viz. the Court of Chancery, King's Bench, Common Pleas, and Exchequer, either to particular persons, or to inferior jurisdictions.

Of which therefore there may be said to be two kinds.

First, Such as are granted to prohibit persons from continuing an act which they have begun contrary to the common or statute law of this kingdom; as where a *Quare Impedit* is brought against the incumbent, and *pendente lite* he commits waste, the court will grant a *prohibition*. Hob. 36. Moor 917.

So for erecting any thing that is obnoxious to the commonwealth of this kingdom, as (*ex. gra.*) a *prohibition* was granted for erecting a bowling-alley near St. Dunstan's church, it being a nuisance. And in 1 Mod. 76. in *Jacob Hall's* case, that point was cited by *Hales*.

And a *prohibition* hath been granted to the bishop of *Durham*, upon a suggestion that he was selling timber, and suffering dilapidations. 1 Rol. Rep. 86.

Secondly, Such as are granted to the Court Christian, Court of Admiralty, or some inferior court, upon a suggestion that the party grieved, and praying a prohibition, is prosecuted in such court, contrary to the laws of *England*, and to the dishonour of his Majesty's crown and dignity, either in the matter or manner of the suit.

So that of this latter sort of *prohibitions*, it may be said to be granted in the following instances:

First, Where the matter in dispute is triable wholly at common law, which is to be preferred before the civil law.

Secondly, Where the Court Christian, Court of Admiralty, or some inferior temporal court, exercise a jurisdiction which they have not at all; or exceed that jurisdiction which they have, either by taking cognizance of more than they ought to do, or of matter out of their jurisdiction in point of limits as to place.

Thirdly, For that such Court Christian, Court of Admiralty, or inferior court of law do not, in their manner of proceeding distribute justice to the parties, according to the wisdom and provision of the common or statute laws of this kingdom.

Fourthly, Where one inferior jurisdiction infringes upon another.

Readings and Observations on Prohibition.

So that in the *first* and *second* instances this writ may be termed *restrictive*, in the *third remedial*, and in the *last* an instrument of interposing authority.

It may be said to be *restrictive* in the *first* and *second* instances, because it absolutes, prohibits and restrains such spiritual, admiral or inferior court from proceeding any farther in the matter in variance, in regard of its being an infringement upon the courts of law, as to the whole matter in dispute, or by taking cognizance of some matter incidental, which is wholly triable at law, or for usurping a jurisdiction of trying a matter for which the party by the law of the land ought not to be answerable in any court whatsoever.

And in the *third* it may be well termed *remedial*, because it is granted, not because it is an infringement on the superior courts; but because by the * manner of their proceedings (P* 390) justice is not done to the defending party, and that therein they act in violation of the laws of *England*; and therefore this writ, in several cases where it is granted for their not proceeding consonant to the law of *England*, is not *absolute* but *conditional*; (that is to say) a prohibition till they have complied with the terms of that condition, when they shall regain their power of judging between the parties, and proceed to execute the sentence of their court; as where in a case cognizable in the spiritual court, they refuse to give the defendant a copy of the libel, or refuse such evidence as ought to be admitted. The prohibition is not *absolute*, but *quousque* they admit such evidence, or grant the copy of the libel. And in the *last instance* it may be termed *an instrument of interposing authority*; for that it is not granted in that case, because such spiritual court in any wise infringe upon the jurisdiction of a superior court; or does it give relief in regard to their acting contrary to, or in violation of the laws of *England*; but it is granted in respect of the superintendency the superior courts have over the inferior, and their power as well of regulating and correcting their errors, as of determining the disputes between inferior jurisdictions.

The several acts of parliament, that appear to have been made relating to prohibitions, are as follow:

3 Ed. 1. By which it is enacted, that a prohibition shall cap. 1. lie to the (a) spiritual court on (b) fornication, avowtry,

(a) On which statute observe, that the ecclesiastical judges derive their jurisdiction therein by parliament, and the custom of the realm, and not from any foreign power. 2 Inst. 488.

(b) That in ancient times *fornication* and *adultery* were punishable in the Leet, and the King had the fines assessed for these offences. *Ibid.*

Readings and Observations

(P^{re} 391)

try (*i. e.* adultery) (*c*) or such like; for which sometimes corporal, and sometimes (*d*) pecuniary penance is inflicted, ornaments, or (*e*) reparation of the church, (*f*) tithes due or (*g*) accustomed, not exceeding a (*h*) fourth part of church oblations, mortuaries, (*i*) pensions, (*k*) * striking a clerk (*l*) and defamation, when money is not demanded, but is done for a punishment of sin; and likewise for (*m*) breaking an oath.

This

(*c*) That by the word *hujusmodi*, in this act, is to be understood offences of the like nature, as the two offences there expressed, as *Solicitation of chastity* and *incest*. 2 Inst. 488.

(*d*) This must be intended for commutation of penance, as appears by the statute of *Atie super chartas*. Cap. 2.

(*e*) That of right the parishioners ought to repair the church, and that this statute extends to a chapel annexed to it, but not to a private chapel, for that must be repaired by the owner.

(*f*) That the right of *tithes*, before this statute, was determined in the King's courts, but now the conuzance of subtraction of tithes belongs to the Court Christian.

(*g*) By this act the parson may sue upon a *modus* or *prescription* in the Court Christian, where the duty is personal, but not where the duty is real; as a real satisfaction for a discharge from tithes. 2 Inst. 491.

(*h*) That at this day, where a parson, of the presentation of one patron, demands tithes of another by the presentation of another patron, amounting to a fourth part; it is to be tried at common law. 2 Inst. 491.

(*i*) That this statute extends only to a pension claimed, which had its essence by some ordinance made by the ordinary; but if claimed by prescription, it must be tried at common law; but this opinion of *Coke* was by *Keeling* and *Twifden* in Ven. 3. in the case of the *Bishop of Lincoln* against *Smith* held not to be law; for the spiritual court having conuzance of the principal, shall have conuzance of the matter incident.

(*k*) That the end of the suit, for laying violent hands on a clerk, must be only *pro salute animæ*, by excommunication, or corporal penance; but not for damages.

(*l*) That the defamation must be merely spiritual, and not mixed with a matter temporal determinable at common law, and it must be only *pro salute animæ*, and not for damages; and the particular defamation must be express in the libel, nor for giving evidence upon an inquest, nor for a charge of perjury, nor for words which at common law are not words of reproach.

(*m*) And where they cannot hold plea of the principal, they cannot hold plea of accessory.

on Prohibition.

This statute is called the statute *de circumfactis* against, and in my lord Coke's comment upon this statute, 2 Inst. 487, he tells us, that these things mentioned therein, which were temporal, and not merely spiritual, did not belong *ab initio* to the Court Christian.

24 Ed. 1. Where no writ lieth out of Chancery to redress the matter, a consultation may be awarded.

34 Ed. 1. That an *indicavit* shall not be granted, till the matter be recorded by the spiritual court.

This writ of *indicavit* was an ancient writ by the common law of England, as may be seen in *Glanville*, lib. 4. cap. 13. to remove a writ into the King's courts; and if the incumbent of one patron, demanded tithes against the incumbent of another patron, this writ of *indicavit* laid, because the right of patronage would come in question. *Vid.* 2 Inst. 364.

This act recited, that thentofore suits met with unmeet delays, by the *indicavits* being sued out before the suit in the spiritual court was recorded; so that the statute ordains, that no *indicavit* shall issue till the suit shall be recorded, and the chancellor hath a sight of the copy of the libel.

35 Ed. 1. Where it lies, if a parson cuts trees in the churchyard, unless it be to repair the chancel; but if the body of the church be out of repair, the parson would do well to relieve the parishioners by bestowing the trees. But says the statute, we do not command them to do it, but shall commend them when done.

9 Ed. 2. Commonly called *Articuli Cleri*, a prohibition lieth on a demand for money in the spiritual court; for the sale of (a) tithes in a barn, but not in a suit for tithes.

Cap. 1. It lies of (b) tithes to the fourth part of the goods, the goods of the church, on the right of patronage, and on (c) pecuniary penance; but not on corporal penance bought off by money, it doth not.

Cap. 2. A suit for a (d) clerk *infra sacros ordines*, to have satisfaction for being beat lies before the King, but excommunication for that cause may before the prelate. (P. 392)

Cap. 3. No prohibition lies, where corporal penance is inflicted, and bought off by money.

Cap.

(a) *Vid.* 2 Inst. 603, 605, 610, 611, 612, 619. V. Coke's comment upon the statute of 18 Ed. 3. cap. 7. of tithes. 2 Inst. 639. upon the second of Ed. 6. cap. 13. 2 Inst. 649.

(b) *Vide* 2 Inst. 489, 490, 491, 492, 620.

(c) *Vide* 2 Inst. 492, 604, 607, 620.

(d) *Vide* 2 Inst. 492.

New Natura
Brev. 105.

Readings and Observations

- Cap. 5. It lieth not, where the defendant in a suit, in the Court Christian is excommunicated for not paying tithes of a new mill. *Vide* 2 Inst. 621.
- Cap. 6. The King's courts shall discuss matter notwithstanding a sentence in the spiritual court. *Vide* 2 Inst. 622.
- Cap. 7. The King's writ to assil (that is absolve) parties excommunicated shall not issue, but where it is found the King's prerogative is prejudiced. *Vide* 2 Inst. 623.
- 1 Ed. 3. A prohibition lieth on a suit in the spiritual court, for defamation against the prosecutors of indictments.

Cap. 11. It may not be amiss before we abridge the cases under the head Prohibition, to speak somewhat of the spiritual jurisdiction in the following manner :

The spiritual ordinary jurisdiction is all in the bishop, *i. e.* in the archbishop throughout his province, and in the bishop within his particular diocese ; whereby they are called Ordinaries, or Spiritual Judges.

By the statute of 37 H. 8. cap. 17. every doctor of the civil law legally deputed may exercise all ecclesiastical jurisdiction, and their censures.

Prerogative.

The King is the supreme ordinary (viz.) by the ancient common law of England, before the statute of 24 H. 8. cap. 12. For (a) resignation might be made to him, he (b) might give a church to hold to his own use, he might not only (c) exempt any ecclesiastical person out of the jurisdiction of the ordinary but might besides grant him episcopal jurisdiction, he might (d) present to his free chapels (in default of the dean) by lapse, and that as ordinary, and in respect of his supreme ecclesiastical jurisdiction. Also he might (e) dispense with a bastard to be a priest, although the ecclesiastical laws allowed within this kingdom prohibits it ; (and the reason is) because it is not *malum in se*, but only *malum prohibitum*. And all that the Pope used to do in such cases within this kingdom, *viz.* (f) provisions, (g) appeals to the court of Rome to (h) hold plea of things spiritual arising here. (i) Excommunication under his bulls, and such like, were nothing but usurpations and encroachments upon the dignity and prerogative royal.

(g) See the preamble of the statute of 24 H. 8. cap. 12. (h) 9 E. 4. b. New Natura Brev. 100 N. (i) 30 Ass. pl. 19. 7 Ed. 4. 14.

Sometimes that ordinary jurisdiction is delegated to other spiritual persons, as to archdeacons, or such like, in some particular places ; whereby they are called Peculiars.

(a) 19 Eliz. Dyer 408.
(b) 7 E. 3. Fitz. Qu. Imp. 19.
V. 29 E. 3. 9.
(d) 1 H. 7. 23.
17 Ed. 3. 23.
(d) 27 Ed. 3. 84.
F.N.B. 34 f.
(e) 11 H. 7. 12.
(f) 19 Ed. 3. Fitz. Quare non admittit, pl. 7.
See the statute of 23 Ed. 3. de provisionibus.
F. N. B. 44.

on Prohibition.

Matters arising from our laws, upon an issue at common law, of a matter of fact, which is a spiritual thing, (*as bastardy, excommunication, or such like.*) The trial shall be by the (1) certificate of the ordinary; and *therefore his certificate makes an end of the matter, and is not traversable. (1) Vide the (*P393) recital in the statute of 9 H. 6. Cap. 11. 7 Co. 14. b. 7 Ed. 4. 14. 8 H. 6. 3.

The ordinary is also an immediate officer to the King's courts as to things spiritual, (*i. e.*) for serving their process, which shall be done by the ordinary himself, not by the commissary, archdeacon, or any other, although he hath immediate jurisdiction, if he be not specially admitted an officer to the court. 12 Ed. 4. 15.

Of suits in the Spiritual Courts.

The suit in their courts is by libel. The proceeding by citation and censures of the church, (*i. e.*) (a) excommunication, if the party does not appear, or for other contempts, as disobeying their sentence, or such like. (a) Vide the statute 2 H. 6. Cap. 3. for citation and libel. Vide the statute articuli Cleri, Cap. 12.

By the statute *Articuli Cleri*, the King's tenants may be cited out of the parish or vill.

Matters arising from our law.

The suit of a person excommunicated shall be put without day, till the party is absolved. The entry whereof is *remaneat loquela sine Die quousque, &c.* 3 H. 6. 40. Litt. 44.

Prerogative.

If he who is excommunicated, will not by forty days be reconciled to the church, and submit to their censure, the King upon a *significavit*, *i. e.* a certificate made to him by the ordinary into the court of Chancery will put him in prison, and so to punish him by his body, till he makes satisfaction to the church for his contempt; and that by a writ of *excommunicato capiendo*, which writ is also a *justicies*. Old N. Brev. 34. 35. b. New N. Brev. 145. And if the sheriff will not execute this writ, the party shall have an alias and a pluries, and an attachment against the sheriff returnable in the King's Bench. New N. Brev. 145. c.

Statutes.

V. 5. Eliz. Cap. 23. *The manner of the execution of that writ.*

When the church is satisfied, and they don't absolve him, the party may have a writ *de excommunicato deliberando*, to be discharged out of prison. Old N. Brev. 35. a. Fitz. N. Brev. 63. a. New N. Brev. 145. a. If the sheriff will not execute this writ, the party shall have an alias and a pluries, and an attachment against the sheriff directed to the Coroners.

When

Readings and Observations

Fitz. N. Brev. 636. When one taken by a writ of *excommunicato capiendo*, offers sufficient sureties, or caution to obey the church, which is refused, he shall have a writ *de cautione admittenda*, to have that caution admitted, and to be discharged; and it may be either to the ordinary himself to command him to discharge him, which the ordinary may do by parol, or to the sheriff to discharge him; and then it is with an *excommunicato deliberando*.
New N. Brev. 145. c. See more concerning this writ in Old N. Brev. and New N. Brev. 145, 146, 147, 148, 149, 150, 151. Spiritual law.

(*P394) * If the party is grieved by the sentence, he may have an appeal, and thereby the sentence is suspended, till the appeal is determined.

By the statute of *Articuli Cleri*, cap. 2. it appears, that they are to judge of offences, and of matters of interest.

(a) *Articuli Cleri*, cap. 2. The suit in matter of offences is not to recover damages, or any other thing; and the (a) prelates cannot impose any pecuniary mulct, but it is only to inflict a punishment upon the offender (*pro salute animæ*) which is called penance; but the party may redeem it with a (b) pecuniary amends. The King may pardon such offences. 5 Co. 51. For all suits there of that nature (i. e. to inflict a punishment on the offender) not only ex officio, but at the prosecution of the party grieved, are for the King; inasmuch as a punishment only is to be inflicted, and no damage to be recovered, and therefore he may pardon them.

The offences punishable in the Court Christian are either, Such which may be punished *ex officio judicis*, or such for which the offender may be prosecuted by the party * *dammifid*.

The first sort are,

(c) The statute de circumspice agatis. Heresy, Simony, (c) *avowtry*, fornication, and (d) *usury* before several acts of parliament made, the latter (punishable by common law) (e) not receiving the sacrament of his curate, (f) letting the church-yard be uninclosed, or the church uncovered, or not conveniently decked, (g) for the breach of an oath, or such like.

(c) Reg. f. 49. 1. Roll's 126. 2. Roll's Rep. 111, 262, 270. Noy 41. 2. Keb. 254, 439, 739. 3. Keb. 286, 726, 802. 2. Mod. 8, 222, 223. 3. Mod. 284, 5. Mod. 447. (f) The statute de circumspice agatis. (g) Fitz N. B. 53. b.

Parson or curate here in this court for offences of the greater nature, as Heresy, &c. may be deprived. F. N. B. 53. b. So for Homicide, so if a chancellor be sued in the Court Christian for his insufficiency, they are the proper judges. 3 Cro. 65. 4 Mod. 27.

Fitz. N. B. 53. a. In offences which may be prosecuted by the party damaged, he shall recover costs, and sue for them in the Court Christian: So also he shall sue there where the other party agrees to pay him a certain sum for amends to be excused from corporal punishment.

The statute de articulis contra prohibitionem regiam 2 Inst. 489. Articuli cleri, cap. 3. The statute de circumspice agatis

on Prohibition.

The offences of the latter sort are,

First, The laying violent hands upon the clerk. *Vide* 2

Inst. 429.

Secondly, * Defamation of avowtry, i. e. adultery, or of-
fences of the like nature, whereof the Spiritual Court hath
consuance.

**Vide* 3 Co. 110, 207, 285, 309, 340, 456, 457. 1 Sid. 248, 404, 433, Latch 14, 15. 2 Lev. 49, 63, 66. 1 Mod. 21, 22. B Mod. 74. 4 Mod. 367. Het. 94. 2 Cro. 535. 2 Roll's 82. 1 Roll's 61, 217. rShow. 131, 337. 2 Salk. 352, 547. Moor 460, 607, 855, 906. 2 Keb. 334, 577, 335, 441. 3 Keb. 28, 58, 64, 200, 284.

Thirdly, The taking and detaining of a man's wife; for a man may sue there *pro restitutione uxoris*, although he may have an action of trespass, or on the case at common law. *F. N. Brev.* 52. k. *New Na. Brev.* 121.

* The suits which are for the interest of the party are,

(*P395)

First, For matters which tend to the maintenance of the church.

As a parson shall sue there against the parishioners, for subtracting of his tithes, for disturbing him in carrying them away by the ways and passages, used for that purpose; for a mortuary where it hath been accustomed, for oblations, obventions, &c., *But if the parson sells these tithes in his barn, he shall not sue for the money in the Spiritual Court.*

One incumbent might sue another for tithes, or other fruits of the church where they were claimed by one and the same patron, and where the right of patronage, or of the avowson did not come in question, before the statute of *W. 2. c. 5.*

And now by the said statute, he may sue in the Court Christian for tithes, although they claim by several patrons; so that the right of avowson does not come in question, nor they demand the fourth part of the value of the church. *F. N. B.* 51. *Vide* the said statute of *circumspecte agatis.* Before the statute of 18 E. 3. c. 7. the right of tithes was determinable in the Temporal Courts, at the election of the party, and by that statute were determinable in the Ecclesiastical Courts only. *F. N. B.* 30. But see Coke in his ecclesiastical laws, 16 and 2 of *Ed. 6.* 7 and 8 *W. 3. c. 6.* he may sue in the Exchequer as the King's debtor.

By 18 Edw. 3. *pro clero*, cap. 7. writs of *scire facias* shall not be granted hereafter to clerks to answer for the tithes in Chancery. Before that statute, the right of tithes was determinable in the Temporal Courts, at the election of the party, and now by that statute it shall be determined in the Ecclesiastical Courts, and the Temporal Courts are excluded.

Also one parson or vicar may sue another in the Spiritual Court for a pension due to him. *Cro. Ja.* 666.

And

Readings and Observations

And may sue the executors of his predecessor for the dilapidations of his predecessor. 13 *Eliz. cap. 10.* 14 *Eliz. cap. 11.* 3 *Lev. 413.* *vide postea.*

Church-wardens of the church may sue there for goods devised for the reparations of the church, or church-yard. *F. N. B. 30. c. Reg. fol 57.*

Parishioners and the parson may sue there the tenants or possessors of any lands within the parish, who have time out of mind used to find a chaplain for divine service in the parish church. *F. N. B. 53.*

They have likewise consufance of causes matrimonial and testamentary. *Vide* the said statute of 13 *Ed. 1. of circumfpecte agatis, articuli cleri, cap. 1, 2, 3, 4, 5, 6, 13.*

Secondly, Causes matrimonial and testamentary.

Vide 13 *Ed. 1. de circumfpecte agatis. 2 Inst. 487, 488, 489, 490, 491, 492, 493. Articuli Cleri, cap. 2, 3, 4, 5, 6, 13. 2 Inst. Coke's comment upon that statute. Rast. prob. 5. 1 R. 2. cap. 14.*

15 E. 3. cap. 6.

* 1 Sid. 432.

2 Keb. 578.

Maddocks

v. the Chan-

cellor of

164. Boyle

Harris v.

In cases * matrimonial are to be considered the contract itself, and the right of marriage, a promise to marry a daughter, matters of divorce, bastardy, and the like.

Peterborough. 1 Mod. 22. S. C. 2 Mod. 314. Anonym. 3 Mod. v. Boyle. 5 Mod. 268. Haines v. Pelscot. Vaughan 240. 1 Salk. 548. Hicks. 2 Keb. 551. Howard v. Freme. 2 Lutt. 10:9, 1075.

And see concerning marriages the several acts of parliament following.

32 H. 8 & 38. Where all marriages are declared lawful, which are not prohibited by the law of God.

2 Edw. 6. c. 28. Where the authority of the ecclesiastical judge is confirmed.

5 Edw. 6. Concerning the marriage of priests.

(*P396)

* 1 Jac. 1. c. 11. Concerning a man's marrying two wives.

7 & 8 W. 3. Of marrying without a licence, and

10 A. c. 10. Which gives half of the penalty to the informer.

Where a man marries a woman, where he had issue before, such issue, in the spiritual law, is a *Mulier, i. e. legitimate* issue, and is not a bastard. But in our law such issue is a bastard, and not inheritable. *Finch's law 143 b.*

In causes testamentary it is necessary to observe,

That it hath not always been the law for the church to have the probate of wills in this kingdom. For the Temporal Courts have the probate of wills in all other places, except in *England*; and in many places in *England* at this day, the lords of manors have the probate in their Temporal Courts. And the Bishop in ancient times, had no power to grant administration, but when a man died intestate. The King (as *Parens Patriæ*) used by his officers to seize the goods,

9 Co. 35,
37, 39.

on Prohibition.

the intent that they might be preserved, and disposed of for the burial of the deceased, for payment of his debts, for the advancement of his wife and children, if he had any; if not, to his kindred.

But now the will is to be proved before them in the Spiritual Courts, and the executor is sworn to perform it. 21 Ed. 4, 24. Vide 2 Cro. 346. Egerton v. Egerton. 3 Cro. 94. Wesley v. Allen. 115. Dean's case 165. Hill v. Thornton 395, 396, 397. Netter v. Brett. 2 Sid. 143. Combe v. Combe. 1 Mod. 90. 1 Show. 293. Hill v. Miles & al'. 2 Salk. 552. Outridge's case. Hard. 313. Herbert v. Barrow. 2 Keb. 838. Stroud's case.

Matters arising from our law.

Where there are several *executors*, and one (*a*) *refuse*; yet (*a*) *There* he may (*b*) *administer* at his pleasure, and the other shall name *sal* of one (*c*) *him* in any action for a debt due to the testator, and the (*d*) *when the* release of him that refuses will be a bar of the entire debt; *rest adminis-* and if he survive the other executor (*e*) *he* shall have the admi- *ter, the re-* nistrati- *fusal is void.* on, and not the (*f*) *executor* of him that died. Otherwise is *1 Salk. 307.* if they all refuse, for then the (*g*) *testator* died *quasi* (*h*) *in-* *5 Co. 28.* *estate.* But if the executor once *administer*, as if he sells land, (*i*) *1 Salk.* which is appointed to be sold, or meddle with the adminis- *37.* tration, &c. he cannot afterwards (*i*) *refuse.* And by the sta- *(d) 1 Salk.* tute of 21 H 8. cap. 4. *Where a man devises, that his execu-* *(e) 1 Salk.* *tor shall sell his lands, and one refuses, the other may sell.* *311. and* *administra-* *tion granted during his life is void.* *1 Salk. 307, 308.* Q. if not good, if he refuses to ad- *ministrati-* *ministrate.* (*f*) The administrator of an executor cannot be executor to the first testator. *1 Cro. 88. 2 Rep. 37. Dyer 236. b. Mo. 273. 1 Cro. 92. Ow. 44. 1 Leon. 23c. 2 And. 17. 1 Bro. 58. Salk. 5. 311. Far. 39. Yelv. 130. (b) So where one executor as-* *1 Salk. 309.* *sum v. Cunningham cited. And the Spiritual Court is to grant administration de bonis non,* *1 Salk. 304. (i) 1 Salk. 308.*

Spiritual law.

For legacies given in a will not issuing out of lands, the legatees may sue there. 1 Cro. 88. Wi. 78. 2

Ben. 139, 209. 1 Keb. 291. 1 Roll. Rep. 12. 2 Show. 158. 2 Salk. 547. Ben. 139, 311. 1 Keb. 324. 709. 3 Keb. 676.

Where a man died intestate, the ordinary had the disposition of all the goods and chattels of the *intestate*, to be distributed in *pious usus*. For he who had the care of his *soul* in his lifetime, was presumed to be the fittest person to have the care and disposal of his *effects in pious usus* after his death; and therefore the ordinary might seise the goods, and * keep (*P397) them without wasting them; and might *alien* them, or *sell* them at his pleasure, and dispose of the money which he had for them in *pious usus*; and if he did not so do, he broke that 9 Co. Hen- *flor's case.* trust and confidence which the law reposed in him. But yet

Readings and Observations

yet his gift or alienation remained good in law; yet he being a spiritual governor was not subject to temporal suits, could not have an action of debt, or any other action for any monies due to the intestate.

By the statute of Westm. 2. cap. 9. where the intestate is obliged in any debt, the ordinary shall answer as long as he hath assets, as the executor shall do.

This administrator created by the statute is taken notice of by the common law, as one who hath an interest vested in him; and when the Spiritual Court hath granted administration, they have finished their authority; and therefore if they go about to repeal their administration, the courts of law will prohibit them. *Vide postea Allen 56.*

By the 31 of Edw. 3. cap. 11. the ordinary shall depute the next friend of the intestate to administer, and they shall sue and be sued, and be accountable to the ordinary as executors.

By the 21 of H. 8. cap. 5. he was to grant administration to the widow of the intestate, or to the next of kin, or both, at his discretion; where they were in equal degree, the ordinary might grant administration to which he pleas'd, that required the same.

Many disputes arising concerning the distribution of intestates effects, and a multitude of prohibitions having been sued out where the ordinaries granted partial administrations, sometimes taking no security, and did not distribute the intestates effects in such manner, that justice was done to the people; therefore the statute of 22 & 23 Car. 2. was made.

§. 1. cap. 10. By that statute, ordinaries, &c. are to take bonds with two or more sureties in the name of the ordinary, with a condition mentioned in the act, §. 2.

§. 3. Ordinaries are to call administrators to an account, and to make distribution amongst the wife and children, or kindred in equal degree, saving to every one his right of appeal.

§. 4. This act not to extend to London.

§. 5. The surplus to be thus divided, one third to the wife of the intestate, and the residue to the children; and such persons as represent such children, except such child, &c. (not being heir at law) provided for by settlement, equal to the share to be distributed; such settlement to be made equal to the others, out of the effects, but the heir at law to have an equal share with the rest, notwithstanding his estate.

§. 6. If no children, nor representatives of them, then one moiety to the wife, the other to the next of kin, in an equal degree, and their representatives.

§. 7. If no wife, then equally amongst the children, and if no child, then to the next of kin in equal degree, and their representatives.

§. 8. No

on Prohibition.

§. 8. No distribution till after a year, and that those who have their distributions shall be chargeable pro rata, to the administrator, towards payment of just debts.

§. 9. This act not to extend to administrations granted with the will annexed.

By the 29 Car. 2. cap. 3. the above act was not to extend to the estates of feme coverts.

* By the statute of 1 Jac. 2. cap. 17. no administrator shall be cited into any ecclesiastical or other courts, having right to take probate of wills, to render an account of the personal estate of his intestate; otherwise than by an inventory thereof, unless at the instance of some person in behalf of a minor, or having a demand out of such estate, as a creditor, or next of kin, nor shall be compellable to account before any ordinary or judge, impower'd by the act of 22 & 23 Car. 2. cap. 10. otherwise than as aforesaid. (*P398)

If after the death of a father, any of his children shall die intestate, without wife or children, in the life-time of the mother, every brother and sister, and their representatives, shall have equal share with her. There is a clause in the said act, for the better settling intestate estates, by which is provided, that that act shall not prejudice the customs of the city of London, and province of York, shall not be construed to extend to such part of any intestate's estate as an administrator, by virtue of his being so, by pretence of any custom, may claim to exempt the same from distribution.

45 Edw. 3. cap. 3. A prohibition lieth to the Spiritual Court on a suit there for tithe of wood of twenty years growth, commonly called Sylva Cædua. Vide 2 Inst. 642. Cro. Jac. 100. that this statute was but in affirmance of the common law. But if the defendant in prohibition pleads, that the trees were dry, hollow and rotten, whether tithes shall be paid for the boughs. * That no action will lie for a suit there, for tithes for great trees above twenty years growth, tho' not titheable, bought by the party only; for where a statute prohibits a thing, and adds no penalty, an action will lie, if brought *qui tam pro Domino Rege quam pro seipso*, because the King is to have a fine. Vide Cro. Jac. 134.

* V. Moor
908.
1 Roll 690.
1 Cro. Eliz.
477. 8.
11 Co. 49. a

50 Edw. 3. cap. 4. A prohibition shall not be granted after a consultation for the same cause. But if a consultation be not duly granted according to the intent of the statute, (which is to be intended where it is granted upon examination of the matter, and not for the insufficiency of the proceedings) a prohibition may be granted even after a consultation. Cro. Eliz. 736. Yelv. 102. Sibley v. Crawley.

2 H. 5. cap. 3. That a copy of the libel in the Spiritual Court be delivered to the party where a libel is grantable by law.

Readings and Observations, &c.

34, 35 H. 8. cap. 11. §. 4. A prohibition lieth not where the archbishop, bishop, &c. sues for a pension, simony, &c. lawfully issuing, and enjoy'd ten years before the dissolution of monasteries; and a remedy there given by §. 5. where the matter is determinable at common law, and by §. 6. a suit for the King's grantee, where by covenant he is discharge'd of pensions, &c. to be in the court of augmentations of the revenues of the King's crown.

2 & 3 E. 6. cap. 13. §. 13. Amongst other things, that suits for subtractions of tithes be in the Spiritual Court.

§. 14. That the party suing for a prohibition shall bring into the court where the prohibition is prayed, a true copy of the libel; and by the same session, if the suggestion be not proved within six months, a consultation to go with double costs. Vide 1 Leon. 286. that such libel is to be exhibited by attorney. That where a suit is for tithes, and there is a suggestion of a deprivation for not reading the thirty-nine articles according to the statute of the 13 of *Eliz.* the party need not prove his suggestion within six months, because the matter of the suggestion was since the statute.

That upon a suggestion, that *A.* the plaintiff's lessor was seised of the same land, and in consideration of 5*l.* paid by him to the said parson, it was agreed betwixt *A.* and the parson, that *A.* and his assigns * should be discharge'd of the tithes of the land during his life; and afterwards *A.* leased the lands to the plaintiff in prohibition, this suggestion need not be proved within six months; for it is not within the statute. 3 Leon. 257. *Case* 341. *Woodward v. Baggs.*

The proof of the suggestion need not be precise, as if a prescription be, that the parson holds 100 acres of land in satisfaction of tithes; and the proof is, that he holds sixty acres only in satisfaction of them; it is well enough, because the substance is proved, that he held land in satisfaction. *Cro. Eliz.* 736. So where the prescription was to pay 4*s.* a year in discharge of all tithes, and the proof was, that he used to pay 4*s.* 6*d.* yet a consultation was denied, for the substance of the suggestion was proved, *i. e.* that the parson had not any cause to sue for tithes of that land. *Cro. Eliz.* 819. *Bull v. Webb.*

Having said as much as is thought proper to introduce the law of prohibition, as branch'd out by Rolle in his abridgment, we shall here, in imitation of Mr. Danvers, add the similar cases thereto, continuing the same heads.

(A) Its Antiquity.

3 E. 1. Rot. Clausarum m. 10. A prohibition was granted, and afterwards there went an attachment against the bishop and official for holding plea after the prohibition.

Prohibition.

(B) *For what things, or actions, and for what causes it lies: The judges not having jurisdiction.*

1. If there be an entire contract for above (c) 40s. and a man (c) 2 Keb. 617. sues for it in the Court Baron, severing it out into several sums under 40s. a prohibition shall be granted, because it is done to (d) defraud the King's courts. 19 H. 6. 54. *Girling v. Aldas.* The same point adjudg'd. (d) The King's superior courts may award a prohibition, upon the information of the plaintiff or defendant, or of any stranger, as an Amicus Curie, that any Court Temporal or Ecclesiastical do hold pleas where they have no jurisdiction, and may lawfully prohibit such court, as well after judgment as before. 2 Inst. 229, 60, 601. 4 Rep. 127. 3 Bulst. 119. the same point.

2. Prohibitions may be granted to the court of the Lord Marshal, by the courts of common law, if it exceeds its jurisdiction; and it hath been strongly insisted on, that the court of the Constable and Marshal may also be prohibited; but there having been no court holden before the Constable and Marshal for many years past, little is mentioned in our books on that head. 2 Hawk. Pleas of the Crown 14. Vide 2 Bulst. 119.

3. If the Court of Admiralty proceeds in any matter which is not maritime, tho' the things were done upon the sea, the Court of King's Bench will grant a prohibition, because the admiralty hath jurisdiction only of maritime causes, such as concern sea affairs; but not of all matters done at sea, as contracts, properties, &c.

4. A prohibition was granted to the Court of Admiralty, because the matter complain'd of was done upon land beyond sea, and not upon the high seas. 1 Roll's Rep. 133, 250. 2 Bulst. 322. S. C. *The Spanish* * Ambassador against Pontes; (*P400) yet Vide 3 Leon. 232. Case 314. where it was held, that a man might sue there upon a bond made in France.

5. A prohibition hath been granted to an inferior court, when the original foundation of the action commenced in a superior court. 1 Roll. Rep. 54. *Peach v. Dr. Leyseild.*

6. So a prohibition was granted to an inferior court, upon the statute of Westm. 1. cap. 34, 35. upon a suggestion, that the cause of action arose out of the jurisdiction. 1 Sid. 464.

7. So a prohibition was granted to the Marshal's Court for suing in an action of debt upon a judgment in B. R. Salk. 439.

8. A prohibition hath been granted to a Court of Honour for words. Salk. 353. the like upon a libel to the court of Honour, against the defendant, for marshalling funerals. 4 Mod. 128.

9. If a Court of Equity takes upon itself to determine matters properly triable at law; it hath been held, a prohibition will lie. 1 Roll. Rep. 42, 66, 331, 368. *Bromage v. Genning.* (c.)

Prohibition.

(C) Jurisdiction Spiritual.

Where the King hath 1. IF the King's farmer sues in the Exchequer against the
(a) Tithes in parson for detaining of (a) tithes, parcel of the posses-
the Forest of ons leased to him in farm by the King, altho' the right of
Inglewood, tithes comes in debate between them there; yet the court
&c. which is shall not be ousted of their (b) jurisdiction. 38 Aff. 20. ad-
not in any Parish, and judg'd. But the report says quod Mirum.
grants them to another, who brings a scire facias against those who received them before.
In this case the Temporal Court shall have (b) jurisdiction; but if there be a dispute, who
ought to pay the tithes, and who ought to have them; the Spiritual Court shall have their
jurisdiction. And where the Spiritual Court ought to have the jurisdiction, a prohibition
shall not lie; otherwise where the Temporal Court ought to have a jurisdiction. Br. Abr.
Tit. Prohibition, pl. 23. 22 Aff. pl. 75.

(D) In what cases the Court shall not be ousted in respect
of something collateral.

(c) Br. Abr. 1. IN (c) trespasss, if the right of tithes come in debate be-
title Prohibi- tween a parson and a (d) lay-man, being a farmer of ano-
bition, pl. 10. ther parson, the court shall not be ousted of their jurisdic-
(d) But if tion between the on. 20 H. 6. 17. b.

parson and vicar, there no prohibition shall issue. 1 Roll's Rep. 126.

Godb. 176, 2. In an annuity between spiritual persons, chargeable by
196. reason of certain churches, grounded upon the deed of grant
of the predecessor of one, altho' the persons and things out
of which it issueth are spiritual; yet because of the deed the
Temporal Court shall not be ousted of their jurisdiction. 29
E. 3. 39 b. adjudg'd.

3. Where the Spiritual Court hath cognizance of the origi-
nal or principal, there a matter subsequent and dependant
upon it triable at common law shall not take away the juris-
diction of the Spiritual Court. 1 Roll's Rep. 12. but where
the original cause properly belongs to the Spiritual Court,
and by a plea a thing properly triable at common law, comes
(*P401) in question, if their proceeding of trial differs from ours,
and they don't pursue the manner of trial, by the same law,
a prohibition lies; and *Dodderidge* agreed to this difference;
if the defendant pleads a release, and the Spiritual Court re-
fuse the release to be proved by one witness, which is good
proof at common law, a prohibition lies. 2 Roll's Rep. 439
Wood v. Churly. But if the original cause of the suit is tem-
poral, tho' the accessory be spiritual, that court shall have no
jurisdiction; as where the plaintiff in the Spiritual Court
claims tithes in the Spiritual Court, by virtue of a lease from
the parson, and the defendant (now plaintiff) in prohibition
suggests, that he himself claims them by virtue of a former
lease from the same parson; and thereupon the dispute is

Prohibition.

which of those two leases shall be preferr'd; a prohibition was granted, *G. Crooke* for a consultation. But *Cooke e contra*, who also said, that if a man makes a title in the Spiritual Court, by virtue of a lease from the proprietor; and the other says, *non dimisit*, a prohibition shall be granted. 2 *Roll's Rep.* 61. *Wortes v. Clifton*.

(E) *What Pleas shall oust the Court of their Jurisdiction.*

1. IF the issue be, whether the place, where the (a) tithes were within the (b) parish of one parson, or of another, the court (c) shall not be ousted of their jurisdiction. 50 Ed. 3. 20 b. 20 H. 6. 17. b. 22 Edw. 4. 22. 38 Ed. 3. 5. b. 39 Ed. 3. 23. b. Fol. 282.

(a) But if a suit be, for tithes of such a (b) Close, and the defendant says, it is the Close of another, this shall be tried in the Spiritual Court; for they may (c) try the bounds of a Close or Vill, tho' not the bounds of a parish. 1 Sid. 90.

2. But a prohibition prayed to stay a suit for tithes, suggesting, that the lands out of which they were demanded lay out of the parish, was denied, because it did not appear, that a plea thereof had been offer'd to the Ecclesiastical Court. 1 Ven. 335. Anonymus.

3. If the issue be, whether one (d) parson had by prescription a [e] portion of tithes in the parish of another parson, that shall not oust the court of their jurisdiction; because that forty years by the spiritual law is a good prescription, which is not so at common law. 10 H. 6. 17. (d) If a parson of a parish claims by prescription a (e) portion of

tithes out of the parish of another, the Spiritual Court there hath jurisdiction, because between spiritual persons. But if he that is sued, had agreed with the parson, and that had been the dispute, he shall have a prohibition. 1 Leon. 128. Hob. 286. 1 Sid. 332.

3. If one parson sues for tithes in the Ecclesiastical Court, and the defendant saith, that the place for which the tithes are sued are in another parish; (f) a prohibition (g) lies. (f) 1 Roll.

Rep. 332. *Poster v. Hide*, the same point, Cro. Eliz. 288. (g) 1 Ven. 335. denied, because it did not appear, that a plea thereof had been offered to the Spiritual Court. — Denied, where the boundaries of two Villis in the same parish came in question; for tho' the bounds of parishes are not triable in the Spiritual Court, yet the boundaries of Villis in the same parish are. 1 Lev. 78. *Petler v. Yalerman*. The same case reported in 1 Sid. 89. 1 Keb. 369. Yelv. 92. by the name of *Butler v. Yalerman*. 1 Keb. 945. *Reeves v. Bould*, the same point adjudg'd. — The Spiritual Court may try, whether a parish be within a peculiar or not. 1 Keb. 764. *Pinder v. Coofs*.

(*P402)

* (F) *Jurisdiction Spiritual.*

Jurisdiction of the Matter.

J de A. is pardon'd for suing in the Court Christian, de *Castreis, Villis, Noveriis, &c. & aliis Feodis, & placitum inde prosequi presumendo in Enervationem Juris nostri Regni*

Prohibition.

Regni & Exheredationem Coronæ nostræ, & subversionem Statutorum Regni nostri Manifestam. 3 E. 1. Rot. Patentium & M. 11. ibid. m. 12. The like 4 E. 2. Rot. Pat. M. 6.

2. *Mirror of Justices*, fol. 27. cap. 2. §. 13. For that he held plea against the defence of the King, and prejudice of the dignity of his crown. Inasmuch as it belongs not to any ecclesiastical judge to hold any secular plea, but of testaments and matrimony, to the prejudice of the King's prerogative.

2 Roll's Rep.

6. *Hutton's case*.

Hob. 15. S. P.

If the repeal

of the (a)

Institution

be before in-

duction,

there shall be

no prohibi-

on.

1 Sid. 293.

[b] Inducti-

on is the

placing a person

in the possession

of a church,

which gains him

a freehold, which

the common law

takes notice of;

and therefore

for the quieting

mens possessions,

the law will not

permit the Spiritual

Court to disturb

the possession,

and to strip a man

of his freehold,

by their repealing

a former act done

by them, whereby

he gain'd his

possession in a

legal manner,

which possibly

they might have

done before he

had been so in-

ducted.

Mo. 861. 2 Lev. 125.

[c] And whe-

ther a priest,

or not a priest

in Com. Wilts,

where the suit

was in the arches,

after in-

duction, to avoid

institution; be-

cause that the [c]

institution

was made after

a [d] Caveat

enter'd not to

institute, &c.

For that

does not make

void the insti-

tution in our

4. *Mich.* 15 Car. B. R. between *Phipps* and *Hayter*, per *Curiam*, a prohibition was granted for the church of *T. E.* in Com. *Wilts*, where the suit was in the arches, after in-

duction, to avoid institution; because that the [c] institution

was made after a [d] Caveat enter'd not to institute, &c. For

that does not make void the institution in our law. *Hob. Rep.*

22. *Hutton's case*, a prohibition granted.

Hill. v. Barne 2 Leon. 250. 2 Show. 52. 3 Keb. 567, 827. 2 Ven. 309, 319. 2 Lev. 199.

Hob. 15. the same point cited in 2 Keb. 63, 72, 392. *Offley and Ux' v. Bett.* [d] And

the same point adjudg'd, as to the repeal of an administration, because granted after

Caveat.

5. If a man be admitted, instituted and inducted to a church,

and afterwards he is deprived, because that he was instituted

against the course of the ecclesiastical law; that is a void sen-

tence of deprivation, because it is become a lay fee by in-

duction. *Hill.* 15 Ja. B. R. between [e] *Hitchin* and *Glover*

adjudg'd.

upon a special verdict in ejectment.

6. 35. C. 1. Rot. Patentium Membrana 25. Whereas W.

B. hath obtained the possession of the treasury in the church of St.

Peter, York, upon the collation of the King by a judgment in

the King's court; and he is now disturb'd by citations and ap-

(*P403)

Fol. 238.

Prohibition.

ments rightly given in our court in all respects, we command you, that you support the said clerk in his possession; and if any one presumes to interpose with provocations, citations, appeals or other impediments, by which, &c. then do you cause them to be arrested, and detained in prison, till you have another precept.

7. If a town erects a common school, and gives an allowance to the schoolmaster, the bishop cannot remove the [a] schoolmaster, and put in another at his pleasure. But if he be a recusant, he may [b] remove him by the statute of 23 Eliz. cap. 1. *Mich.* 13 *Ja.* C. B. *the bishop of Carlisle's case*, per curiam. The same point adjudged in 1 Ven. 47. 2 Keb. 438. 544. Bate's Case.
Mich. 21 *Car.* 2. 1 *Med.* 3. S. C. that if the spiritual court sue to remove a [a] schoolmaster, a Prohibition lies; for if he comes in without licence, they can only censure him, but not [b] remove him. *Comb.* 324. and when the bishop has once granted him a licence, he hath executed his authority, and can only proceed against him for immorality, contra bonos mores. *Wood v. Hill* — He may be punished in the spiritual court for keeping a school without licence. 2 *Salk.* 372. 3 *Salk.* 318. Vide the cases in the margin of that book.

8. If an administration be granted to *A.* where it ought not to have been granted to him; and afterwards the administration is repealed, and granted to *B.* because he is next of kin. *B.* may sue *A.* in the spiritual court, to account for the profits of the testator's chattels, during his time, and no prohibition shall be granted, for *B.* cannot have an action of trespass against *A.* nor hath he any remedy for them at common law. *Hill.* 15 *Ja.* B. R. between *Wadsworth* and *Andrews* adjudged. 1 Keb. 107. 2 Keb. 258. Crane v. — 512. North v. Dumm 544. Prescott v. Compton,

14. *Witchclafs v. Wescot* denied, as to compelling them to [c] account, but granted as to the distribution. Though the spiritual court may call the administrator to an account, they cannot do so by a third person, who bought of the administrator the goods of the testator. 2 *Keb.* 138. *Swinborn v. Gray*. Nor can they do so by an executor. *Noy* 28: *Sparrow v. Norfolk*, 24. *Mountague v. Clarke*. *Noy* 3. Trot's case, the same point adjudged.

9. King Henry the fourth confirmed a church, which was incorporate before, by the name of the *Warden and College* in the diocese of *Exeter*, and ordained a certain number of singing men, some whereof were spiritual, and some lay persons. The dean and chapter, with the bishop, abridged the number to twenty-four in all, and then to sixteen, four spiritual and ten lay; and now they would add two more to the number of the spiritual persons, whereby their livings would become less, yet no prohibition shall be granted; because it appears, their number was greater, and afterwards made less.

8. *Ja.* C. B. *Withers* and *Owen*, per curiam.

10. If a man sues in the spiritual court for (d) perjury, whereas the subject matter upon which, or for which, the [e] perjury was made, did not relate to, nor was a (e) spiritual or not, is to be tried at common law. 1 Keb. 522. Vide Jenk. cent. cases 184. that no prohibition lies for perjury in a [e] spiritual matter.

matter,

Prohibition.

matter, of which the spiritual court could have [a] jurisdiction, a (b) prohibition lies. 2 H. 4. 10.

The [a] spiritual court may punish the breach of a promissory oath. 1 Keb. 545. Pope's case. [b] No prohibition lies for a suit in the spiritual court for forging an order of that court. 1 Lev. 138. Slader v. Smallbrooke.

11. As if a man makes an oath to pay debts, or to make a feoffment; if he be sued in the spiritual court for the breach of this oath, a prohibition lies; for otherwise, he would there (P*404) be *compelled to perform his oath, and so lay contracts would [c] Bro. Abr. be determined in the Court Christian. (c) 2 H. 4. 10. b.

Title Prohib. pl. 8. Fitz. Abr. Title Prohib. pl. 6. 12.

12. *Contra* in 22 Aff. 70. But the ordinary cannot enjoin him to pay the debt, but to penance.

13. H. 2. ordains, that it shall not be lawful for a bishop to [d] Fitz. Ab. punish any man for perjury, or breach of an oath. [d] Speed Title Pro- 458. b.

hib. pl. 6. Bro. Abr. Title Prohib. pl. 8. accord.

[e] Jenkins's But it is said, if [e] perjury be committed in the spiritual Reports 114- court, in a cause of matrimony, tithes, a testament, a legacy, Case 76. or of any other thing, of which the consueance belongs to their jurisdiction, that court shall have jurisdiction in such case of perjury, and no prohibition lies; 'tis otherwise where the perjury concerns a temporal matter. By the judges of both benches, the spiritual court will not give sentence upon the testimony of one witness only; and yet if the cause belongs to their jurisdiction, a prohibition cannot be granted on this account; often adjudged.

Fitz. Abr. 14. If one man promises another to pay debts, or to make Title Prohib. feoffment, and doth not perform it, the ordinary may, *ex officio* pl. 6. cite him for the breach of his oath, and enjoin him penance. Brook's Abr. Title Prohib. pl. 6. e contra.

15. 15 E. 3. cap. 6. It is accorded, that the ministers of the holy church, for money taken for redemption of corporal penance, nor for proof and account of testaments, or travail taken for the same; nor for solemnity of marriage, nor for other things touching the jurisdiction of the holy church, shall not be impeached, arrested, nor driven to answer afore the King's justices, &c. But that was afterwards repealed in the same year. 18 E. 3. cap. 6.

16. A prescription cannot be tried in the ecclesiastical court, because it ought to be tried by a jury, which cannot be done there. Temps E. 1.

1 Vern. 274. The same point adjudged as to a custom. But denied to stay proceedings upon a libel grounded upon a custom, that the constable of the town should collect the parish rates assessed for repairs of the church. Hardr. 510. Goldin v. Wainwright.

Per Coke, where a man deviseth his lands to be sold 7. S. and so much of the money to be disposed of by him to one, and so much of the money to another, this is within the jurisdiction of the spiritual court; but it proper below

Prohibition.

belongs to the common law, and the reason thereof is said to be, because it is issuing out of lands: But if a man deviseth, that his feoffees shall sell his lands, and that the moieties shall remain in their hands to pay legacies, then in such a case a suit is properly in the spiritual court. 2 Bulst. 257. *Samborn v. Samborn. Trin. 12 Ja. Vide the case of Dens and Dens. 1 Bulst. 153. Trin. 9 Ja.*

A prohibition to a suit in the ecclesiastical court by the defendant, church-warden of the parish church of St. Peter, Hereford, against the plaintiff, charging him with the repairs of the chancel of the said church, as owner of the priory house, to which owners it hath belonged, as was pretended, time out of mind, to repair the said chancel; whereas there never was any such custom as the plaintiff suggested, and set forth in his declaration upon the prohibition, and that he had so alledged and pleaded in the ecclesiastical court, to hinder the proceedings * upon, and trying such custom in the court ecclesiastical, which the judge there refused to admit; but both proceed to try, determine, and give sentence against the plaintiff upon the said pretended prescription; whereas all such custom ought to be tried [a] at common law, &c. Upon a demurrer, the court were of opinion, that a consultation should be granted, for they may sue upon this prescription, and try it there, as a suit may be, in the ecclesiastical court, for a *modus decimandi*. And the parson is of common right to repair the chancel; yet it may be, upon a particular man's estate by prescription. 2 Vent. 239. (*P405)

[a] Vide
1 Brownl. 16.
1 Rol. 126.
Poph. 197.
Litch. 217.
Noy 81.

Noy 81.
Steward's
case.
Hetley 153.
Scot v. Wall.
Hil. 4 Car. 1.
C. B.

A bare prescription only is not a sufficient ground for a prohibition, unless it concerns a layman, *per Holt, C. J.* in the case of *Jones v. Stone*, 2 Salk. 550. pl. 10. And though it is held in 2 Co. 45. that in a suit for tithes in the spiritual court, the party may have a prohibition, suggesting a prescription, or *modus* before or without pleading; but *per Holt, C. J. and the court*, it was denied, unless they pleaded below, because, perhaps, they might admit the plea. For, a *modus* be pleaded in the spiritual court, and admitted, a prohibition shall go. But if the question be, whether a *modus* or no *modus*? a prohibition shall go. 2 Salk. 551. pl. 13.

But the spiritual courts may proceed upon prescriptions in some cases, as where it appears to be more for the good and benefit of the subject that the suit be there, than in the courts of law, there a prohibition shall not go. Where the lord of a manor brought an action against the vicar of A. for not celebrating divine service in his ancient chapel, called St. John's chapel, within the site and precinct of his manor of W. setting forth, that the vicars of A. have, time out of mind, used, and of right ought so to do, and to administer

Prohibition.

Where the common law hath permitted prescriptions to be tried in the spiritual court.

After divine service to him and his tenants, there the proper remedy is held to be by suit in the Court Christian: But if the chapel had been for a private chapel for him and his family, where he only could have brought an action, there an action at law had been the proper remedy; but here the chapel being of publick service, and common to all his tenants, every tenant receives a particular injury; and if an action would lie, the party would be liable to a great many actions which will be prevented, by permitting the Court Christian to have cognizance of that matter for the good of the commonwealth. 5 Co. 73.

Fol. 284.

Aliter, if denied.

Palmer 440.

[a] And the reason given was, because this might have a lawful com-

mencement; for it might be, that for all the tithes of the lands, upon which the houses were built this modus was made, and that the parson might sue for the money in the spiritual court; it is in the nature of tithes. [b] Vide 1 Hob. 11. Doctor Leyfield and Tisdale. 1 Rol. Abr. 642. letter S. pl. 1.

[c] But if the prescription be denied, Quare

if a prohibition lies; this difference having been taken, that where the libel is grounded upon a custom, whereof they have original consance, 'tis said no prohibition will lie upon a denial of the custom; but otherwise where the matter ariseth only by virtue of a custom, as in the case of a libel for the tithes of conies [d] not titheable. 2 Keb. 452. Phillips v. Clever.

(*P406)

1 Rol. Rep. 419 S. C. 3 Bullt 41. S. C.

1 Rol. Rep. 420. the same case.

17. A parson may sue in the spiritual court for a *modus decimandi*, and no prohibition shall be granted; for it is in the nature of tithes. 11 Co. Doctor Grant 16. My Reports 16. Ja. Goslin v. Harden, per curiam. Hobart's Rep. 314. between Scot and Wall.

18. So if the parson prescribes to have tithes of things not titheable, as rents of houses, he may sue for it in the spiritual court, and no prohibition lies; [a] yet no tithes of right ought to be paid for them. 11 Co. 16. Doctor Grant case. [b]

19. So if he sues in the spiritual court for tithes of great trees, which he claims by prescription, no prohibition lies [c] yet of right they are not titheable. Quare 9 H. 6. 46.

20. So he may sue there for a *modus* of tithes of fish taken in an island and port in the town where, &c. (yet tithes of right are due, as it seems, for that.) My Reports 14 Ja. Goslin and Harden.

21. If the custom be, that after the grass is cut, and in grass cocks, the tenth cock shall be assigned to the parson, and that he by the custom shall have a lawful authority upon the land to make it into hay; if the owner of the land disturbs him to come to make it, he may sue for that in the spiritual court, and no prohibition shall be granted; for it is incident to the custom to come to make it into hay. 14 Ja. C. B. Reynolds v. Newberry.

22. The proper place to sue for a [d] legacy is in the Court Christian, where there be an agreement to give a legacy in satisfaction of a debt, and that legacy be due; and that legacy be due in the spiritual court, a prohibition shall be granted.

[c] But if

there be an agreement to give a legacy in satisfaction of a debt, and that legacy be due; and that legacy be due in the spiritual court, a prohibition shall be granted.

Prohibition.

Ecclesiastical Court, because it is not any debt, but only due by the will [b].

[b]. 1 Leon.

235. 236. Pet. v. Balden. Cro. Eliz. 274. the same case, by the name of Pett v. Balden.

23. If *A.* owes *R.* five marks, and he devises by his will, that whereas he owed *B.* five marks, that his executor shall make it 10*l.* the suit for the 10*l.* may be in the Ecclesiastical Court, because it is not any addition to the five marks, but a new sum given in satisfaction of the five marks, and so no part of the 10*l.* and not a debt but a legacy. M. 22 Ja. B. R. between *Churley* and *Wood*, a prohibition denied.

24. H. 2. *Ordain'd that th' Laity, or the King, or any other,* might hold plea of churches and tithes. Speed 458. b. Cro Ja. 279. Love v. Napelden.

25. If a man devises a [c] rent out of his stock and messuage, which he hath for years, he may sue for that rent in the Ecclesiastical Court, because it issues out of a [d] chattel, [c] A legacy that was to be raised out of the profits of a lease for

and he hath not any remedy for it at common law. Hill. 7. C. B. *Mary James's* case, per *Curiam*, and a prohibition denied. Pasch. 9. Ja. B. R.

years, as well as out of land, and the executor having raised it, and dying without payment, there being no action maintainable at the common law, it was adjudg'd to be liable for in the Spiritual Court, and a consultation awarded. [d] A prohibition to stay a suit in a Spiritual Court for a legacy, which was a term for years devised to the defendant, suggesting that the defendant below pleaded an assignment of the testator in his life-time; this being an incident question shall be tried by the Spiritual Court. Keeling and Twisden, that the devise of a term is not suable there, no more than money out of it. Wyndham contra, both are but chattels, and a property triable and suable there; aliter of a rent devised out of a freehold. 2 Keb. 5, 8. Rummy v. [?]

26. If a man devises a legacy to another out of certain lands, whereof he is seised in fee, and the devisee sues for it in the Spiritual Court, a prohibition lies. For it issues out of land, and the executor shall not have any estate in the lands, 'till the legacy be raised out of the profits (as it was objected of the other side.) Pasch. 15. Ja. B. R. *Singleton* and *Wade*, per *Curiam*.

27. If a man devises a legacy to another, and that if the executor hath not sufficient to pay it, then he devises out of certain messuage whereof he is seised in fee, which also demands to him that is made executor, if the executor hath not money to pay of the personal goods, he cannot be sued for it in the Spiritual Court, as payable out of a house, because they have no jurisdiction of it. Pasch. 15. Ja. B. R. resolv'd, per *Curiam*, between *Singleton* and *Wade*.

28. If a man seised of [e] lands in fee, makes *B.* his executor, and by his will in writing devises that *B.* and three others shall sell the land, and that the monies shall be divided into four parts, one part whereof shall be to *F.* &c. and afterwards *B.* will not sell the lands, and *F.* sues for a legacy issue out of lands. Vide 2 Show. 50. Pasch. 31. Car. 2. *Eastard* v. *Hockwell*. Jenk. Cent. 215. Palm. 120. Bullst. 153. Popham 59. 2 Keb. 324. *Martin* v. *Holmes*.

[e] That none can sue in the Ecclesiastical (*P407) Court for a legacy issued out of lands. Jenk. Cent. 215. Palm. 120. Bullst. 153. Popham 59. 2 Keb. 324. *Martin* v. *Holmes*.

him

Prohibition.

him in the Spiritual Court, a prohibition lies, because tho' it be a legacy, yet it issues out of lands, and the monies shall not be assets in the hands of the executor. *Trin.* 17 Ja. C. B. between (a) *Graves* and *Adwards*, *per Curiam*, and a (b) con-

(a) *Hob.* 265. sultation denied. *Hob. Rep.* Case 343.

the same case. (b) In the case of *Rosse v. Rosse*, a prohibition was prayed to stay a suit in the Spiritual Court, for rent devised out of a term. *Wyndham* said, that the devise of a term itself is suable there, and for the same reason the rent out of it. But *Keeling* and *Twissden* doubted. 1 *Lev.* 180. This case is reported in 1 *Sid.* 279. by the name of *Ramsley v. Ross*, and there it is said, that the prohibition was denied.

29. If a man sues in the Spiritual Court to prove a nuncupative will of lands, to revoke a will in writing of it, a prohibition shall be granted. *Pas.* 14 Ja. B. R. *Reynold's* case, a prohibition granted.

A prohibition proved, and the party but sixteen years of age, upon a suggestion that by our law he could make none till seventeen. But a prohibition denies, for they are proper judges ther of. 2 *Show.* 204. *Smallwood v. Berthouise.* *Trin.* 34 Car. 2. Vide 1 *Salk.* 399. 44 *Ray.* 44. 1 *Sid.* 162. 2 *Salk.* 625. 2 *Mod.* 315. 6 *Mod.* 260. *Nelson's* *Lut.* 159. 30. If a man possess'd of a [c] lease for years devises that his executor out of the profits shall pay to every of his sons at their full age, the executor may be sued in the Spiritual Court, to give sureties to pay those legacies; and no prohibition shall be granted, because it is issuing out of a [d] chattel. *Hill.* 11. Ja. C. B. *Prew's* case, *per Curiam*.

the executor to pay several sums to several persons upon a suit in the Spiritual Court against the executrix of the executor, a consultation was awarded, in respect it was more personal legacy; and tho' to be raised out of the profits of land, yet being raised out of a [d] lease for years, as well as out of land; and it being raised by the executor in his life time, as here, there could be no action for it at common law. *Cro.* Ja. 279. *Low v. Naplesden*, *Hob.* 12.

A prohibition denied upon a suit for a legacy, devised on [e] Sale of lands. 2 *Keb.* 324. *Martin v. Holmes.* 151. † by the justices of both benches, *contra Dyer*, 9 *Ellen.* 264. pl. 41. opinion. M. 14 Car. B. R. between *Tawyer* and *Whistler*, a prohibition granted, *per Curiam.* *Hob.* 343. between *Adwards* and *Graves*.

† M. 4, 5 P. & M. *Ben.* 21 S.P.

32. In the statute of 21 H. 8. cap. 5. of the probate of wills, there is a proviso, that if the testator devises by his will any lands, tenements or hereditaments to be sold; that neither the monies arising therefrom, or the profits to be taken in the meantime, shall be taken as any of the goods or chattels of the testator. By the coherence it seems it is intended to be put in the inventory.

33. *Pas.* 15 Car. B. R. between *Roper* and *Mattingley*, prohibition was granted by the court, because the suit was

Prohibition.

put the monies for which the lands were sold in an inventory, and that at the suit of the legatees.

34. If the Ecclesiastical Court holds plea of a legacy in equity, a prohibition will lie: for they are bound, or rather circumscribed by their law, as other courts of law are. Hob. Rep. Case 343.

35. If the archdeacon grants to one the office of register of the archdeaconry, by his patent for life in reversion, and afterwards the grantee is a recusant convict; for which the archdeacon supposing him to have forfeited the office, by another patent, grants it to another for life, and he libels in the Spiritual Court against the first grantee, to deprive him of the office for the recusancy; and because it was granted in reversion, and that he might have the office according to his patent, a prohibition shall be granted, because here the office which is a matter of freehold comes in debate, and which of the two patentees shall be preferred, which does not belong to their jurisdiction to determine. Mich. 15 Ja. B. R. resolved, between *Kiste and Bridgman*, and a prohibition granted. (*P408)

36. If there be a dispute between two upon two several grants, which of them shall be register of the Bishop's Court, that shall not be tried in the Bishop's Court, but at common law; for although the subject about which, &c. is spiritual, yet the office itself is temporal. Hill. 8. Ja. C. said by Coke to be *Skinner and Mingey's* case.

37. If the Bishop grants the office of chancellor to *A.* and afterwards *A.* releases to *B.* and afterwards *B.* dies, and afterwards the bishop gives it to *R.* against whom *A.* sues in the Ecclesiastical Court, supposing his release to be void, a prohibition shall be granted, because that the office is temporal, although he exercises the office in spiritual matters. Hill. 5 Ja. *Robottom's* case, resolved, and a prohibition granted by the court.

38. But if a (a) chancellor be sued in the Court Christian and be (b) deprived for (c) insufficiency in not knowing the canon law, no prohibition lies, because they are the proper judges of his (d) ability, and not the judges of the common law. Pas. 3 Car. B. R. *The chancellor of Gloucester's case*, resolved by the court and a prohibition denied.

(c) Homicide. (d) The Spiritual Court may libel for forging letters of ordination, if the parson may be deprived; but they cannot proceed criminally. 1 Kib. 721. *Willbrook v. Slaughter* 762. They may proceed against a parson for simony pro tempore animæ, so they don't draw the title of the benefice into question. 2 Bull. 163. *Per's case*. Hill. 11 Ja.

39. If a vicar sues the parson appropriate of the same parish, to shew cause why a particular in writing, that was made concerning the land and tithes belonging to the vicar, shall

Fol. 286.

Cro. Ja. 930. *Searle's case*, a prohibition denied upon a suit against a (a) parson to (b) deprive him of the office. The Spiritual Court cannot hold plea of the

Prohibition.

shall not be allowed. After a trial at common law against the vicar for the same thing, a prohibition lies, because they cannot determine a matter of (e) freehold there. *Pal 11 Car. B. R. between Pearse plaintiff, and Sir G. Winter and Chester his farmer, defendants, of the parish of St. Phillips in Gloucester*, where the vicar would have the tithes of grain and such like, arising out of the land, whereof he had before the tithes of hay and pasture before it was cut.

Mod. cases in Law and Eq. 338. A prohibition denied upon a suit for Dilapidations. *Ven. 716.* the same point adjudg'd in the bishop of Salisbury's case. *Godb. 259.*

A prohibition was granted to the Court of Aldermen to prohibit them from hindering a person from building a stable, and the court left the defendant to plead the custom as to the uniformity of buildings; and the court said, they could have no jurisdiction to determine mens rights.

40. If a man sets out his tithes by severing of nine parts from ten, and after carries away the tenth part, the parson (*P409) may * have an action of trespass for this, being now become a chattel by the severing of the nine parts, and cannot sue for the same in the Court Christian. *Dubitatur, Pal. Eliz. B. R. between [a] Leigh and Wood.*

[a] This case is reported in *Cro. Eliz. 607.* Fenner and Clinch for the prohibition; Gawdy and Popham against it. *Moore 912. S. C.* and a difference there taken when the tithes are taken away by the owner, and when by a stranger. If by the former, he is suable in the Spiritual Court; if by the latter, not. *Cro. Eliz. 844:* the same point adjudg'd, that tho' the tithes be sever'd, yet by the statute they remain suable in the Spiritual Court. *Blackwell's case. Vide 4 Leon. 7.* that he ought to plead it below. *See 2 Inst. 613.*

41. If the church-wardens of a parish have used time out of mind to elect a clerk of a parish, and the suit is in the Ecclesiastical Court, to remove him, and put in one elected by the parson; a [b] prohibition lies. *Mich. 22: Ja. B. R. between * Walpoole and Coldwell for the clerk of St. Thomas Apostle's in London;* a prohibition granted by consent of parties to try the custom. *Intratur Hill. 22 Ja. Rot. 466.* And the like prohibition granted between *Browne and Cravenshaw* for *White Chapel* parish. *Pal. 19 Ja. B. R. Rot. 177.* And the like prohibition granted between *Beaumont and Wesley* for the parish of *St. Cuthbert in Wells*, in com. *Somer. Pal. 11. Car. C. B.*

*Bend. 142. S. C. [b] 1 Keb. 286. pl. 94. the same point adjudg'd *Godb. 163. Can. dict v. Plover. Pal. 8. Ja. C. B.* the same point adjudg'd. A parish clerk is by common law an officer, and is in for life without deed; so ruled absent Parker C. J. in the case of the parson of *Gatton* and *Milwich.* 2 *Salk. 536.* Eyre justice contra, he is but a servant to the parson at will; where he comes in by election, he has an estate for life by the custom. *Vide the case of Newcombe v. Higgs, Hill. 4 Geo. B. R. Fitz G. 189, 190.* Resolved that where the crime is against the duty of the parties office, as extortion in a judicial officer, he may be proceeded against to a deprivation or removal, before conviction of such crime in due course of law, otherwise not; and therefore a parish clerk, put in by the parson, sued in the Spiritual Court for a deprivation for drunkenness, lewdness, &c. a prohibition was denied. But a curate is removeable at the will of the parson. *Salk. 506. otherw.* if there's a custom for the parishioners to chuse a vicar. 2 *Roll's Rep. 304.*

Prohibition.

42. If a clerk of a parish claims by a custom to have a certain quantity of bread at *Christmas* of every inhabitant of the parish, and sues for it in the Spiritual Court, a prohibition lies, because it is not like a [c] pension due to a [d] parson. [c] A pension For a register of the Spiritual Court may have an assise of his office. *Mch. 8 Car. B. R. between Marsh and Brook.* Resolv'd by the court, and a prohibition granted to *York*, the plaintiff there being the parish [e] clerk of *Bersfoll* in *Yorkshire*. For a pension is suable for in the Spiritual Court, and therefore a consultation was granted. *Cro. Eliz. 675. Collier's case, 2 Cro. 217. Bulbrooke v. Briggs, 2 Keb. 41.* the same point adjudg'd, and by *Holt C. J.* that an [d] annuity is suable for in the Spiritual Court, and that *Coke's* comment upon the statute de circumspete agatis had been often denied to be law. *Comb. 131. Hanifon v. Austin.* [c] The like by the lessee of a parson. *1 Keb. 567.*

If the party sues once at common law for a pension, he shall not afterwards sue in the Spiritual Court, because he hath determined his election to sue here. *Godb. 196.*

Where both parties are spiritual persons, and one sues the other for a pension upon a prescription or composition, no prohibition lies; for they have their election, *per Curiam.* Where both parties are spiritual persons, and one sues the other for a pension upon a prescription or composition, no prohibition lies; for they have their election, *per Curiam.* *Godb. 196. pl. 283.* *Keb. 523.* So if the suit be by administrator of a vicar. *1 Keb. 372.*

A prohibition denied to a suit by the bishop, before his own chancellor, for a pension by prescription; the court held, that he has his election to sue where he will, contrary to the Lord *Coke's* opinion. *3 Cro. 675. pl. 3. 2 Inst. 491.* And tho' the prescription were denied, 'tis said the court would grant no prohibition; nor would they do it on denying a *Modus*, where the suit is for a *Modus*; and tho' the suit is before the bishop's own chancellor. *2 Keb. 439. Noy. 16. Marsh 56. Godb. 196. Noy 81. Steward's case e contra. Palmer 440. S. C. Herley 133. S. P.*

* 43. If a suit be in the Spiritual Court against a woman for exercising the trade of a midwife, without the licence of the ordinary, against the canons, a prohibition lies; for that is not a spiritual employment, of which they can have consultation. *Trin. 9 Car. B. R. between Benskin and Crispe, resolved,* and a prohibition granted to the Court of Audience. But denied upon a suit against an incumbent of a donative for marrying without licence. *Maddox's case. 1 Mod. 22. Mich. 21 Car. 2. 2 Keb. 578. S. C. granted upon a suit against a school master for teaching school without a licence. 2 Keb. 438, 544. 1 Ven. 41. 1 Mod. 3. Bate's case. Comb. 324.*

44. If a presentment be made by the church wardens of a parish in the Ecclesiastical Court, that *J. S.* a parishioner is a disturber, and sower of discord amongst his neighbours; a prohibition lies, because it belongs to the Leet, and not to that court, unless it was in the church, or such like. * *Hob. Rep. * Hob. 246. M. 16 Ja. Rot 716.* *case 311. between Smith and Pannel, a prohibition granted.*

45. If the parishioners of a parish libel in the Spiritual Court to make proof of divers matters of decimation, in perpetuam

Prohibition.

petuam rei Memoriam, a prohibition lies; for it was conceived to be a strange attempt. Hob. Rep. Case 319. between [a] Napper and Steward.

[a] Hob. Rep. 248. Het. 133. S. P.

Fol. 287.

46. If a suit be in the Spiritual Court *ex Officio*, or otherwise for a way to a church for the parishioners, a prohibition lies, upon a surmise, that it is a common highway; for it shall be tried at common law, whether it be a highway or no. *Trin.* 15 Car. B. R. between *Smith* and *Rennet*, *per Curiam*, a prohibition granted.

47. If the church-wardens of a church sue for a way to a church, which they claim to belong to all the parishioners by prescription, a prohibition shall be granted, because it is temporal. Pas. 18 Ja. B. R. between the church-wardens of *Bithorne* and *Bow*. A [b] prohibition granted accordingly.

[b] S. P. in 2 Rol. Rep. 41. Hill v. Bodoe.

48. If the church-wardens of a church sue *J. S.* in the Ecclesiastical Court, for that they and all those who have been seized of such a messuage, &c. at the perambulation of the parishioners of the parish, &c. have used to find a refreshment for them [*viz.*] bread and cheese, and to suffer them to rest themselves there; [c] a prohibition shall be granted, because they claim it in the nature of a corody; and if that should be suffer'd, a great inconveniency might ensue. Mich. 13 Ja. B. R. *The church-wardens of the church of Uffington's case in Com. Berks.* resolved, and a prohibition granted. Hill. 15 Car. B. R. The like prohibition was prayed for the same parish, and one *Locks*, and the church-wardens of the same church, upon a suit by them in the Spiritual Court, but not granted. But refer'd to justice *Jones*, when he should go that circuit.

[c] In the case of *Welby* v. *Hobert*. 2 Lev. 163. The party suing in the Spiritual Court libell'd upon a custom, that all farmers of such a farm had

used to find cakes and ale at a perambulation; and a prohibition was granted, and the declared upon the prohibition. To which the defendant pleaded that there is such a custom; to which the plaintiff demurred, and adjudg'd no consultation shall go, because tho' confess'd by the demurrer, yet it is an ill prescription.

Noy. 31. 139. S. P.

49. If the parishioners of the parish have used time out of mind to elect one church-warden, and the vicar another, and afterwards a canon is made, that the vicar shall elect both, and he does it accordingly, and the parishioners elect one according to the custom, and the ordinary disallows him, and establishes the two elected by the vicar, a prohibition shall be granted. Pas. 5 Ja. B. R. *The parishioners of Raleghden in Kent*, adjudg'd.

50. *Trin.* 7 Car. B. R. between *Shirley* and *Brown*, Rol. 1391. A prohibition granted against the church-wardens

(*P411) *sen by the * parson of St. Magnus prope London Bridge*, by virtue of a canon, upon a suggestion, that the parish had

[a] Vide *Hardy*. 378. [a] custom to elect both church-wardens. Pas. 4 Car. B. R.

Prohibition.

Rox. 420. *Draper and Stane for Abchurch in London.* A pro-
hibition granted. Dawson v. Fowle in

Sec. Whether a custom for a select vestry is to be tried at common law, and the Spiritual Court to be prohibited; for per Hale, church-wardens are lay incorporations, and to many purposes temporal ministers and officers; and an issue may be tried by a jury, whether there be a custom for a special or select vestry or not.

51. If the church-wardens of a church sue *J. S.* in the Court Christian, supposing by their libel that he, and all those whose estate he had in certain lands next adjoining to the church-yard, had used time out of mind to repair such of the fences of the church-yard which were next adjoining to the said land, a prohibition lies; for that ought to be tried at common law, inasmuch as it is to charge a temporal inheritance. *Mich. 14 Car. B. R. the church-wardens of Claydon and Duncomb.*

52. If there be a suit in the Spiritual Court by the official, *ex promotione* of an administrator against another *pro salute anime* for a [b] *temerarious* administration by the defendant of the intestate's goods, and to hinder him from making an inventory, and shews in an inventory annex'd the particular goods, a prohibition lies; because otherwise they would try the property of the goods there, whereas he might have an action of [c] *Trover* and *Conversion*, or of *Detinue* at common law for them. *Mich. 16 Car. B. R. between Say and Harward, per Curiam,* a prohibition granted to the Consistory of *Winton* in two suits. 4 Leon. 150. Case 261. Goram v. Fowles, the same point adjudg'd, a prohibition was granted to stay a suit brought by church-wardens for taking two bells out of a steeple; for the church-wardens are a corporation, and might have brought [c] an action of *Trover* 2 Salk. 547. Starky against the church-wardens of Watlington. Trin. 4 W. and M. B. R. — A prohibition was granted upon libel for shutting up and locking a Chapel that belong'd to an Almshouse, where ten pounds a year was granted for reading prayers; for he may have an action upon the case. *Bzin v. Jackson, Comb. 93 2 Keb 22, 23. Welcombe v. Lake.* — prohibition denied upon a suit for bells, the suit being only for the crime of sacrilege, *pro salute anime & Reformatione Morum.*

53. An attempt and solicitation of incontinence coupled with force and violence becomes a temporal crime *in toto*; so that after a punishment at law either by indictment or trespass, if the party sues in the Court Christian *pro salute anime*, the court will grant a prohibition; and Holt resembled it to the case of words, *thou art a whore and a thief*, or *thou keep'st a bawdy-house*, both are temporal matters, and the party shall not proceed in the Spiritual Court; but otherwise, if the words were, *thou art a whore*, or a *bawd* only, and not that *thou keep'st a bawdy-house*. Note, it was said by Holt, that if he commit adultery, and the husband brings an assault and battery, this shall not hinder the Spiritual Court; for it is a criminal proceeding there, and no indictment lies at common law for adultery. Salk. 552.

54. A prohibition is not to go in every case where a tempo-
ral Pain.

2 Mod 67.
Roberts v.
ral Pain.

Prohibition.

Paſ. 11 Ja. B. R. Ibid. ral loſs may enſue, and therefore denied upon a ſuit againſt a parſon for taking orders, not being of a proper age, by the ſtatute of 13 Eliz. cap. 10.

55. A man ſpeaking diſreſpectfully of the church of England, or of the common prayer book, it is a ſpiritual cogniſance; and in that caſe a prohibition was denied.

Carthew 56. A prohibition ſhall not be granted to any ſuit in the
151. Quilter Spiritual Court for any nuſance, or other matter done in the
v. Newton. church-yard, upon a ſuggeſtion that the church-yard is a lay
fee; for a nuſance there is properly of eccleſiaſtical cogniſance.

(*P412) * 57. A prohibition will be granted to the Spiritual Court upon a ſuit there for a mortuary. Cro. Eliz. 151. *White's* caſe. 3 Cro. 217. but *quare*, if a cuſtom be alledg'd not to pay it, it ſhall not cauſe it to be tried at common law. 1 Keb. 919. *Marke v Gilbert*, 2 Keb. 535. denied upon a ſuit for ſo much money for a mortuary. 2 Keb. 822.

58. Where a bull from the pope, and an appropriation are alledg'd only as inducements to the party's title; it is no ground for a prohibition. 2 Lev. 251. *Etherington v. the* archbiſhop of *York*.

59. The Spiritual Court cannot fine and imprifon. Godb. 181.

Fol. 288.

(G) For Seats in the Church.

2 Buſt 141. 1. THE diſpoſal of [a] ſeats in the body of the church be-
May v. Gib- longs of common right to the ordinary of the dio-
bon. ceſe; ſo that he may place and diſplace whomever he pleaſes.
[a] 5 Mod. 437. The ſame point 2 Lev. 241. Vide 2 Cro. 615. Whether a man may not preſcribe
for a ſeat in the Chancel, Parcel of the Church.

2. If a man and his anceſtors, and all thoſe whoſe eſtate he hath in a certain meſſuage, have uſed time out of mind to [b] repair an iſle of a church, and to ſit in it, and no other perſon, the ordinary cannot diſplace him: for if he diſplaces him, a prohibition lies; becauſe he hath it by preſcription for a reaſonable conſideration. *Mich. 11 Ja. B. R. per Curiam*, *Mich. 10 Ja. C. B. [c] Pimm's caſe, per Curiam*, Hob. Rep. 95. hath an iſle juxta Eccleſiam to place convenient ſeats for him and his family, and hath always repair'd the ſame at his own coſts and charges; if the ordinary places another man with the founder, without his conſent, not only a prohibition lies; but alſo he may have an action upon the caſe. *Latch 116. Hutton's caſe*. The ſame point, 2 Buſt. 141. But it ſeems in *Pimm's caſe*, no prohibition was granted, becauſe it appear'd the pariſh had repair'd it. 2 Cro. 366. *Frances v. Ley*, the ſame point reſolved. [c] 12 Co. 104. *Godb. 200*. the ſame caſe, and ſame point appears. *Moor 878*. the ſame caſe, and the ſame point. 2 Cro. 605.

3. If a man preſcribes that he and his anceſtors, and all thoſe whoſe eſtates he hath in a certain meſſuage, have uſed to ſit in a certain ſeat in the body of the church, time out of mind, &c. in conſideration that he, &c. had uſed time out of mind to repair the ſaid ſeat. If the ordinary removes him from that ſeat, a prohibition lies; for the ordinary hath no

[b] And per Coke C. J. If a gentleman with the aſſent of the ordinary hath an iſle juxta Eccleſiam to place convenient ſeats for him and his family, and hath always repair'd the ſame at his own coſts and charges; if the ordinary places another man with the founder, without his conſent, not only a prohibition lies; but alſo he may have an action upon the caſe. *Latch 116. Hutton's caſe*. The ſame point, 2 Buſt. 141. But it ſeems in *Pimm's caſe*, no prohibition was granted, becauſe it appear'd the pariſh had repair'd it. 2 Cro. 366. *Frances v. Ley*, the ſame point reſolved. [c] 12 Co. 104. *Godb. 200*. the ſame caſe, and ſame point appears. *Moor 878*. the ſame caſe, and the ſame point. 2 Cro. 605.
Dawney v. Dea. That an action lies for a diſturbance of a ſeat in the Chancel.

Prohibition.

any power to dispose of it: For that is a good prescription, and by intendment there may be a good consideration for the commencement of that prescription, tho' the place where the seat is be the parson's freehold. *Trin. 12 Ja. C. B. Crosse's case*, resolved by the court, and a prohibition granted to the bishop of *Exeter*. For *Crosse* was a parishioner of his parish of *Silverton*. *Mich. 13 Ja. C. B. between Laugh and Hussey*, resolved, and a prohibition granted, and by a verdict. *Mich. 13 Ja. C. B. between Boothby and Day, or Bayly*, Hob. Rep. 95. the same case.

4. But if a man prescribes to have a seat in the body of the church generally, without mentioning the consideration of repairing the seat; yet the ordinary may displace him. *Mich. 11 Ja. B. R. per Curiam, Mich. 13 Ja. B. between Boothby and Day, or Bayly*, Hob. Rep. 93. the same case, *per Curiam*, prescribing to have a seat in a church *Ratione Messuagii*, where he inhabited, a prohibition was granted, it being a temporal loss. *Latch 116.*

* 5. The ordinary hath nothing to do with the seats in the chapel, annex'd to the houses of lay-men, as of *Nobles, &c.* *Trin. 12 Ja. C. B. agreed.* (*P413)

6. If a layman by the dissolution of monasteries hath a monastery, in which there is a church part of it, and he suffers the parishioners for a long time to come there to hear divine service, and to use it as a parish church; that shall give a jurisdiction to the ordinary to order the seats, because that now in fact it becomes the parish church, which before was not subject to the ordinary. *Trin. 12 Ja. C. B. Buzard's case* adjudg'd.

7. If there be a custom in a parish, that twelve of the parishioners may elect church-wardens, which church-wardens have a power by the custom to repair the old seats, to erect a pew in the chancel of the church, and to appoint what persons shall sit in them; and the church-wardens so elected erect a new seat in the chancel of the church, and appoint a certain person to sit there; and after the ordinary decrees that another shall have the seat, *a prohibition lies*; for the custom hath the power of the disposal of the seats in the church-wardens. *Pas. 16 Ja. B. R. between Prabin and Tredenham* for a seat in the church of *Breock* in *Cornubia*, resolved, and a prohibition granted; but it was also granted partly, for the sentence of the ordinary was, that *Tredenham* had the seat to him and his heirs, and that none should disturb him, at the peril of the greater excommunication, which is unreasonable; and by that sentence he and his heirs have it, tho' they be not inhabitants within the parish.

Greaterchy v. Beardly.
2 Lev. 241.
a prohibition was prayed upon a suggestion, that time out of mind the parishioners at their own charge built and repair'd

the seats in the church, & *ratione inde* the seats have been time out of mind disposed by the church-wardens of the church; a prohibition was denied, for of common right, the ordinary generally had the disposal of the seats, and of common right the parishioners ought

Prohibition.

ought to repair them. 2 Inst. 489. and adjudg'd that the parishioners had nothing here to oust the ordinary of his jurisdiction, and a prohibition denied in B. R. as it seems it had before in C. B. Popb. 140 the same case reported there, by the name of Brabin and Tredman's case, and the same point appears, 2 Roll's Rep. 24. the same case by the name of Brabin and Tredman.

8. If a layman by the dissolution of monasteries hath a monastery, wherein is a church part of it, and he suffers the parishioners for sixty years to come there to hear divine service, and he himself had used for all that time to have the placing of persons in seats there: The ordinary cannot displace them, because the patron had used, for all the time that it had been a parish church, to have the ordering and placing of, and placing in the seats. *Trin. 12 Ja. C. B. Bazzard's case.*

9. The plaintiff declared in a prohibition, setting forth a prescriptive right in the plaintiff, and those whose estate he had, &c. to a seat in the church, and that the defendant, surmising a usage time out of mind, had libelled against him in the Spiritual Court for disturbing him in sitting there, and shews that he had denied the usage in the Spiritual Court, and the judge had refused to allow his plea; the defendant traversed the plaintiff's prescription, and pleaded his own usage, upon which there was a demurrer. Mr. Eyer urged, that tho' the plaintiff had by his demurrer confels'd his prescription to be false, and by consequence that he had no right to the seat, yet the defendant grounding his libel below, upon a custom which is not triable there, he could not have a consultation. *Vide Hett. 94. Noy. 78. 2 Jo. 3. Holt C. J. held,* that if the plaintiff had not a title by prescription, he ought not to disturb the possession of the defendant, and the ordinary hath consufance of such disturbance, and may settle it

(*P414) according to usage and possession, unless there be a *temporal So where the plaintiff moved for a prohibition upon a suggestion that in such a parish there is a custom, that the inhabitants of such and such ancient tenements have sate in the first seat of such a nisse, and that the bishop removed them, and gave the use to others to sit there, and for that they went to try the custom; a prohibition was granted, for that if this was an idle custom, a prohibition ought to go; for where courts hold plea for an idle custom they shall be prohibited; for which the case of *Topfale and Fenner* was cited, *Hob. 175.* But here denied; and chief justice Pemberton said, that in this case, besides the custom, the Spiritual Court hath consufance of the matter, placing and displacing being in the ordinary; so that if the custom were out of the case, yet they may proceed but in *Topfale's* case they proceeded only upon the custom, which being a vain unreasonable custom, they were prohibited. *Skinner 7, 8.*

The defendant surmised, that he and his ancestors had used time out of mind, &c. to have an isle with a seat in the church for himself and family. This was on a libel for

Prohibition.

seat in the church, *per Cur'*, because it appear'd upon the examination of the party himself, that the parish had always used to repair the isle and seat, the court would not grant a prohibition; for that proves his ancestors were not founders of the said isle and seat. 5 *Mod.* 437. the cases there cited are, *Godb.* 199. *Moor* 878. 12 *Rep.* *Corwen v. Pym.*

A libel in the Bishop's Court of Exeter for a seat which the church-wardens assigned to one *M.* in whose right the plaintiffs claimed, the defendants there, who now prayed the prohibition, prescribed, by a *Que Estate* for the seat as *antient* and belonging to their tenement in *W.* and that they, and all those, &c. had us'd to repair. It was doubted, whether this prescription in *Navi Ecclesiæ* be good, but in an isle it were good; the court inclined that such a prescription in *Navi Ecclesiæ* may be for special cause, but they would not grant a prohibition. And *Vide* 2 *Mod.* 283. the case of *Shambrook v. Fetisplace*, where the question was, whether it could belong to a manor where the party had no dwelling-house, but only land; the court inclined that it was not good. *Moor* 878. *Pym v. Gorwyn* cited, that a man may prescribe for an isle, because it shall be intended his ancestors built it; but not for a seat in the body of the church, because the disposition thereof belongs to the parson and church-wardens. *V. Winch* 19.

5 *Mod.* 436
Crooke v.
Sampson,
&c. church-
wardens.
2 *Keb.* 92.
the same
case.

* (H) *Jurisdiction.*

(*P415)

Reparations.

THE Ecclesiastical Court hath conuſance of the reparation of the body of the church. 5 *Co.* *Jeffery's* case

[a] resolved.

[a] 2 *Inst.*
1 *Bull.* 20.

41, *Cra. Eliz.* 659. *Pob.* 212. *Hardr.* 379. *Win.* 53. 2 *Brownl.* 10. 1 *Bull.* 20.

2. If a man abides and inhabits in one parish, and hath

lands in another parish which he occupies himself, there he

shall be charg'd for that land for the [b] reparation of the

[b] The same
point ad-
judg'd in the
case of *Paeet*
and *Crumpton*
in *Cro.*

church in which the land lies, because he may come there

when he will; and he is to be charg'd in respect of the land.

3 *Co.* 67. *Jeffery's* case, *Trin.* 11. *Ja C. B. Andrew's* case, *per*

Curiam contra, *M.* 40. 41 *Eliz. per Curiam.*

Eliz. 659. pl. 5. the like point in the case of *Stephenson v. Case*, *Cro. Eliz.* 843. pl. 24. *V.*

Winch 53. the same point, 2 *Brownl.* 10. *Jeffery's* case cited and agreed. 1 *Bull.* 20. the

same point adjudg'd *per totam Curiam*, 2 *Roll. Rep.* 270. the same point.

3. But if an inhabitant of a parish lets his land which he

2 *Roll. Rep.*
270.

hath in another parish, reserving a rent, he shall not be charg'd

where the land is in respect of the rent, because there is a [c]

[c] *Hill.* 20. *Ja.*

C. Justice and *Chamberlain* held that the farmer should not be charged for the whole tax

rent; for that it would be unreasonable for a [c] poor husbandman who pays rent for his

land to repair churches, who perhaps pays the utmost value; but otherwise of church or-

parishioner

Prohibition.

parishioner and inhabitant who may be charged. 5 Co. 67.

* Cited in *Jeffery's case* resolved. *Mich. 5 Ja. C. B. **
the case of Paget and Crumpton. Cro. Eliz. 65. Pasf. 41. of Eliz. the judges agreed to that point. Vide 4 Mod. 148. held a good suggestion to say, that the lands were in the occupation of his tenant, and that he was an inhabitant of the parish where the church was. But if a man takes a lease of a stall in a market town, where he only comes once a week to sell his wares, but liveth in another parish, he shall not be charged towards the repairs of the church in that market town.

4. A man cannot be charged in the parish where he dwells

[a] Cited and for lands which he hath in another parish to the [a] repairs agreed to in of the church, because that then he may be twice charged; the case of for he may be charged in the parish where the lands lie. Pasf. Paget and 16 Ja. B. R. Sir *H. Butler v. —* resolved, and a prohibition granted. 5 Co. 67. *Jeffery's case*.

Cro. Eliz. 659. Cro. Eliz. 843. *Stephenson v. Case*. The same point adjudged according to *Jeffery's case*. The same point adjudged in 2 Brownl. 10. in the case of Glover and Wenhams; but said to be otherwise in the case of church ornaments, or the repairs of seats in the church. Winch 53. The same point said to be adjudged, *Mich. 19 Ja. 1 Bullst. 20.*

5. If a petty chapman takes a standing for a rent in the wastes of a manor within the market for two or three hours every market-day, to sell his commodities (the market being held there one day every week) but dwells in another parish, he cannot be rated to the repairs of the church for that standing. *Mich. 20 Ja. B. R. between Hollynes and the church-wardens*

[c] Cited in of *Kettering in Northamptonshire* resolved, and a [b] prohibition 4 Mod. 148. granted accordingly.

(*P416) *6. If a citizen of London erects a messuage in the parish of A. to inhabit there in the time of the sickness in London, and hath not any lands in the parish, and afterwards is assels'd 20s. to the repairs of the church; whereas others that have 100 acres of land in the same parish pay but 6d. yet no [c] prohibition shall be granted upon a suit for the 20s. in the Court Christian, because they have a jurisdiction of the thing, and may order it according to their law. *Mich. 5 Ja. B. R. Sir Robert Lee's case, per curiam.*

[d] Per Whitlock, upon a suggestion that the lands

were over-rated, resolved that the valuing of the land belongs to the spiritual court. *Holland v. Kerton, 2 Rol. Rep. 463.*

[d] The suggestion must shew that the chapel of ease had parochial rights, otherwise 'tis ill. Comb. 132.

7. If there be a [d] chapel of ease within a parish, and some part of the parish have used time out of mind, &c. alone, without others of the parishioners, to repair the chapel of ease, and to hear service there, and marry, and all other things; but only that they buried at their mother church; yet they shall not be discharged from the repairs of their mother church; but they ought to contribute to it, for the chapel was ordain'd only for their ease. *Mich. 13 Ja. B. between the church-wardens of Ashton and the inhabitants of Castel Bromage. Hob. Reports 91.*

8. So it is, if the inhabitants, who have used to repair the chapel, prescribe that they, time out of mind, have used to

Prohibition.

repair the chapel, and [a] by reason thereof have been discharged from repairing their mother church; yet that shall not discharge them from repairing their mother church, because it is not a direct prescription to be discharged from it; but it is *ratione inde* (that is) by reason of repairing the chapel. *Mich.* 13 *Ja.* C. B. in the above case of *Ashton*.

[a] *Brown v. Palfrey*, 2 Lev. 102. upon a suggestion that they had a parochial chapelry

within another parish in Northumberland, and that the inhabitants of the chapelry had, time out of mind, used to have divine service and sacrament in the parochial chapel, and had used to be exempted from repairing the parish church, bells, &c. in consideration that they had used to be charged to the repairs of their chapel, and had used to repair it; a prohibition was granted; and in this case it was said, that in the case of *Chapel Bromage*, Burying was reserved to the parochial church, and that was a reservation of their ancient right. But upon an issue, it being found there was no such custom, a consultation was granted. *Vide* 2 *Rol. Kep.* 265. The same point adjudged. *Wise v. Creek*, 2 Lev. 186. S. P. 1 Bullst. 17. that a prescription to be discharged from the repairs of the mother church is a matter merely spiritual, and a prohibition denied. *Hill.* 7. *Ja.* 1.

9. If the chapel be three miles distant from the mother church, and the inhabitants who used to come to the chapel had used time out of mind to repair the chapel, and there to marry and bury, and for 60 years together had not been charged to repair the mother church, yet that is not any reason to have a [b] prohibition; but he ought to shew in the spiritual court that exemption, if they had any upon the endowment. *Hill.* 18 *Car.* B. R. *per curiam*; a prohibition denied, moved for by Mr. South.

[b] *V. 2 Rol. Rep.* 265. that such prescription is against

common right, that they who have a chapel of ease should be discharged from the repairs of their mother church; and it may be, said the Chief Justice, that the church being built at home might not need repairs within time of memory; and yet that does not discharge, unless they shew the discharge specially, i. e. how it began. *Mich.* 20 *Ja.* in B. R. 2 Lev. 102. e contra. And the case of *Chapel Bromage* in *Hob.* 66. distinguished; for that there burying was reserved to the parochial church. In 3 *Mod.* 264. in the case of *Godfrey and Everiden*, said to be denied upon producing an affidavit, that there had been no divine service, burials, or baptism for forty years. *Comb.* 148. the same case and point. *Vide Comb.* 138. *Hussey v. Caslock*, where it was said to be denied only for that they had omitted (Burials) in the suggestion, and that they were advised to amend the suggestion.

10. If a man be sued in the spiritual court for the repairs of a church, no prohibition shall be granted, upon a suggestion that other persons have lands within that parish, who ought to be charged with the repairs of the church as well as they, and * are not charged therewith; for if that be true, it is a good plea there; and if they will not allow it, they ought to appeal. 9 *Car.* between *per curiam*, and a prohibition denied accordingly. (*P417)

11. If the inhabitants within a chapelry prescribe to be discharged time out of mind from the repairs [c] of their mother B. R.

[c] *Palmer* 532. *Pal.* 4 *Car.* 1.

Per Hide, Jones and Whitlock, that such prescription is not good. *Noy* 41. *Pal.* 4 *Eliz.* Church-wardens of *Deusford's* case, cited *Poitea*, title *Reparation*, pl. 1. The same point adjudged, 2 *Rol. Rep.* 265. The same point, 2 Lev. 102. e contra, if the chapel of ease had all parochial rites, 3 *Mod.* 264. The same point as in *Lev. Comb.* 138. The same point.

Prohibition.

ther church, and are sued for such repairs; a prohibition lies upon that suggestion. Hob. Rep. 66, 67.

12. The seeming contradictions in the before-mentioned cases, seem to be reconciled in the case of *Wife and Creek*, 2 Lev. 186. The case was, the plaintiff in prohibition declared, that time out of mind they had in *Bodecut* within the parish of *Adderbury* a chapel parochial, or church of *Bodecut*; and that time out of mind they had a body of a church, a chancel, bells, and other parochial trophies or ornaments, and divine service and sacraments, and a distinct perambulation of *Bodecut* and *Adderbury* separately; and the inhabitants of *Bodecut* never went to the church of *Adderbury*, nor had they any seats there; and that the inhabitants of *Bodecut* had distinct churchwardens, and no other use of the church or church-yard of *Adderbury* but to bury their dead there; and that time out of mind they repaired their parochial church or chapel of *Bodecut*, and the inhabitants were therefrom exempt, *ratione inde* they had used to be freed and discharged from the repairs of the church of *Adderbury*, yet they were sued, &c. Upon a demurrer it was argued for the plaintiff; *First*, A prescription generally without cause from repairing the mother church is not good, because they are of common right obliged to it. *Secondly*, That the cause here to repair the parochial chapel is not a good cause, because it is for their own ease; but that if they had prescribed to repair so much of the parochial church, or the walls of the church-yard, it might be good. *Thirdly*, That this custom, if any such there be, might be tried in the spiritual court. For the defendant it was said that though it be true that a general prescription to have such discharge would not be good, no more than to be discharged from the repairs of a highway, because for the publick good: Yet here it is a good cause of discharge *viz.* the not having seats in the church, the not doing any thing there but burying their dead, which might have a reasonable commencement; for when the mother church came to be too little for the people growing too numerous, it might be agreed that the inhabitants of that village should build a chapel, and no more incumber their mother church, but should repair and find seats, bells, &c. for their own chapel; and they cited 2 Rol. 90. and said that the case in Hob. of *Chapel Bromage* was not, because the custom was void, but because the suggestion appeared to be false; and though the repairs of a church is expressly within the Statute *de Circumspecte agatis*; yet when a custom comes in dispute it is temporal, and shall be tried in the temporal courts; and

Prohibition.

of such opinion was the court, and an issue ordered to be tried upon the custom.

13. *Note.* In the above case in Hob. 66, 67. it was said to be in the discretion of the court to deny a prohibition. 1 Sid. 65. all the court held that prohibitions were grantable *ex debito Justitiæ*, and not honorary at the discretion of the judges, as in Hob. *supra*. And to prove it *Wyndham* cited the case of *Warts* and *Clifton* in 2 Cro. 351. *per Holt* in Salk. 33. *e contra*, according to the case in Hob. that they were not grantable of common right, or *ex debito Justitiæ*, but discretionary; and he said that *Hale* and *Wyndham* were of that opinion, but that *Keling* differed.

14. A bishop cannot appoint commissioners to tax the parish for building or repairing the church. 2 Mod. 8. *Curtis v. Davenant*. (*P418)

15. If any of the parishioners refuse to pay their proportion according to the rate for the repairs of the church, they may be libelled against in the spiritual court; and though the libel mentions generally *pro reparatione ecclesiæ*, it shall be intended the body of the church, *per curiam*.

The like point in the following case.

Deusford was an ancient church in the county of *N.* and the church-wardens sue the inhabitants of *K.* in the same parish where there is a chapel of ease, for contribution to repair the church of *D.* and they pray a prohibition, upon a suggestion, that time out of mind they had used to repair their own chapel, and only part of the wall of the church-yard of the church of *D.* By the better opinion of the court it was not good; for their ease shall not be a charge, or (as it is there called) a disease to the rest of the parishioners: *Yelverton*, that the parson ought to repair the churchyard; *Fenner*, that the parishioners ought, Noy 31. the church-wardens of *Deusford's* ease.

The case of
St. Mary
Magdalen,
Bermondsey
in South-
work.
2 Mod. 222.
Pas.
29 Car. 2.

(I) Reparation

IF there be a parochial church and a chapel of ease within the same parish, and the chapel of ease time out of mind had all spiritual rights *but burying*, and that had used to be done in the parochial church; and for that they who had used to go to the chapel of ease had, time out of mind, used to repair one part of the [a] wall of the church-yard of the parish church, and in consideration thereof, and for that those who were of the chapel of ease had used, time out of mind, to repair the chapel of ease, they had, time out of mind, been discharged from the repairs of the parish church, this is a good prescription;

[a] The same point cited in the before-mentioned case of *Wife and Creek*.
2 Lev. 186.

Prohibition.

[b] prescription; and therefore, if they are sued in the spiritual court to repair the parochial church, a prohibition lies. *Trin.* 15 Ja. B. R. between the inhabitants of the parish of *Stratford*, and the inhabitants of the chapel of ease of *Luddington*; a prohibition granted, and there was then shewn a precedent. Pas. 44 Eliz. Rot. 17. between *Marshall* and *Ashley*, a prohibition granted for the chapel called [b] *Densford* against the parish of *Ringstead*.

[b] A prescription generally to be discharged from the repairs of the mother church is not good, because against common right, no more than a prescription to be discharged from the repairs of a highway; because it is pro bono publico; argued and adjudged in the case of *Wife and Creek*, 2 Lev. 186. Noy 41. the same case.

2. If the chapel of ease had used, time out of mind, to have all the sacraments except burial, and the inhabitants within the chapel always also used to repair the chapel, and prescribe, that in consideration of 3s. 4d. a year paid for repairing of the mother church, to be discharged from the repairs of the mother church, if the inhabitants of the chapel are sued for the repairs of the mother church, a prohibition lies upon this *modus*. Pas. 11 Car. B. R. between *Penneland* and *Toye*, a prohibition was granted; *Goosey* was the chapel, and *Stanford* the mother church in com. *Berks. Trin.* 11 Car. B. R. In this case a prohibition was confirmed and ordered to be tried at the next assizes. But *Mich.* 11 Car. a consultation was granted in that case, because the prohibition was granted after sentence in the spiritual court, that there was not any such custom.

(*P419) * Two church-wardens sue S. for the repairs of a church according to the tax assessed, S. pleads he always offer'd to pay upon which a sentence passed against the plaintiffs there, then they appeal, and the sentence is repealed, and 15l. costs given to them, and they sue for that 15l. in the spiritual court and S. pleads a release of one of the church-wardens. Three judges were of opinion that the release is a good bar, and disallowed a prohibition lies; a case in 7 Ja. B. R. Rol. 852 was cited *contra*, that the church-wardens in such a case are a corporation for the benefit, but not for the prejudice of the parish. 13 H. 7. 9. 11 H. 4. 12. and that the release shall be determined there. Noy 129. *Gore v. Stark*

A rate to the repair of a church is not good, if made *perpetuis duratura temporibus*, because it binds the inheritance. Noy 531. and in the same book 136. in *Chambers's* case, a prohibition was awarded to the court of the bishop of *Oxford*, that *Chambers* was sued there for a perpetual charge imposed upon the land for the repair of the church; for *per curiam*, the inheritance cannot be charged with it.

Prohibition.

(K) Jurisdiction.

Repairation, Ornaments.

Fol. 291.

If a man be rated for the ornaments of a church, according to the lands he hath in that parish, a prohibition lies; because for those things he ought to be rated according to his personal estate. *Mich. 20 Ja. B. R.*

2 Rol. Rep. 262. the same case 270. the same point.

2. If a man, who is not an inhabitant within the parish, but hath lands there, is there rated for church ornaments according to the lands, a prohibition lies; for the inhabitants ought to be rated for them. *Mich. 20 Ja. B. R.* resolved by the court, and a prohibition being moved by Mr. Telverton was granted, who said, it had been several times so resolved.

1 Bullst. 20. the same point. 2 Brownl. 10. the same point. 2 Rol. Rep. 262, 270. 3 Mod. 211. the same point. A person lived in one

diocese, who occupied lands in another, where he was taxed towards the finding bells for that church; for which a suit was commenced in the bishop's court where the lands were; they suggested the statute of H. 8. that no man shall be cited out of his diocese, except for some spiritual cause neglected to be done there, and a prohibition was granted; for this was not a spiritual cause neglected to be done, because church ornaments are a personal charge upon the inhabitants, and not upon the land owners who dwell elsewhere; but the repairing the church is a real charge upon the land. So in the case of subtracting tithes, the party must be sued where the wrong was done; and the party had a consultation. 2 Salk. 463. *Machin v. Maultin.* 3 Mod. 211. Woodward's case. Pasl. 4 Ja.

3. If all the parishioners are not rated for the repairs of the church, but some are, and some not; and those which are rated are sued in the ecclesiastical court, a prohibition shall be granted. 11 Ja. B. R. *per curiam.*

But where the lands were said to be over-rated upon

on a suggestion, resolved that the valuing of the land belongs to the spiritual court. 2 Rol. 463.

4. If the major part of the parishioners of a parish where there are four bells, agree that there shall be a fifth bell, and it is accordingly made, and they make a rate for the payment of it; that shall bind the minor part of the parishioners, although they do not agree to it; for otherwise some obstinate persons might hinder any thing intended, and which is fit, for the ornaments of the church. * *Mich. 2 Car. B, R.* between

(*P420)

per curiam, a prohibition denied, being moved for by Mr. Wilde, concerning the parishioners of Bromford in Worcester-shire.

5. So upon a motion for a prohibition to stay a suit in the spiritual court for a church-warden's rate upon a suggestion that they had pleaded, that the rate was not made with the consent of the parishioners, and that the plea was refused; the court said, that the church-wardens (if the parish were summoned, and refused to meet or make a rate) might make a rate alone for the repairs of the church, if needful, because if the repairs were neglected, the church-wardens were to be cited, and not the parishioners; and a day was given to shew cause why a prohibition should not go. 1 Ven. 167.

6. Denied upon a suit to repair the church brought by the proprietor against the parson, who pleaded that he repaired

ed

Prohibition.

ed the chancel, and ought not to repair the church, and that plea refused; for this is cause of appeal only. 2 Keb. 472. *Slowman* against the church-wardens of *Longueville*.

7. Upon a demurrer to a prohibition, the case appears to be, that the parishes of *St. Maurice* and *St. Mary Kalendar* in the city of *Winchester* were united, *concurrentibus hiis*, by the statute of 17 Car. 2. and the church of *St. Maurice* was appointed to be the presentative church; afterwards the church of *St. Mary Kalendar* was demolished, and houses built on the ground where that church stood: the court, it seems, inclined to continue the prohibition upon these reasons; that an union of churches can intend no more at common law than a consolidation of tithes; but that the bounds thereof continue distinct as before: *i. e.* that the union is only for the benefit of the parson, but that the parishes remain separate, and the provision of the statute mentions that they are so to be; that it was said by the counsel for the defendant, that the case in *Hob. 67.* was different from this, for that there both churches remained in being, but here one was demolished and gone; so that if the plaintiff should not be contributory to the church in being, he would not be contributory to the repairs of the church at all; and 'tis unreasonable that he should have the benefit of the church in conjunction with the rest of the parishioners, and at their charge. *Carthew v. Felldown v. Beale.* Pasf. 4 W. & M. B. R. Rot. 3. but no judgment appears to be given.

But in *Mich. 7 W. 3. B. R. Rot. 3.* Upon a motion for prohibition to a suit in the ecclesiastical court, upon a rate against the inhabitants of the parish of *St. Mary's*, to contribute to the repairs of the church of *St. Swithin*, to which parish the parish of *St. Mary's* was united by the act for rebuilding the city of *London*; it was urged on the behalf of the plaintiff, tho' the churches are united, yet the parishes remain distinct; as if in a market town there are two churches, and one is pulled down, and the other church becomes common to both parishes, yet it does not unite the parishes, which was granted. But *Holt* made a distinction between such an union made by the patron and ordinary, and an union by act of parliament; for in the first case the union does not make the church remaining, a parish church to the other parish, but here the parish church is become the parish church of both parishes, and therefore reasonable that both parishes should contribute to the repairs of it. This case came on again, and appears in the same book 616. and the rule for the prohibition was discharged; and *Holt* amongst other things took notice that upon an union either at common law, or by the statute

en. 8. (by which he means the statute of 37 H. 8. that re-

Prohibition.

churches, not being above a mile distant, and one of them not above the yearly value of 6l. may be united into one; though one church be united to another, yet it did not unite the parishes, or bind the parishioners of the church united to resort to the church to which it is united, but 'tis only an appropriation * of the one church to the other; so that the incumbent and his successors of the other church shall be parsons of the church united, but notwithstanding he is bound to celebrate divine service in the church united; and the inhabitants are not bound to resort to the other church. (*P421)

And Note; there is a proviso in that act, *That where the inhabitants shall insure the incumbent so much money as with the sum rated shall amount to 8l. in the King's books (i. e. of his first grants, &c.) the union to be void*, which much strengthens the distinction made by Holt.

(L. n. t. cases it shall be granted for a collateral cause.

[F] a suit be in the spiritual court to try the [a] bounds of a parish, a prohibition shall be granted; for they cannot try that matter. *Mich. 14 Ja. B. R. Fisher and Chamberlain* resolved. *Hill. 41 Eliz. B. R. between Piper and Barnaby* adjudged, and a prohibition granted. *Hill. 13 Ja. B. R. between [b] Foster and Hide* adjudged. [c] Cro. Eliz. 228. *Stran-shall v. Culling-ton*, the same point adjudged. Nov. 147. Phillips v. Slacke, the same point. But the bounds of villis in the same parish are triable in the spiritual court. 1 Lev. 78. 1 Vent 335. 1 Keb. 369, 945. 1 Rol. Rep. 331. [b] 1 Rol. Rep. 331. pl. 39. the same case. V. 5 H. 5. 10. 7 Co. 44 b.

2. If a vicar of a parish do libel against another to avoid the institution to the church of D. which he suggests to be a chapel of ease belonging to his vicarage, if the defendant suggests that D. is a parish by itself, and not a chapel of ease, a prohibition shall be granted; for they cannot try the [c] bounds of the parish. *Mich. 14 Ja. B. R. Fisher and Chamberlain* adjudged for the church of *Oakley and Clapham*; and yet where he alledged it *subdole libellando*. [c] Cro. Eliz. 228. *Stran-shall v. Culling-ton*, S. P. Nov. 147. Bull. 159.

3. If there be a question in the Court Christian, whether a church be a parochial church, or but a chapel of ease, a prohibition lies. *Trin. 3 Ja. C. B. the church-wardens of St. Simons* case of *Cornwall*. Pas. 9 Car. B. R. between *Elie vicar of Sherburne in com. Wilts.* and *Coke* granted a prohibition, it being the vicar, and thereupon issue was joined, whether they were several parishes, and found by the verdict to be one parish.

4. If there be a chapel of ease in a parish, and vicar thereof distinct from the parochial church, and the vicar is endowed with the tithes of the parishioners, who are inhabitants within that chapel, and the vicar sues one of the parish, who is not within the chapel, and he affirms that he is of the parish, and

Prohibition.

[d] Where a man was sued ex officio for not coming to the church of A. and he pleads that the church of A. is not his parish church, but that he used to frequent another parish church, they in the Spiritual Court would not receive his plea; a prohibition granted per totam Curiam; for they are not to meddle with the precinct of parish churches, nor to determine which is a man's parish church. 1 Bull. 159. The Spiritual Court may try whether a parish be within a peculiar jurisdiction or not. 1 Keb. 764.

5. If the church-wardens of a parish sue a vill for the repairs of their church, supposing the vill to be a hamlet within their parish, and the vill say that it is a parish by itself, and not a * hamlet of the other parish, a prohibition shall be granted; for here the bounds of the parish will come in question. *Trin.* 16 Ja. prohibition granted.

6. If there be a suit in the Consistory of *Durham* for tithes of land lying in *Berwick*, no prohibition shall be granted upon a surmise that the lands lie in *Amerton* within the kingdom of *Scotland*, and not in *Berwick*, for altho' it be true yet it may be, that the parson ought to have tithes thereof. *Trin.* 11 Car. B. R. between *Morton* and *Resdon* per Curiam, after a prohibition upon such a suggestion made, and a traverse taken that it did not lie in *Amerton* in the kingdom of *Scotland*; a consultation was granted, and it seems it was partly as having respect to the said kingdom of *Scotland* and *England* in point of state.

7. If a man who hath lands by descent sues in the Ecclesiastical Court against another for calling him bastard, a prohibition shall be granted, because it tends to a temporal disinheritance. *Mich.* 3. Ja. B. R. per Curiam.

8. If a man sues for a legacy in the Spiritual Court against an executor, and he there pleads that he hath not assets, but for the debts, if the court disallows that plea a prohibition shall be granted. *Pas.* 15 Ja. B. R. between *Singleton* and *Wade*, a prohibition was granted accordingly.

9. Tho' it belongs to the Temporal Courts to try whether an executor or administrator hath fully administered, yet if he be sued in the Court Christian for a matter of which they have original cognizance, as for a legacy, tho' *Plene administravit* be triable by a jury, yet it may in that case be tried in the Spiritual Court per *Testes*. But if they in their proceedings refuse such proof so fully administered, in discharge of the party, which would have been good evidence in the court of law, they are to be prohibited. 3 Bull. 314. *Mich.* 1 Car. B. R. *Dickes & Ux' v. Brown*.

10. Upon a suit for a legacy in the court of Audience where the defendant there pleaded a release, and proved

Prohibition.

by one witness, the plaintiff confess'd the release, but replied that the intestate was an idiot, a prohibition was denied; for it was pertinent to the cause and their jurisdiction; but if they had disallow'd the proof by one witness, a prohibition would lie. Hob. 188.

11. The Ecclesiastical Court may try matter triable at common law, which comes into dispute casually and incidentally, where the principal matter is ecclesiastical, and shall not be prohibited, if they proceed according to the rules of the common law, 2 Lev. 6. *Sir William Juxon v. Byron*. Trin. 24. Car. 2. B. R. 3 Lev. 72. the same point, and *Juxon's* case cited, but adjudg'd that they shall not try the validity of Letters patent. See 12 Co. 66. Reg. 57, 58. 3 Cro. 466. 3 Cro. 68. cited by *Levinz*.

(M) *In what Cases they shall not have a (a) Jurisdiction for a (b) Collateral Cause.*

(P*423)

(a) 'Tis said, the Temporal Courts will not

grant a prohibition where the sentence of the Court Christian is in affirmance of justice, tho' the matter was not originally cognizable before them. Latch 170.

(b) When the principal cause is of ecclesiastical cognizance, the Spiritual Court may try matters

If *A* presented by *J. S.* to a benefice be admitted, instituted and inducted, and afterwards the King presents his clerk to the same church, supposing *A.* to be presented by Simony, and his clerk is instituted and inducted; whereupon *A.* sues in the Ecclesiastical Court against the King's clerk, supposing that he came in by (c) *Simony*, and so prays that the super-admission, institution and induction of him be repealed, a prohibition shall be granted for the King's clerk upon his suggestion, that *A.* was presented by Simony, for now the question only between them is, whether the church was void or not at the time of the King's presentment, which is triable only by the Temporal Court. Trin. 16 Ja. B. R. between *Wison* and *Bathoe*, resolved by the court, and a prohibition granted. But afterwards the prohibition was staid. But 16 Ja. B. R. the prohibition was granted, altho' it was said, that they only question'd the institution in the Ecclesiastical Court; for that is not to be allowed after (d) induction.

which happen casually and incidentally in the cause; but then they must take care that such matter of a temporal nature be determined by them in such a manner as it would have been determined at common law; otherwise the Temporal Court will grant a prohibition; but if the matter incident be of a spiritual nature, they are to try it according to their law. For instance; if they require two witnesses to the proof of a legacy, or a revocation of a will, a prohibition will not lie, because such proof is required at law; but if they require two witnesses to prove the payment of a legacy, or refuse to admit the proof of one witness, a prohibition will be granted. 1 Rol. Rep. 12. Moor 413. Velv. 93. Latch 217. 23. 1 Show. 158, 172. 3 Salk. 288. Noy 12. a case cited e contra, and it hath been adjudg'd, that where a matter triable at law is collateral to the complaint in the libel, of which the Spiritual Court originally have cognisance, they shall not be prohibited; as where the libel is for the tithes of such a close, there they have an original jurisdiction of the cause, viz. for tithes. If then the defendant pleads that it is not his close, but the close

Prohibition.

of another person, this is triable at law, but being collateral to the original cause it shall be tried in the Spiritual Court. 1 Sid. 89. where the libel is grounded upon a custom, whereof they have original consueance, no prohibition will lie upon a denial of the custom; but otherwise where the matter ariseth only by the custom, and not otherwise, as for the tithes of conies. 2 Keb. 452. Philips v. Clever, per Coke chief justice. The civil law will not allow of a lease, unless that it have tradition delivery; and therefore the same is not to be tried there, because they will then draw the matter ad aliud Examen. If an acquittance be there shewn they may try it, but not feoffments or leases; but if one says he had a lease, and the other says he had a former lease, this is triable in the Spiritual Court, 2 Bullst. 219. Parker v. Kemp 283. Clifton v. Oates. 1 Rol. Rep. the same case, 2 Bullst. 315. the same point. Mich. 12 Ja. Ben. 141. Firrell's case. A prohibition lies if the Spiritual Court meddles with a matter wholly conuzable at law. Cro. Ja. 350. Worts v. Clyfton, — that the Spiritual Court is not to try the validity of the assignment of leases, 1 Bullst. 125. A prohibition was prayed upon a suit for tithes, and the prohibition grounded upon the statute of 31 Eliz. cap. supposing that the said parson had committed (c) Simony in coming to the parsonage, and thereby the church was void, and the tithes not belonging to him, agree per Curiam absente Glanville, that a prohibition lay not; for the Simony might more aptly be tried in the Spiritual Court, wherefore a consultation was awarded. Cro. Eliz. 642. Riefby v. Wentworth. (d) The Spiritual Courts are not to meddle with induction, even tho' a caveat had been entered before to prevent induction. Lit. 165, 176. 2 Keb. 572, 392. Hetley 392. Induction is the placing a person in the possession of a church, and gives him a freehold therein, and is such a freehold as the common law takes notice of; and therefore for the quieting men in their possessions the law will not permit the Spiritual Court to disturb the possession, and to strip a man of his freehold by their repealing a former act done by them, whereby he gained that possession, which possibly they might have done before the party had been inducted. Moor 861. 2 Lev. 125. 1 Bullst. 179.

(c) Cro. Eliz. 2. The patron of a benefice may be sued in the Ecclesiastical Court for presenting his clerk (who is now inducted) for 642. Riefby v. Wentworth.

(e) Simony; for the statute of Simony doth not take away the ecclesiastical * jurisdiction from punishing the party *pro salute Animæ*. Hill. 11 Ja. B. R. (a) Sir William Boier's case resolved 183. S. C. and S. P. adjudg'd.

3. If *A.* recovers in a *Quare Impedit* against the ordinary and incumbent, and the incumbent brings a writ of error, of which the judgment is affirmed, and a writ to the bishop is granted for *A.* whereupon *A.* presents his clerk to the bishop before any actual removal of the first incumbent, and his clerk is admitted and instituted, upon which the first incumbent appeals to the audience for a (b) *super-institution* before that he was removed, a prohibition shall be granted; for the first incumbent was removed in law by the first judgment, altho' he continued incumbent *de facto* till the last incumbent was presented, and this last institution was by virtue of the King's writ, and therefore there could be no appeal thereof. Mich. 12 Ja. B. R. between (c) *Whistler* and *Singleton* adjudg'd and a prohibition granted.

f. 99, 100 101. (c) 1 Rol. Rep. 62. the same case.

4. If *A.* be instituted and inducted to a church, and afterwards he is sued in the high Commission Court for it, because that before, one *B.* was instituted and inducted, and after *A.* was super-instituted and inducted, by which, according to the canon law he is an *intruder*, and is to be punish'd as such.

Prohibition.

and *A.* answers that he did not know that *B.* was instituted and inducted before him, whereby he excuses himself from any crime, a prohibition shall be granted; for they shall not try which of them has the best right after institution and induction, but that shall be tried at common law; but the ordinary may punish such clerk who procures himself to be (*d*) super-instituted and inducted, knowing the institution and induction of another. *Mich.* 16 Car. B. R. between *Maddocks* and *Chivall per Curiam*, a prohibition granted to the high commission court.

(*d*) Lit. Rep. 140. *Petty's* case. After induction the court cannot try the super-institution.

5. If the parson of *B.* takes a second benefice within the statute without a dispensation, whereby the first benefice becomes vacant, which is of the King's patronage, and afterwards *ad uberiorem Cautelam, & ad tollendum omne dubium*, he obtains a new presentation of the King, and thereupon requires the bishop to admit him and super-institute him, the bishop takes time to be advised, and in the mean time the king presents another who is instituted and inducted, and afterwards the first parson sues the bishop in the Spiritual Court for injustice, a prohibition shall be granted; for the judges of the Spiritual Court cannot (*e*) try the right of presentations. *Mich.* 3 Ja. C. B. *William's* case adjudg'd and a consultation denied.

(*e*) Trin. 9 Ja. Holt's case. 1 Bull.

179. the same point, nor can they try the validity of an induction. *Ibid.*

6. If a man sues in the Court Christian to have an account of the profits of a benefice, a prohibition lies, because that it belongs to the common law. *Hill.* 3. Jac. C. B. adjudg'd.

7. But if a suit be there for the profits receiv'd in the time of a sequestration, no prohibition lies. *Hill.* 3 Ja. C. B. adjudg'd.

8. If two churches are united by the patron, ordinary, and the King, by the statute of 32 H. 8. upon a surmise that the two churches are no more distant than a mile, one from the other, and afterwards the parishioners are sued in the Spiritual Court to come to one of the churches, a prohibition lies upon a suggestion that the churches are distant more than a mile one from the other. *Mich.* 10 Car. B. R. between *Dobson* and *Sir Robert Mordant*, a rule for a prohibition was granted, the churches united were *Wellesborough* and *Walton-Dewell* Com. *Warwick*; but afterwards, Pas. 11 Car. B. R. the prohibition was denied, because there was not any suit depending against the parishioners, nor any other suit in the Spiritual Court to be prohibited.

(*P425)

9. If the parson libels in the Spiritual Court for a (*a*) *Modus* *mandi*, if the defendant suggests that he has mistaken the *modus*, and shews another *Modus*, he shall have a prohibition, because

(*a*) Noy 81. Palmer 440. that if the *modus* be denied a pro-

Prohibition.

hibition lies. because they shall not try the *Modus* by which his inheritance will be bound, and a usage for ten years is a good custom by case, 3 Bulst. the spiritual law ; and if that should be suffered they would 41. the same defeat the temporal courts of their jurisdiction. My reports point. Hob. 247. Hetley 14 Jac. 1. (b) *Gosling v. Harding* adjudg'd. 133. if the custom be allowed between the parties they may proceed there. Hill. 4 Car. 1. C. B. Scott v. Wall. Hetley 133. 3 Bulst. 41. the same case and point. (b) 1 Rol. Rep. 419. 3 Bulst. 41. the same case and point.

10. If a man presents to a bishop, and upon his refusal appeals to the archbishop, who after donation, citation, and default of the bishop, admits and institutes the incumbent, upon which he is also induced ; and afterwards the bishop sues out his *Duplex querela*, appealing from the said sentence to the delegates, to annul the admission and institution, a prohibition shall be granted, because that after (c) induction the admission and institution ought not to be question'd in the Spiritual Court. * *Mich.* 12 Jac. between Sir T. Hutton and the bishop of *Chester*, per *Curiam*.

(c) The Spiritual Court cannot meddle with the institution after induction, tho' the induction were after a caveat enter'd. *Stephens v. Crips*, Lit. 165, 176. *Mich.* 4 Car. 1. C. B. 2 Keb. 63, 72, 392. * *Hob.* 15. S. C. Moor 186 S. C. and if the judges see a reason, they may write to the bishop to certify concerning the institution. If the bishop meddles with the right of patronage, or that comes in question, a prohibition lies; but not if he goes upon a tortious admittance only. 2 Leon. 168. *Gerard's case*. A lay patron having the next avoidance presents the plaintiff, being a son of the last incumbent, the ordinary refuses, being contrary to the canon. Then the patron presents the defendant, after which the plaintiff procures a dispensation of the canon, and yet the ordinary institutes and inducts the defendant, the plaintiff libels against the defendant and ordinary. And they pray a prohibition, and granted; and by *Dodderidge*, a lay patron may vary his presentation before induction: but a spiritual patron cannot, because he may well be supposed to understand the sufficiency of his presentee at first. *Noy* 91. *Stock v. Sycks*.

11. If upon a resignation of an incumbent another be presented and instituted, and afterwards he who resigns libels in the Ecclesiastical Court against the new incumbent, pretending that he did not resign, and afterwards makes a lease, whereupon an issue is joined to try the title, whether he was a parson at the time of the lease made; yet no prohibition shall be granted, because that the question there is only upon the resignation, which properly belongs to the Ecclesiastical Court. *Mich.* 10 Ja. C. B. *Manknoll's case* per *Curiam*.

12. If a man pending a *Quare Impedit* libels in the Spiritual Court to avoid the institution of a clerk of a church, after he is (d) induced, a prohibition shall be granted; for otherwise they would * prevent a *Quare Impedit*. *Mich.* 14 Jac. B. R. between *Fisher* and *Chamberlain*, so held by *Dodderidge*, and he said, that it had been so adjudged several times in the *Common Pleas*.

Husley, the same point adjudg'd.

13. So it shall be, if after induction, where no *Quare Impedit*

Prohibition.

impedit is depending, if the suit be there to avoid institution, a (a) 2 Leon. prohibition shall be granted; for by the (a) induction it is become a temporal matter, which draws that which is spiritual to it; for if they shall avoid the institution they will avoid by consequence the induction, *contra* 14 Jac. B. R. between *Fisher and Chamberlain*; and a prohibition for the church of *Clapham*. 168. Lit. Rep. 165, 76. 2 Keb. 63, 72, 392. Moor 861. 2 Lev. 125. 1 Bullst. 179 Hob 15. Latch 205.

14. If I present my clerk, and he is admitted and instituted, and before induction a (b) caveat is entered by a stranger in the Spiritual Court that he may not be inducted, and thereupon an inhibition is there granted to the archdeacon that he shall not induct him; in this case a prohibition shall be granted, because that when he is instituted he hath an inception to a lay fee, and the church is full against all persons except the King, and if that should be suffered, it would oust all trials by a *Quare impedit*. *Hill*. 14 Jac. C. B. a prohibition was granted. before induction, no prohibition lies. *Quare*. New Natura Brev. 95. Letter I. (b) Lit. 165. 2 Keb. 63, 72, 39. the same point. (c) Sid. 293. in the case of *Offey v. Best*, if the repeal of the institution be before induction.

15. If a bishop collates, pretending a lapse, and thereupon the patron presents, and recovers in a *Quare impedit*, and hath a writ to the bishop, and before his clerk presented hath his institution sealed, the archbishop sends an inhibition that he shall not be instituted, and thereupon a sentence is given in the arches that he shall not be instituted, a prohibition shall be granted in this matter; for they shall not try that which is before tried at common law, and draw into question the recovery; for otherwise recoveries at common law would be of little signification. *Hill*. 4 Jac. B. R. between *Fletcher and Baker, per Curiam*. (c) A prohibition was granted to the archbishop to stop

proceedings in a cause belonging to the jurisdiction of Durham, the right of jurisdiction having been tried but the term before, and found against the archbishop; therefore he was concluded by the verdict, 1 Vent. 234. If the party brings an action for dilapidations, and the defendant pleads a tender of so much as is sufficient to repair, and upon an issue it be found against the plaintiff, whether he may sue in the Spiritual Court, or if he does, and they refuse this verdict as a bar, whether a prohibition shall go. *Dubitatur*, 3 Lev. 413. *Oakes v. Ange* Hill. 6 W. 3. C. B.

16. If a patron presents A. his clerk to his church, and the bishop delays his examination more than two months, whereas by the late canons he ought not to delay him above a month; upon which A. fearing that a lapse would incur, sues out a *Duplex querela* in the court of audience, thereby to inhibit the bishop from presenting, and after the six months the court of Audience give judgment for him; and afterwards the bishop notwithstanding collates by lapse, and upon this matter being set forth to the court of B. R. prays a prohibition to the court of Audience, the prohibition shall be granted; for now, if it be a lapse the Ecclesiastical Court shall not remove him, the church being full; and if the bishop be a disturber then his clerk shall be removed, notwithstanding the plenary

Prohibition.

plenarty for six months before the writ purchased; for collation without a title doth not make an usurpation; and therefore be it which way it will, it belongs not to the ecclesiastical law to proceed on the *Duplex Querela*. *Trin. 3 Jac. B. R.* between *Palmer* and *Smith*, a prohibition granted, and a consultation denied.

(*P427) * 17. If the cause in the Spiritual Court is not like to have a fair and indifferent trial, the courts of law will grant a prohibition. But in a case reported in *Comb. 131.* for a prohibition it was suggested, that the bishop libell'd for a pension before his own commissary, and so would be a judge in the cause; but a prohibition was denied.

18. *Pinson* was collated, instituted and inducted by the bishop of *Exeter's* patron *Dr. Hall*, the bishop collates another, pretending that the first incumbent had taken a second benefice, whereupon the first was void, when in fact the first incumbent had a dispensation; notwithstanding which the bishop sequesters the benefice, upon discovery whereof to the court a prohibition was granted. *Hetley 125. Pinson's* case.

(N) *What shall be called Defamation Spiritual, to maintain a Suit in the Ecclesiastical Court.*

1. **R**EG. fol. 54. b. *Title Consultatio*, a consultation granted to proceed in the Court Christian in a cause of defamation, viz. for the crime of *Fornication*, as also, for that he unjustly hindered the Spiritual Court by routs and tumults from duly making their execution in that cause, and therefore *ex officio ad animæ suæ correctionem processit*.

Fol. 195.

(a) Denied for calling a woman a witch, *Moor 906.*

Morrice v. Smith.

* *Vol. Rep. 407*, the same case.

(b) So if some of the words are actionable at the common law,

and a prohibition was granted for the words, she is a bitch, a whore, and an old bawd, because some of the words are actionable at law, and one entire sentence. 3 *Mod. 74*

Anonymous. Mich. 1 Ja. 2. So if the matter be indictable: And a prohibition was granted.

2. If a man libels in the Spiritual Court against another for saying, (a) *he was a witch, or the son of a witch*, altho' no action lies for it at common law, yet no prohibition shall be granted; for peradventure he might have some spiritual prejudice if he be the son of a witch, as he can't be a priest, or such like; for it seems all the force of the words consists in the latter words, they being spoken in the disjunctive. *My Reports, * 14 Jac. C. B.* adjudg'd.

3. If a man libels in the Ecclesiastical Court against another for speaking words of him, which would maintain an action upon the (b) case at common law, a prohibition lies. *Hill 4 Jac. B. R.* between *Turnain* and *Thorn*, per Curiam. *Mich. 38, 39 Eliz. B. R.* between *Butler* and *Bartlet* adjudged.

Prohibition.

granted to the Consistory Court, nisi, &c. on a suggestion that the libel there was for writing a libel, and publishing it. Comb. 71. — Denied on a suit for these words, you are a false lying knave, and took a false oath before Glyn a Justice of the Peace, tho' the words are actionable, if they proceed only pro reformatione Morum. 2 Keb. 439, Bennet & Clarke.

4. So if the words, which are only proper for the jurisdiction of the Ecclesiastical Court, are put in the libel, and which will not of themselves maintain (c) an action at common law; yet upon a suggestion to the Temporal Court of the rest of the words which would maintain an action at common law, a prohibition lies. *Mich. 38, 39 Eliz. between Butler and Bartlet adjudged.*

A person call'd a woman bitch, where, and an old bawd; and on a libel in the Spiritual Court a prohibition was granted, because some of the words are punishable at common law, and some in the Spiritual Court; and if a prohibition should not be granted, the plaintiff might be doubly vexed, 3 Mod. 74. the same point per Twifden 1 Sid. 404. in the case of Mellet v. Herbert & Ux'. Hill 20, 21 Car. 2. B. R. Q. if it lies for calling one a witch. Moor 506.

* 5. If a parson of a church calls A. a Drunkard, upon which (*P428) he says, *he lies*, if the parson sues A. for giving him the lye, a prohibition lies; for that the cause, upon which he gave him the lye was not spiritual, but depending upon a temporal matter precedent. *Mich. 7 Jac. C. B. between Sampson and Waters, per Curiam.*

6. If a clergyman be a bailiff of the manor of F. S. and he oppresses the tenants of the manor, and one of those tenants says to him, *thou art a (a) knave, and fitter to wear a white cloak than a black*; if the clergyman sues him for these words in the Court Christian, a prohibition lies, adjudged as cited. *Mich. 7 Jac. C. B.*

A knave indeed; because nothing was said that could make him liable to ecclesiastical censure. 2 Salk. 548. Hawkins's case.

7. If a man says of F. *he is a railer and fower of sedition* among his neighbours, he cannot be sued for these words in the Ecclesiastical Court, because they are not in any respect spiritual, nor tend to a spiritual defamation, but merely temporal. (b) *Mich. 16 Jac. B. R. between Pannel and Smith resolved, and a prohibition granted.* point adjudg'd, Hob. 246. the same case and point, and there said to be granted, because punishable in the Leet.

8. If a man calls a minister a (c) *knave*, he may be sued (c) *E contra*, for it in the Ecclesiastical Court, and no prohibition shall be granted. *Hill. 7 Jac. C. B. per Coke.*

spoken of his function. *Mich. 20 Car. 2. B. R. denied for these words, you lye like a knavish parson, and you couzen'd such a one, and you have brought one to swear and forswear.* Lit. 217. v. Salk. 548. Hawkins's case.

9. If a man says, *he will not hear sermons made by those who are ordained ministers by bishops*, he may be sued for that in the Court Christian, and no prohibition shall be granted. *Hill. 7 Jac. C. B. per Curiam, adjudged.*

10. If

(c) A person call'd a woman bitch, where, and an old bawd; and on a libel in the Spiritual Court a prohibition

(a) A prohibition granted for these words of a parson, thou ecclesiastical

(b) Hetley 13. the same case and

(c) E contra, 1 Vent. 2. it not appearing to be

Prohibition.

10. If a man says of a feme covert, *she will be meddling with a thing*, he may be sued for it in the Ecclesiastical Court, and no prohibition will be granted, because it is a spiritual defamation. *Mich. 9 Jac. C. B. per Curiam*, a prohibition denied.

(d) But a prohibition was denied for the words, *thou art a bawd*, and I'll *Fitzherbert*. 11. If a man says of another, *that he keeps a (d) bawdy-house*, and is sued for it in the Spiritual Court, although he may have an action at common law, yet the spiritual law hath a concurrent jurisdiction therein, and the words are mix'd, and therefore no prohibition lies. 27 H. 8. 14 b. by

prove thee a bawd; but otherwise (says the book) had it been, if the words had been, *thou keepest a bawdy-house*, because that is indictable. *Hollingshead's case*, 3 Cro. 229. *Noy 117. W. Jones 246.* the same point as to the word *bawd*. *Palmer 2. Rob its v. Brown. Hill. 3 Car. B. R.* the same point adjudg'd, 2 Keb. 612. *Palmer 379.* the same point as to the words *keeping a bawdy-house*. See many cases cited in *Bole's case*, *Godb. 447.* where a suit may be in the Spiritual Court, tho' an action might lie at common law.

Fol. 296.

(e) S. C. reported in Latch 155.

(f) S. C.

reported in

3 Cro. 229.

And the

words there

said to be,

thou art a

bawd, and I

will prove

thee a bawd,

and that a

prohibition was denied.

W. Jones 246. (a) Noy 117. granted for the words,

that the defendant kept a house of Bawdry.

14. If a woman sues another for speaking these words to

her, *Thou art a [b] quean*, a prohibition lies; because it is

not well known what is intended by the word *quean*, and it

is but a word of [c] anger. *Trin. 3 Car. B. R.* between *Black-*

shaw and Stephens, per curiam, a prohibition granted. *Mich.*

8 Car. between *Yates and Glover*, a prohibition granted.

Denied upon a suit by a

virgin saying, she had had a child, 2 Keb. 335. *Hodgson v. Brown.* (c) On a libel

these words, *you are a rogue, rascal, and a son of a whore*, and the suggestion for a pro-

hibition was, that they were words of heat and passion; but a prohibition was granted

for the words import that his mother is a whore, and he a bastard, and so both are scandal-

liz'd, and this is an ecclesiastical scandal, 3 Lev. 119.—one call'd another, *whore master*

on a libel, &c. it was urged that they were words of passion and not defamatory; but ad-

judg'd e contra, and that it was spiritual slander. 2 Salk. 692.

(d) But a

prohibition

was denied

for these words, *rogue, rascal, and son of a whore*, 3 Lev. C. B. *Vincent v. Alpy.* So a

prohibition was denied for these words, *you are a rogue, rascal, whore-master, and the*

12. If a man says of another that *he is the pander of J. S.* he may be sued in the Ecclesiastical Court, because the signification of the word is well known, and it sounds in spiritual defamation. (e) *Mich. 2 Car. Lewes and Withy, per Dodderidge* and *Jones contra Whitlock.*

13. If a man says to another, (f) *thou art a bawd, a filthy bawd, and a common bawd*; and for that he is sued in a Court (*P429) * Christian, no prohibition lies, because he can't be indicted for it, if it be true, inasmuch as he does not say that he (a) kept a bawdy-house, which had been presentable in the Leet. *Mich. 7 Car.* between *Hollingshead v. Hicks, per Curiam*, a prohibition granted after a prohibition. *Mich. 8 Car. B. R.* between *Yates and Glover*, a prohibition denied where the words were, *that he was a bawd, and that he would die so.*

And that a prohibition was denied. *W. Jones 246. (a) Noy 117.* granted for the words, that the defendant kept a house of Bawdry.

14. If a woman sues another for speaking these words to her, *Thou art a [b] quean*, a prohibition lies; because it is not well known what is intended by the word *quean*, and it is but a word of [c] anger. *Trin. 3 Car. B. R.* between *Blackshaw and Stephens, per curiam*, a prohibition granted. *Mich. 8 Car.* between *Yates and Glover*, a prohibition granted.

Denied upon a suit by a virgin saying, she had had a child, 2 Keb. 335. *Hodgson v. Brown.* (c) On a libel for these words, *you are a rogue, rascal, and a son of a whore*, and the suggestion for a prohibition was, that they were words of heat and passion; but a prohibition was granted for the words import that his mother is a whore, and he a bastard, and so both are scandaliz'd, and this is an ecclesiastical scandal, 3 Lev. 119.—one call'd another, *whore master* on a libel, &c. it was urged that they were words of passion and not defamatory; but adjudg'd e contra, and that it was spiritual slander. 2 Salk. 692.

(d) But a prohibition was denied for these words, *rogue, rascal, and son of a whore*, 3 Lev. C. B. *Vincent v. Alpy.* So a prohibition was denied for these words, *you are a rogue, rascal, whore-master, and the*

Prohibition.

court for it, a prohibition lies, because they are but words of
[e] anger. *Mich.* 3 Car. between *Lowndes* and Sir *Arnold Her-* son of an old
bert, a prohibition granted. damn'd, per-
jur'd, affida-

181. *Elliot v. Chamberlain, C. B.*

16. If a man says to a woman, [f] *Thou art a whore, and thy children bastards*, and thereupon the woman sues in the Court Christian, no prohibition lies. For the statute of Eliz. of Bastards saves the ecclesiastical jurisdiction. *Mich.* 3 Car. B. R. between *Wallis* and *Procter*, *per curiam*, a prohibition denied. [f] So a prohibition was denied on a suit for these words, *You were Bishop's*

who before he married you. 3 Lev. 137. Snell v. Bishop, C. B.—So a prohibition de-
clined on a libel for calling a woman whore, 2 Lev. 63. Betniff v. Pepple, 1 Mod. 21, 22.
1 Show. 25. Mich. 30 Car. 2. B. R. the same point. 1 Vent. 7. Mich. 20, 21 Car. 2.
Herbert v. Merit, 1 Sid. 404. S. C. 1 Sid. 433. S. P. So denied for these words spoken
to a third person, Go tell thy mistress she is a whore, and I will prove it, 3 Keb. 38.
1 Lev. 63. A prohibition was granted for saying of a woman in London, You are a
whore, and ply in Moorfields, upon a suggestion that the words were spoken in London,
1 Vent. 342. Mich. 31 Car. 2. S. P. 2 Lut. 1039. Sti. 69, 229, 245. 1 Vent. 342, 343.
Hill. 51 Car. 2. But the court denied a prohibition for calling a woman whore, upon a
suggestion that the words were actionable by custom in London without an affidavit, that
if any such words were spoken, it was in London and not elsewhere. 4 Mod. 367. A libel
in the spiritual court for these words, Thou art a cuckold old dog, call down your bitch
your wife; a prohibition was granted, and a consultation denied, although it was alledg-
ed that these words were not actionable by the custom of London: for that the custom
extends only to such words as are directly defamatory, and the cases cited to that point
were, Cro. Car. 339. Vent. 222. Sid. 248.—2 Lut. 1042. where the words were, She
is a common woman, and such as you have no children. Denied, for they do not amount
to whore; but the case of Lutwyche was denied to be law, and it was said to have been
ruled, that any words that are defamatory and punishable in the spiritual court are triable
in London by the custom there. Hotchkiss v. Corbett, Mod. Cases in Law and Equity, 114.
Q. If a prohibition lies on a suggestion of a libel for calling a single woman a bastard.
1 Show. 337. Poke v. Hawkins. A prohibition was denied upon a libel for these words,
He is a whore master, and has had a bastard; for he is not punishable by 18 Eliz. unless
it was chargeable to the parish.—Upon a suit in the spiritual court, for saying one had a
bastard, upon a suggestion that he was adjudged the reputed father before a justice of
peace, and that the words were spoken before the justice, held a good cause for a prohibi-
tion. Far. 81. 2 Cro. 535. the same point adjudged. Webb v. Cook. Comb. 434. Mack-
ley v. Mayzey.

*17. If a man says to another, *Thou art a [a] drunkard, or* (*P430)
a drunken [a] W. Jones 305. p. 14.
 Cro. Car. 285. S. C. Cro. Car. 309. Pasf. 9 Car. Starr. v. Buckhold, the same point ad-
 judged. 3 Salk. 288. a prohibition denied on a libel for these words (without an averment).
 She is a drunken jade, a cheating jade, and a stinking jade. 2 Show. 487. Warwick v.
 Skinner, Mich. 2 Ja. B. R. A prohibition denied for these words, She is a drunken,
 cheating, forsworn jade. Cresswell v. Trott. Comb. 37. Denied for these words, Whore,
 drunken jade and a bawd. 2 Keb. 612.—In the case of Brown v. Tanner, Pasf. 2 Annæ,
 3 Salk. 288. there had been a libel in the spiritual court for brawling in the church-yard,
 and for saying to the parson, Thou art a pitiful drunken parson, a drunken puppy; and
 Buckhold moved for a prohibition, upon the authority of the above case of Starr and Buck-
 hold, where for the like words a prohibition was granted, and so in Haine's case; and the
 reason was, because drunkenness is a temporal offence; 'tis true (says the book) the cases
 before mentioned (by which is meant these cases in Rol. Abr. and in Cro. Car. 207.
 March 6.) were of drunkenness in laymen; but if it is an offence in a layman (a fortiori).
 it should be so in a clergyman; it is a crime which doth not arise, or take its nature from
 the person that commits it, but from the law which is offended. 'Tis true the canonists
 make

Prohibition.

make every thing which is a sin, and forbidden by the ten commandments, to be a spiritual offence, as *lesa fides*, murder, perjury, &c. But by the common law, whatever is taken notice of, and punishable by the temporal laws, is a temporal offence; and what is not punishable by the temporal law but by the spiritual law, is a kind of supplanting the temporal law, and the offences so punishable are spiritual offences, as fornication, adultery, &c. But as for drunkenness it was always accounted a temporal offence; for it was indistinct at common law, and alehouses were formerly appointed in the leet; and before the 24 of Eliz. there was scarce such a crime in England: 'Tis true a parson may be deprived for drunkenness, and so he may for buggery; but yet he is not punishable for that offence in the spiritual court, because it is a temporal offence; a prohibition it seems was granted as to the words, but not as to brawling in the church-yard. *Cambden's Eliz.* 263. *Hob.* 121. 12 Rep. 42.

[b] Cro. Car. 18. If a man says to another, *Thou art a [b] cuckoldly knave* and for that he and his wife sue in the spiritual court for a defamation, no prohibition lies, because that the words amount to a spiritual defamation; that is to say, that the wife was incontinent. *Hill.* 9 Car. B. R. between *Iyles* and *Corbet*, per *curiam*, a prohibition denied.

2 Lev. 66. *Tofer & Ux' v. Davis*, 3 Keb. 64. S. C. Aliter, if he sued sole; e contra, *Salk.* 288. said to be ruled by *Holt*, that they cannot both sue in that court for these words. 2 Show. 294. *Paf.* 35 Car. 2. B. R. *Grey v. Munford*, 1 Vent. 2. A prohibition likewise denied for these words of the plaintiff, (viz.) That he is a cuckold and a wittall, which worse than a cuckold, and that *Aylsworth* had lain with his wife, *Cro. Car.* 111. *Eaton Ayloffe & Ux.* In the resolution of this case, the court agreed that there ought not to have been any suit for the first words, they being too general; yet being coupled with a particular shewing, that the wife committed such an offence with such a particular person, they are not now barely words of spleen, but of spiritual defamation; whereupon, says the book, the prohibition was denied. But chief justice *Holt* said, as reported in 2 *Salk.* 692. that to call a man a Cuckold was not an ecclesiastical slander, but that *Wittall* was, for it imports knowledge and consent to his wife's adultery. Vide 1 *Sid.* 248, in the case of *Knight and Jacob*, where the same point is said to be adjudged, that the word Cuckold is but a word of passion.

19. If a man says to another, *Thou art a knave, a pauling knave, and a pockey-faced knave*, and a suit is brought in the spiritual court for these words, a prohibition lies. *Paf.* 35 Car. B. R. between *Packer* and *Moore*, a prohibition granted.

(*P431) * 20. If *J. B.* says to *J. D.* *It is reported that J. N. did or do keep in his house a man or boy to bugger*, to which *J. D.* answers, *He vile villain would have done as much to me.* If *J.*

Prohibition.

J. D. for this defamation, averring himself to be a minister, a prohibition lies, because it is not a spiritual defamation, and buggery is made felony by the statute, *Mich. 8 Car. B. R. between Higgon and Coppinger*, a prohibition being granted before, a consultation was denied, and after a demurrer was joined upon the declaration, and adjudged *per curiam*, that the prohibition was well granted. *Intratur Hill. Car. Rot. 129.* although the suit in the spiritual court was for words.

21. If *A.* sues *B.* in the spiritual court for a defamation, *scilicet* for saying these words, [a] *That A. was false forsworn before the judges, in that he swore that J. S. was no tinner*, a prohibition lies; for an action lies at common law for these words, if it be well laid. *Mich. 8 Car. B. R. between Robin-son and Taylor*, a prohibition granted by the court. You are a rogue and a knave, and have hired fellows to swear false. 2 Show 45. M. 1 *Ja. B. R. Venners v. Allen.*

22. If *A.* a surrogate sues in the spiritual court against *B.* *ex officio pro salute animæ, & morum reformatione ex promotione* because that *C.* being a proctor of the spiritual court, and master of arts, the said *B.* spoke to him thus, *Thou art (or is) a scabbed knave, and a pickerell bumbailiff*; (or thus) *I turn to be abused by such a scabbed knave, or such a pickerell bumbailiff as thou art*, and avers that he spoke the words to defame *C.* and to contemn the ecclesiastical jurisdiction, a prohibition lies; for it is not any [b] spiritual slander, nor any defamation to the court. *Mich. 8 Car. B. R. between Cory and Wood, per curiam*, and a prohibition being before granted thereupon, and a plea and demurrer for a consultation, the court now seemed that no consultation ought to be granted. But before it was determined *Cory* died. [c] A prohibition was granted for libelling the words, *A knave, a knave, and a knave* indeed, because not liable to ecclesiastical censure. 2 Salk. 548. *Hawkin's case.*

23. If there be a suit in the spiritual court, *ex officio pro reformatione morum*, because that *J. S.* was a doctor of divinity, and the parson of *Shipling* in com. — and *J. D.* did to *J. S.* *You were twice overthrown by the parishioners of Shipling*, *J. D.* replied, *he ly'd, it was but once*; whereupon *J. D.* replied, *he ly'd, and that he was as good a man as J. S.* that he was but a blacksmith's son, or the son of a blacksmith, a prohibition lies. For here is not any spiritual slander, and but the return of the lye upon the Doctor, who gave it first. *Mich. 8 Car. B. R. between Hye and Doctor * Godb. 446.* *Hells, per curiam, præter Richardson*; a prohibition being the same granted, and now a demurrer for a consultation, the prohibition shall stand. *Mich. 9 Car.* it being moved again, *per curiam*, again adjudged the prohibition to stand.

24. If

Prohibition.

(*P432) 24. If *A. R.* a woman, says of *J. S.* a minister, [*c*] *He is a rascal, a prophaner, he preacheth against pride, and bringeth a truller to church with him* (meaning his wife) *my husband will suffer me to be abused by such a knave.* This is a spiritual defamation; for which, if there be a suit in the spiritual court, no prohibition shall be granted. *Pasc. 11 Car. B. R.* between *Vaughan and Dantsey, per curiam*, a prohibition granted. 2 Lev. 49. *Newman v. Kingerby*, 3 Keb. 28. S. C.—The like for calling one *Kare* 1 Vent. 2. A consultation was granted upon a prohibition in a suit for these words of a parson, He preaches nothing but lies and malice in the pulpit, tho' the words are actionable at common law, being spoken of his profession. 3 Lev. 17. So a prohibition was denied for these words of a parson, He is a lying fellow, and has lain with all the women between *Hatton and D—*; he lies so much with other women that he lies not with his wife. 3 Lev. 18. But to say of a parson, That he hath no sense, he is a dunce, blockhead, &c. a prohibition hath been granted, because a parson is not punishable in the spiritual court for calling a blockhead. 2 Salk 693. So for calling a parson, &c. in a thing which doth not concern his profession, no prohibition lies. 2 Lev. 41. *Godb. 447.* A prohibition denied for these words, You lie like a knavish perion, and you cozened such a one, and you have brought to swear and forswear. Lit. 217. *Procter v. Barley*. Mich. 4 Car. 1. C. B.

[*a*] Cro. Car. 456. S. C. 25. If *A.* a woman sues *B.* in the spiritual court, for saying of her, [*a*] *Thou art a Welsh jade*, averring in the libel that these words signify as much as if he had said that she was a [*b*] whore; no prohibition shall be granted, for it is a spiritual defamation, *Pasc. 11 Car. B. R.* a consultation granted after a prohibition before granted upon shewing the libel saying, *Thou art a thief, and a Welsh jade.* But here the prohibition came into court, and certified to the court, that the word was not in the record in the spiritual court; and upon that consultation was granted between *Jefferies and Pue, per curiam*, that the wife is a whore. *Meriel & Ux' v. Kendall*. Comb. 312.

26. A prohibition was moved for, and denied, upon a suggestion that the plaintiff gave the defendant provoking language, calling him rogue; for the provocation is not to the suit in the spiritual court, though it might be a mitigation of damages in an action at common law. 3 Lev. 137.

(O) *Where the spiritual and common law differ in the matter of the suit; if the suit be according to the common law, a prohibition shall be granted.*

Fol. 298.

[*c*] It was held in the case of *Norton v. Ferne*, Cro. Car. 113. that it is not *de jure per legem terræ*, that any person is discharged from tithes of fuel spent in the house, and that it is alledged prohibitions to alledge such customs, but not to alledge *per legem terræ* that he is discharged, and therefore where the plaintiff in a prohibition alledges such a custom, and upon that it be found for the defendant, a consultation shall be granted. *V. Hetley 110, 117.* the case, and said by *Crook and Yelverton*, that there are divers precedents, where in the case a prohibition hath been granted, without alledging a custom. Lit. Rep. 152, 153. the

Prohibition.

1. Vide 2 Cro. 576. upon an issue on a custom to be discharged from tithes for the agistment of dry cattle, whereof by law no tithes are payable, the issue being found for the defendant, a consultation granted. V. Moor 91, 909, 917. [d] Granted upon a suit of tithes, being part of the freehold, as lime, chalk, gravel, &c. 2 Keb. 596. Amiers v. Chambers. Cro. Eliz. 609. Austin v. Lucas. S. P.

2. So if a lessee of pasture, rendering rent, be sued for (*P433) tithes of the rent, and not in kind, a prohibition lies, because (a) Upon a writ if it is contrary * to the (a) common law; for he ought to have tithes of the land, and not of the rent. If he has sued for tithes in kind, as it was adjudged, Pasf. 14 tithes of Pilschards, a prohibition lies between Ellis and Drake antea.

3. If granted upon the suggestion of a custom, that the owner of the boat had one moiety of the fish, and the other moiety the other; and that the owner used to pay the tenth of his moiety in discharge of the other; for by the common law the parson could not have the tithes taken in the sea, and when the parson by the custom ought to have the tithes of the fish, he ought to take them according to the custom. Noy 108. Holland v. Hale.

3. If A. gives a legacy to B. and makes C. his executor, and dies, and afterwards C. dies intestate, and D. takes out letters of administration of the goods of C. and afterwards B. sues D. as administrator of C. for this legacy, supposing C. then he was executor, to have wasted the goods of A. a prohibition lies, (b) because that by the common law it was a personal tort; for which the administrator was not to be charged. (b) 1 Rol. Rep. 263. Powel v. Harris, the same point. Pasf. 11 Car. B. R. between Amend and Fotherbie, by two justices against one, a prohibition granted.

A real composition for the endowment of vicarages ought to be expounded by the judges of the common law; and Buzard's case.

Therefore, if the Spiritual Court meddle therewith a prohibition lies; and the judges said, that words in such endowments are always expounded according to their use, as *decime barbarum* in B. R. was expounded to extend to hay. Lit. 265. Pasf. 5 Car. 2. C. R.

All customs against common right are triable at common law. Hob. 319.

A man devises goods to A. and B. the executor assents to the legacy, and then A. dies, the executor of A. sues in the Ecclesiastical Court for the part of A. For by the ecclesiastical law there is no survivor in such case. B. sues a prohibition, and declared, and upon argument on a demurrer, it was adjudged, that a prohibition shall stand; for by the assent of the executor the interest is vested, and becomes a chattel, and governable by the common law. 2 Lev. 209. Bush v. Stukely, Jones Car. 2. 130. the same case.

If a bishop, parson, &c. cuts trees not for repairs of the church, which is a dilapidation, they may be punished in the Spiritual Court; and yet for such wastes they may be punished by the common law. Godb. 259. Moor 917. Saccar's case. 1 Rol. Rep. 86, 167, 325. 2 Bulst. 279. 3 Bulst. 91, 92, 158.

That a prohibition lies, if the custom alledged be against the rules of the common law. Moor 916. Reynold's case.

(P) Where

Prohibition.

(P) *Where the Temporal and Spiritual Law differ in the Manner of the Suit.*

(c) And if the wife sues without the husband

(where there is no divorce) and costs are assess'd, and the husband release them, the release is

a bar as to the costs, but not as to the suit, quoad reformationem morum; so that the Spiritual Court may proceed to sentence the defendant to a submission or corporal satisfaction which the husband cannot release. Cro. Car. 222. * 1 Rol. Rep. 426. 3 Bull. 264 the same case.

(*P434)

1. IF (c) husband and wife are divorced by reason of adultery, and afterwards the wife sues sole without the husband for a defamation, altho' the divorce does not dissolve the marriage; yet because the wife may by the course of the Spiritual Court sue solely, in such case, no prohibition shall lie altho' it be against the usage of the law. * My Reports, Motam and Motam adjudg'd.

Cro. Car. 222.

* 2. If a man libels in the Spiritual Court (for speaking certain words) naming them, or the like in effect, altho' such declaration had not been good at the common law; yet such libel is good by the usage there, and therefore no prohibition shall be granted. Hill. 11 Ja. B. R. Palmer's case.

3. If a feme covert be sued in the Spiritual Court for scolding in the church-yard, and be convicted, and costs are taxed the husband not being a party to it; yet because it is a custom (or rather a practice of the Spiritual Court) no prohibition shall be granted. Hill. 14 Ja. B. R. Bennet's case, a prohibition denied.

4. If A. be sued in the high Commission Court, at the instance of the party for incest; and it appears that there was a fact committed, and a report was spread, and a witness produced, that the defendant was guilty of it; yet because there were not two witnesses, he was put to his purgation because there a man cannot be condemn'd by one witness, and he purges himself accordingly; and yet there they give costs to the party, who prosecutes according to the usage, in such cases, no prohibition shall be granted; for altho' he escapes the censure of the court, for the strictness of their law, for the default of one witness; yet for the presumption that he is guilty, they may give costs according to their law. Pas. 1 Ja. B. R. Coortnoll's case resolved.

Rol. 299.

5. Upon a suit in the Spiritual Court *ad Instantiam partium* if the defendant pleads the King's pardon, and afterwards costs are taxed for the plaintiff, because that the pardon is in a manner a confession of the fact; but altho' that be the usage there, yet a prohibition shall be granted. For inasmuch as the matter and the suit is pardon'd, the costs are all gone. Hill. 11 Ja. B. R. Watson's case resolved.

Prohibition.

6. If an husband and wife are sued in the Spiritual Court for polygamy, and it appears that the wife was married before to *J. S.* within age of consent, afterwards she disagrees at her age of consent, and marries the defendant, by which the courts acquits the defendants; yet if they tax costs to the plaintiff, no prohibition shall be granted, because they have jurisdiction of the cause, and it is their usage to tax costs for the plaintiff, where he had *Causam litigandi*. *Mich. 8 Ja. C. B. Blackdon's case*, and a prohibition denied.

7. If a parson sues upon the statute of *2 Ed. 6.* in the Spiritual Court for the double value, for not setting out his tithes, and the defendant doth surmise that he did set them out, and they would admit there the proof of it by one witness; no prohibition lies, because they have consufance of that matter. *Hill. 9 Car. B. R. between Yelle and Sir Edward Powel, per Curiam*, a prohibition denied.

2 Cro. 264, 269, 273. 3 Mod. 284. 1 Show. 158. Comb. 190. 1 Sid. 161. Moor 413. Cro. Eliz. 88, 666.

8. If the parishioners sue the church-wardens of the parish to make an account in the Ecclesiastical Court, and in that suit there are costs of suit taxed for the parishioners against the church-wardens, and afterwards the church-wardens pay the costs to one of the parishioners; and thereupon he that receives them gives a release to the church-wardens of the costs, and this release is afterwards pleaded by the church-wardens against the other * parishioners in the Ecclesiastical Court, and they disallow it; yet no prohibition shall be granted, because they having consufance of the original (to wit) of the costs, they shall have consufance also what shall be a sufficient payment of them. *Mich. 15 Car. B. R. between Holmes and Goodwin, per Curiam*, a prohibition denied.

The same point on refusal of the proof of a will by one witness. *Noy 12. Chadron v. Harris. vide Yelv. 1 Vent. 291.*

The like point adjudg'd where a man was sued by church-wardens, and pending the suit, one of the church-wardens releaseth to the defendant; it was adjudg'd,

that as the Spiritual Court have original consufance of the matter, they shall judge of the case, whether it be a good bar, or not, to that suit. *2 Brownl. 215. Barton's case. 17 Ja. B. R.*

9. A feme covert sued in the Spiritual Court to be divorced from her husband *propter Sævitiā*, and sentence was there given against the wife, and the husband was forced to pay all the costs for the wife, and afterwards she appeals; and for that the husband would not answer to the appeal, and pay for transmitting the record, he was excommunicated, and so it was hard that he should expend money against himself, yet because it was the course there, a prohibition was denied. *Mich. 1 Car. 1. Green's case, C. B. Cro. Car. 16.*

10. Where a prohibition was prayed, and denied, upon a suggestion, that several citations had been sued out without presentment or accusation, and only interrogatories exhibited, and the party discharg'd, paying his fees. *2 Keb. 11. No*

Cressley's case.

Prohibition.

11. No prohibition was held to lie upon an excommunication, for not receiving the sacrament, even tho' the Spiritual Court refused his allegation, that he had taken it elsewhere, and the reason there given was, for that the cause was purely spiritual, and they are proper judges of the certificate; and if they refused the plea, an appeal lies. It was argued by the attorney and solicitor general, that no prohibition ought to go in this case, because the matter is purely spiritual, and of ecclesiastical consueance, and no temporal matter; and if the Spiritual Court does not do justice in it, an appeal lies; and they further argued, that if the original matter be of spiritual consueance, and some incident temporal matter arises, as a lease, or livery of seisin, which in their own nature are of temporal consueance, and such matter be pleaded there, and refused, yet a prohibition ought not to be granted; and for that they quoted 12 Co. *Robert's case*; and that in no case whatsoever, a prohibition shall be granted, for any temporal matter arising in a cause before refusal, where the original cause belongs to the jurisdiction, but only in the case of a *Modus*; and that the reason of that is, because the Court Christian does not allow of any *Modus*. But *Hale, C. B.* denied the ground that they went upon; for says he, if the law were so, then, if a suit were well commenced there, the temporal courts could not determine any matter arising in it which is not true; but for the first part of their argument the prohibition was denied. *Hardr. 406. Lyonel Copley's case. Scaccario*, the like point upon a refusal of a plea, touching the repairs of a church. 2 *Keb. 742.*

12. And a prohibition was prayed, on a suggestion, that the Spiritual Court refused a plea, that the plaintiff had not read the thirty-nine articles, &c. but denied; for this plea is triable there. But if the court refuse the plea, the court will grant a prohibition *Quousque* they accept it. 2 *Keb. 40. Clevely v. Adams.*

13. And where *Pendleton* sued *Green* in the Spiritual Court for tithes, who pleaded that *P.* was not the lawful incumbent, but one *Taylor*, and the Spiritual Court refused this plea, prohibition was granted. 3 *Leon. 265. Case 355. Cro. Eliz. 228.* the same case.

14. Other cases, where prohibitions have been granted and denied, upon refusal of plea. 1 *Keb. 387, 433. Parker Williams. 2 Keb. 254. Allison v. Reeves.*

15. A prohibition denied, for that the party was excommunicated for a contempt in not obeying an ordinance of the church, in refusing to be veiled at the time of her being churched. *Palmer 296. Shipden v. Redman.*

Prohibition.

(2) *If the Common Law and Ecclesiastical Law differ, and the Proceedings are not according to the Common Law, a Prohibition lies.* (*P436)

If a man sues for a legacy in the Ecclesiastical Court, and there says, that the legacy was given upon condition that he should not disturb the execution of the will of the defensor, and alledges, that he disturbed him, &c. and the condition became broken; if they will not there allow such condition upon a legacy, yet no prohibition lies, because a legacy is a gift by the ecclesiastical law; for which there is no remedy in our law; and therefore, inasmuch as it is due by the ecclesiastical law only, it may be ordered and allowed of according to the ecclesiastical law; and the executor who is to pay it hath not any remedy, but in the chancery by way of equity. *Mich. 15 Ja. C. B. between Wilson and Wilson* agreed by the court, and a prohibition was denied. But it was denied partly because it did not appear to the court, whether that plea was disallowed there or not.

2. So upon a suit for a legacy in the Ecclesiastical Court, if the defendant there pleads, that it was given upon a condition, that the plaintiff being his wife, would not marry a man without the consent of the executor, and that she had married J. S. without the consent of the executor, and so the condition was broken; if they disallow that condition there, yet no prohibition shall be granted, for the reason aforesaid; that he is put to his remedy in chancery. *Mich. 15 Ja. C. B.* in the above case of *Wilson*, agreed by *Winch* and *Warburton*, and *Winch* said he had known it to be so adjudged.

Fol. 300a

3. If a man libels in the Spiritual Court for a legacy against an administrator, after a refusal of the executorship, and he cannot prove the will by which the legacy was given but by one witness; and therefore they will not allow it there, yet no prohibition lies; for by our law there is no will where there is no executor; and therefore if they will give him relief, they may give it in what manner they please. *Hill. 37 Eliz. B. R. per Curiam.*

4. If a man libels in the Spiritual Court for a child's part against an administrator, who pleads there that the plaintiff's father made a nuncupative will, and thereby devised a term to the defendant, and died without making any executor; whereupon the defendant took out administration, and this is refused there, because he cannot prove it but by one witness; yet no prohibition shall be granted, because that by our law no will is allow'd of, wherein there are not executors named, altho' the Ecclesiastical Court will compel him to perform the will, if he proves it as their law required. *Hill. 37 Eliz. B. R. per Curiam.*

Nov. 12. Chardon v. Harris, the same point cited in the case of Shotton and Fried, reported in Carthew 143. 1 Show. 158. 3 Mod. 284. Comb. 160.

Prohibition.

5. If a man makes his son (being an infant) his executor, and during his infancy he appoints two other guardians to the infant; and also makes by the same will two supervisors, and devises several legacies out of the profits of certain lands to be paid at certain days, and appoints also by the will that the guardians shall enter into a bond to the supervisors, to pay the legacies at the days appointed by the will, in a suit in the (*P437) * Ecclesiastical Court to compel the guardians to enter into the bond as aforesaid; if they plead that they cannot raise the legacies out of the profits by the days appointed, and this plea is refused, a prohibition shall be granted. *Trin. 10 Ja. C. B. between Walkeden, &c.* adjudg'd, and prohibition granted.

The same point cited in Carthew 143, in the case of Shotter and Friend.

6. If a man makes a will, and thereby gives a legacy to J. S. and afterwards revokes the will, and dies intestate; and the ordinary grants administration to J. D. against whom J. S. sues for the legacy in the Ecclesiastical Court; and J. D. there pleads the revocation, and offers to prove it by one witness, which is refused, for this plea is in effect that he made no will, *Trin. 4 Ja. B. R. between Brown and Wentworth*, a prohibition granted, after a debate upon a demurrer to the declaration.

7. If an executor will prove the will in the Ecclesiastical Court by one witness, and that is disallowed; yet no prohibition shall be granted, because they have a jurisdiction of the matter and the proceedings. *Trin. 4 Ja. between Brown and Wentworth agreed.*

(a) Vide Cro. Eliz. 675. Collier's case. 2 Cro. 666. Gilby v. Williams, Pas. 21 Ja. 1 Keb. 372, 523, 567. 2 brook and Bridges, per Curiam. 8. If a man libels in the Spiritual Court for a (a) pension whereas he never demanded it, altho' the statute of 34 H. 8. which gives a remedy for such pensions, is, where it is wholly denied, he shall sue in the Ecclesiastical Court; yet a prohibition shall be granted, because it belongs originally to the Ecclesiastical Court. (b) *Hill. 6 Ja. B. R. between Brook and Bridges, per Curiam.*

Phillips v. Hinkson. (b) 2 Cro. 217. the same case and point. — A prohibition was prayed to stay a suit against J. S. lessee of a rectory, out of which a pension was demanded; it was suggested that the Lord Byron had three parts in four of this rectory, upon which pension was chargeable, and that the suit against one alone ought not to be, as in an action for a rent-charge, all the tenants are to be named, and here the party has an election to sue a writ of annuity; and if so, he must have named all that had been charged. Curia: 'Tis true, in our law it were a good plea in abatement, but perhaps their law course is otherwise; and here they have jurisdiction, and may proceed according to their own rules, or if not, you may have an appeal; whereupon a prohibition was denied. Vent. 335.

(c) Vide Cro. Ja. 269. in the case of *stratford of the tithes*, if the defendant pleads that he fees the subtraction of tithes, the plaintiff suggested the plaintiff in the Spiritual Court (the defendant) had but one witness to prove the lease of tithes; a consultation was awarded.

Prohibition.

and they will not allow the proof there by one witness,
(d) prohibition lies. *Mich. 17 ja. C. B. between Downs* (d) The same point ad-
and *Devenish, per Curiam.* judg'd e con-

upon a suit for tithes, and a plea of having but one witness to prove a real contract. 1
Sol. Rep. 42. *Barnwell v. Tracy.* Cro. Eliz. 666. the same point as to payment of

10. If husband and wife are divorc'd for adultery, *a Mensa* Fol. 301.
Thoro & mutua Cohabitatione, and afterwards the wife as a
feme sole sues an estranger for slander and defamation, and a
sentence is there given for her, and the defendant enjoin'd to
renewance, and the costs of the suit is assessed to the plaintiff;
and afterwards the husband releases all actions, and this suit,
and all belonging to it, and the defendant pleads this release
in the Ecclesiastical Court, which is disallow'd; yet no pro-
hibition shall be granted; because the divorce does not dis-
solve the marriage, but they continue husband and wife not-
withstanding; yet inasmuch as by the course of the ecclesiastical
law such wife may sue solely without her husband, and
this suit is but to restore her to her credit again, which was
speak'd by the defendant, and the costs of suit are not for
any damages, but merely for the charges of the suit, and de-
pendant upon the suit; therefore neither the suit or the costs
depending upon it should be released by *the husband. (a)
Mich. 14 ja. C. B. between Motam and Motam adjudg'd.

A prohibi-
tion was deni-
ed upon a
suit by the
wife against
the husband
for a di-
vorce, prop-
ter Savitiam,
and for Ali-
mony. 2 Cro.
364. Hyatt
case. Cro.
Car. 220.
Drake's
case. Godb.
215. Sey-
mour's case.
(*P438)

The same case and point. 1 Rol. 426. and in 3 Bulst 264. by the name of Motteram
Motteram; and it is there mention'd that this case differs from the case of a legacy;
that is to go into the husband's purse, and therefore may be a bar; but this is a
personal wrong to the wife, the determination of which belongs to the Spiritual Court.

11. But if such wife after such a divorce sues in the Eccle-
siastical Court for a legacy given to her, and the (b) release (b) Moor
the husband is pleaded and disallowed, a prohibition shall 665. Cro.
be granted; for here the legacy is originally due to the hus-
band and wife, and the suit there is for a real interest; and
therefore the release of husband will discharge it. 44 Eliz.
R. between **Stephens and Tott* adjudg'd.

(b) Moor
665. Cro.
Eliz. 908.
1 Rol. Rep.
426.
* Noy 45.
the same
case and
point.

12. If A. a feme covert speaks scandalous words of B. ano-
ther feme covert, and afterwards the husband of B. executes a
release thereof to the husband of A. and afterwards A. sues B.
in the Court Christian for this defamation, to restore her to
her credit, and there the release of the husband of B. is plead-
ed and notwithstanding this a sentence is there given for A.
and costs taxed, and thereupon an appeal; no prohibition
as to the matter, because they have a jurisdiction of the
cause, and also of the manner of the proceedings*. But a *Cro. Car.
prohibition lies as to the costs, because the costs are gone by 222. the
release of the husband. *Trin. 7 Car. B. R. between Perry* same point.
Hubbart, per Curiam. And a prohibition granted accord-

Prohibition.

ingly. *Trin. 13 Car.* between *Paynell* and *Walford*, per *Curiam*, where the feme sued in the Court Christian for defamation; and the husband and the other refer'd the matter to the award of J. S. who made an award, and that was pleaded in the Court Christian, and not allowed; yet a prohibition was denied, because that the suit is to restore his wife's credit to her, which the husband cannot hinder.

13. If a man deviseth 20*l.* to five of his infants, to be equally divided between them, and afterwards one of the infants dies, and afterwards the surviving infants sue in the Court Christian for all their 20*l.* as they may by the ecclesiastical law; for by their law they (c) are jointenants, although by the common law they are tenants in common; yet no prohibition lies, because he hath not any remedy for such legacy by the common law, but only by the ecclesiastical law, and therefore they have a power to judge that he shall have it. *Mich 5 Car. B. R.* between *Evans* and *King* resolved, and a consultation granted accordingly.

(c) Jones

Car. 2, 130.

Bastard v.

Stukeley. But

if the executors assent to

the legacy,

quere, if the

determination

of the

property does not

belong to the common

law; and if they of the

Spiritual Court proceed

in that case, shall they

be prohibited. This case

is reported in 2 Lev. 209. by

the name of *Bastard v. Stukeley*, and there said to be adjudg'd, upon a demurrer that the

prohibition shall stand, for by the assent of the executor, the interest is vested, and becomes

a chattel, and governable by the common law, Vide 3 Keb. 440, 458, 49, 613, 67

686, 755, 828.

14. If there be a suit upon a *Modus decimandi* in the Spiritual Court, and the defendant pleads that the *Modus* is other

wise than the plaintiff alledges; and they refuse to accept

such proof of this *Modus*, a prohibition lies. † *My Reports*

14 *Jac. Goslin* and *Harden*, and proves it but by one witness

which is not sufficient by the spiritual law, if they refuse to

for this cause a prohibition lies. *My Reports* 14 *Jac. Goslin*

and *Harden*.

15. So if the suit be upon a *Modus* in the Spiritual Court

and the defendant pleads that the *Modus* is otherwise than the

plaintiff hath alledged, and they refuse to accept his proof

that *Modus*, a prohibition lies. † *My Reports* 14 *Jac. Goslin*

v. *Harden*.

* 16. If there be a suit for a legacy in the Spiritual Court

and the defendant pleads a release in bar, which is denied by

the plaintiff, and the defendant proves it by (a) one witness

and they refuse that proof, there a (b) prohibition lies; be

cause that is good proof by our law. *Mich. 15 Ja.* between

Percher and *Wheble*, per *Curiam*, *Hob. Rep.* 255. *Anonymous*

Pol. 302.

(a) The like

in case pay-

ment is

pleaded and

refused, be-

cause offer'd to be proved by one witness. *Carth. 142. 1 Vent. 181. 3 Mod. 28*

Show. 158. 2 Cro. 264. Hutton 23. 12 Co. 6. e contra. (b) Denied on a suit for a

legacy, upon a suggestion of payment offer'd to be proved by one witness thirty years before

and it was said, that the party might have pleaded the statute of Limitations; and if the

had been refused, a prohibition would have been granted. 2 Keb. 225. In 12 Co. 6.

Prohibition.

it is said, that if the suit be in the Ecclesiastical Court for a legacy, and the defendant plead a release, if in the admitting or rejecting of proofs concerning this release, which is matter determinable at common law, they do wrong to the plaintiff or defendant, they have no remedy but by appeal. But in the case of *Shotter and Friend*, reported, in 3 Mod. 284. 1 Show. 158. Comb. 160. Salk. 547. this point seems to be settled, and notwithstanding the above case in 12 Co. a case in *Yelv.* 92. and 2 Cro. 264. the court were of opinion, that a prohibition ought to be granted, if they refuse the proof of payment, the revocation of a will, &c. by one witness, but they may judge of the credibility of the witness; and the case of *Richardson and Desborow* was cited, by Judge Dolben, as of Hill. 1675. in B. R. which case is reported in 1 Vent. 291. where there was a suit for a legacy, and the administrator pleaded, that he had fully administered, and had no assets, and upon producing but one witness to prove it, they gave sentence against him; and thereupon he appeal'd, and prayed a prohibition, and it was granted; and the case of a revocation of a will was cited by Hale, which, says he, is a stronger case, because that is entirely of ecclesiastical cognizance. But it seems prohibitions had been denied before, where the Spiritual Court refused the proof of payment of a legacy, as may be seen in *Peep's* case cited in Noy 12. in the case of *Chadron and Harris*. 1 Sid. 161. Vide *Moor* 403. cited to be adjudg'd.—That a prohibition lies, upon such suggestion of the refusal of the proof of a release by one witness, where a suit is for a legacy. Cro. Eliz. 88. *Bagnall v. Stokes*, the same point adjudg'd. Vide Cro. Eliz. 666. A prohibition granted upon refusal of the proof of payment of tithes by one witness. 2 Rol. Rep. 43. the same point. *Malory v. Marriot*. Vide 2 Cro. 269, 270—But a surmise that the party has but one witness is not sufficient; because, if such surmise should be sufficient, then all suits in the Ecclesiastical Courts would be taken away. 2 Salk. 547. the same point adjudg'd in *Shotter and Friend*.

17. So when a release is pleaded in bar of a legacy, if they will not allow it in the Ecclesiastical Court, because the subscribing witnesses to the release are dead, and refuse to allow any proof thereof by circumstances, as by comparing the witnesses hand-writing, &c. a prohibition shall be granted. * * *Hutton* 22. the same case. *Mich. 16 Ja. C. B.* between *Watts* and his *Wife* against the executor of *Sir John Conisby* resolved, and a prohibition granted. *Hob. Rep.* 312. the same case, if that be not proved upon the prohibition, a consultation shall be granted; and if it be proved, the plaintiff hath no cause of action.

18. Upon a suit in the Spiritual Court, if the court takes a bond from the defendant to perform their sentence, a prohibition lies; for they have other lawful means to compel him to perform it, if they have a jurisdiction. *Mich. 12 Ja. B. R.* * *Codd's* case, per Curiam. Vide my Reports 14 Ja.

* 1 Rol Rep. 432.

19. If a parson sues his parishioner for not setting out his tithes according to the statute of 2 Ed. 6. and the defendant pleads that he set out his tithes, and this plea is there refused, because it is not sufficient to set out the tithes, unless the parson be present; yet a prohibition shall be granted, because it is sufficient at (c) common law, tho' the parson be absent. (c) Vide 2 Leon. 101. case 124. *Mich. 15 Ja. C. B.* resolved, and a prohibition granted.

Cro. Eliz. 206. *Bennet v Shortwright*, the same point adjudg'd. If the common law differs from the civil law, touching the legality or illegality of a thing, if they proceed according to their law, a prohibition lies. *Stile* 10. *Pal.* 23 *Car.* *Buttsworth v Buttsworth*.

20. If a man sues another in the Spiritual Court for calling him bastard, and the defendant there pleads that he was

bo n

Prohibition.

born after a contract between his father and mother, but before any * marriage, which plea is there refused, for that they by the ecclesiastical law hold such issue legitimate, which by the common law is a bastard, a prohibition shall be granted. *Hill. 39 Eliz. B. R. between Ambler and Medcalf* adjudg'd.

21. If an husband possess'd of goods in right of his wife, as administratrix, grants the goods to *J. S.* and after the wife dies; and after a new administration is granted to *J. D.* who sues the grantee of the goods in the Ecclesiastical Court for wasting those goods, a prohibition lies. *Mich. 11 Car. B. R. between Clarke and Daniel*, and such prohibition granted, *per Curiam*.

22. If an husband possess'd of goods in right of his wife, as administratrix, wastes the goods, and afterwards the wife dies; if the husband be sued in the Spiritual Court for spoiling, or wasting these goods, a prohibition lies. *Mich. 11 Car. B. R. in the above case of Clarke and Daniel*, said by Justice *Jones*, that it had been so resolved, altho' the Spiritual Courts complain'd of it to be very hard.

23. If a parson sues for tithes against a parishioner, and there the parishioner pleads a lease from the parson to him of his own tithes, by way of discharge by deed, and this plea is refused, a prohibition lies. *Mich. 15 Ja. B. R. parson Starcie's case* adjudg'd, and a prohibition granted. *2 Rol. Rep. 42. the same case reported by the name of Barnwell and Tracey. Cro. Jac. 269. the same point adjudg'd in Robert's case.*

24. If a parson sues for tithes, and the defendant pleads an award in bar; if it be refused in the Ecclesiastical Court, a prohibition shall be granted. *My Reports Pas. 12 Ja.* prohibition was granted, where the Spiritual Court refused a plea, that the parson was not lawful incumbent, but one *Taylor*. *3 Leon. 265. Cro. Eliz. 228.*

25. If an executor is sued in the Ecclesiastical Court for a legacy, and the executor there pleads, that there is a bond forfeited, which ought to be first satisfied, and this plea is disallowed there, a prohibition shall be granted; for by the common law debts ought to be satisfied before legacies. *Mich. 11 Ja. B. R.* But if the Spiritual Court refuse a plea, that by our law is not good, a consultation shall be awarded, as a bond not to suffer escapes, 'till forfeited. is not to be pleaded to a suit for a legacy. *Owen 72. Cro. Eliz. 446. Goldsb. 141. Moor 413.*

26. If an executor be sued in the Court Christian for a legacy, and the executor pleads that he hath fully administered all that he had; but that he had some desperate debts upon bonds and contracts which he offer'd to the plaintiff there, and to make him a letter of attorney to sue in the executor's name, and the Court Christian will not allow this plea; a prohibition shall be granted. *Mich. 3 Ja. C. B. between Sheyney and Harmy. Dubitatur.*

Fol. 303.

Owen 72.
Cro. Eliz.
446. Goldsb.
141. Moor
413. Winch
78.

Prohibition.

27. If administration be granted to the next of kin by blood, and thereupon there is an appeal sued to the delegates, and where they purpose to revoke the administration, and to grant it to another, who is not the next of kin by blood by our law, but by the ecclesiastical law; a prohibition lies, because it being ordain'd by statute, it ought to be interpreted according to our law. *Mich. 21 Ja. B. R. between Wingate and Finch* Bend. 133. Noy 24. Montague v. Clarke. *Ibid. 24. Took's case.* 2 Keb. 163, 73, 392.

* 28. If administration be granted to a cousin of the half blood, and thereupon a suit is brought by another, who pretends to be a cousin of the whole blood; whereas his father was a bastard by our law, and an appeal to the audience, and there they intend to (a) repeal to the first administration, and to grant it to the son of the bastard, according to the ecclesiastical law; (b) a prohibition lies, because the statute is to be interpreted according to our law. *Hill 22 Ja. B. R. a* (*P441) *Mich. 23. Car. B. R. the same*

point adjudg'd; a prohibition denied to repeal an administration, because granted to the eldest sister, upon a Suggestion that the plaintiff is youngest sister, and in equal degree. *Sti. 147. Mich. 24 Car. B. R. Brown v. Poyns.* (b) The ordinary is at liberty to repeal an administration obtain'd by fraud or surprise. *Trin 9 Geo 2. Harrison & Ux' v. Mitchell. Fitz-G. 303.* a prohibition was granted to the Spiritual Court for granting administration to A. where B. was named an executor, but was a Bankrupt. *Hill v. Mills. Comb. 185.*

29. The death of the plaintiff or defendant by the civil law is no abatement of the libel; and therefore, if they have jurisdiction of the cause, the temporal courts will not prohibit them, if they proceed. *Cro. Ja. 483. Bishop of Carlisle's case.*

30. If the guardianship of a child be devised by a will, and there be a suit in the Spiritual Court to prove the will, the court will grant a prohibition; for it is conuzable at the common law. *1 Vent. 207. Lady Chester's case.*

31. Where prohibitions have been granted, or denied upon the ordinary's distribution of intestate's estates. *1 Show. 1. Brown v. Brown. 1 Show. 2. Browne v. Shaw. Pasf. 1 W. & M. 2 Show. 285. Hill. 33, 34 Car. 2. B. R. Percival v. Crispe. 2 Show. 285. Pasf. 35 Car. 2. Taylor v. Ames 286. Caldicot v. Smith. Pasf. 35 Car. 2. 2 Show. 407. Mich. 35 Car. 2. Palmer v. Allicock. Mich. 2. Ja. 2. Comb. 14. the same case. 1 Vent. 13. 2 Mod. 23. Wilson v. Drake. 3 Cro. 5. Fetherby's case. Comb. 389.*

32. A Prohibition hath always been granted for denying the defendant a copy of the libel, because the party ought to know whether the matter be within their jurisdiction, or not; and

Prohibition.

and how he might answer thereto. 6 Mod. 87. *M. 2 Anne, Cunmer v. Milton* Parishes. 2 Salk. 528, 529. the same case. and there *per Holt*, Chief Justice, tho' it was formerly held by all the judges of *England*, that when there was a proceeding *ex officio* in the Ecclesiastical Court, they were not bound to give the party a copy of the articles. But (says he) the law is otherwise; but it seems, as by the case *Pas. 11 W. 3. B. R. Hale* moved for a prohibition to the admiralty, for refusing a copy of the libel, and it was denied *per Holt*, C. J. because not within the statute 1 *Shorr.* 158. the same point adjudg'd as to the denial of a copy of the articles. *Vide Nelson's Lett.* 49. 327. so that the resolution in *Moor* 756 appears now to be not law.

1 Keb. 82.
so adjudg'd.

33. When a prohibition is moved for, upon being denied a copy of the libel, such denial must be verified by affidavit. 1 *Vent.* 255. *Hill.* 25, 26 *Car. 2. B. R.* and *per Holt*, C. J. where the matter suggested for a prohibition appears upon the face of the libel, we never insist upon an affidavit, but unless it appears upon the face of the libel, or if you move for a prohibition, as to more than appears upon the face of the libel, to be out of their jurisdiction, it must be verified by affidavit. 2 Salk. 549. *Godfrey v. Lewellin*, *Trin.* 11 *W. 3. B. R.*

34. And *Note*; where a prohibition was granted *Quousque* they deliver'd a copy of the articles, and the prohibition was drawn up absolutely, the court would not grant a consultation, but discharged the prohibition by *Superfedeas*; and when the Spiritual Court proceeded to excommunication, for want of answering, the court granted a prohibition, with a *Mandamus* to absolve the party, if it were for not answering before they give him a copy of the articles. 1 *Vent.* 5. *Hill.* 20, 21 *Car. 2. Anonymus.*

(*P442) *35. The common law and the spiritual law differ in this instance, that by the spiritual law a man is to answer upon oath, tho' it be to accuse himself; but by the common law of the land *Nemo tenetur seipsum accusare*; but in some cases the courts of law will allow the Spiritual Courts to administer an oath for the party to discover, &c. as in cases testamentary and matrimonial, where no discredit can be given to the party by his oath; and for cases as to this point, *vide postea* *Letter T. and Cro. Eliz.* 201. *Moor* 906. *Cro. Eliz.* 262. 3 *Cro.* 201. 4 *Inst.* 333. *Hardr.* 364, 406. 2 *Mod.* 118. 1 *Vent.* 114, 339. 2 *Lev.* 247.

36. A prohibition was denied for not granting a copy of the libel, without an affidavit that they tender'd the fees, &c. 1 *Keb.* 825.

(R)

Prohibition.

(R) *In what Case the Spiritual Court shall not have Jurisdiction for a Collateral Cause, for a prosecution at the Common Law.*

Vide the Stat. of 1 E. 3. Cap. 11.

IF a man be accused of being the father of a bastard before justices of peace, and the justices in examining the matter say, *that it is his bastard*; if they are afterwards sued for those words in the Spiritual Court, a (a) prohibition lies, because they are spoken in the administration of their office. *Hill. Jac. Cade and Windham. Mich. 14 Jac.* it was again affirmed. Court at which for defamation, saying, that the defendant had a bastard, and shews that the defendant, who sued in the Spiritual Court, was sentenced for having a bastard, and b the defendant ordered to keep it; he being sentenced to be the reputed father at the sessions, which by the authority of the statute law; it cannot now be impeach'd in the Spiritual Court. *Jac. 625. Webb v. Cook. 2 Rol. Rep. 82.* the same case; but it is reported there, that if the defendant had not pleaded the conviction, but had only justified and offer'd to prove it, and they had refused his plea, no prohibition would have been granted.

2. But otherwise had it been, if the justices had spoken the words at another time, after the excommunication, as it was ordered. *Mich. 14 Jac.* in the above case of *Cade and Windham.* 3. If *A* sues *B.* in the Spiritual Court for saying, *that he lived incontinently with C. B.* shall have a prohibition upon a suggestion, that he was brought before a justice of peace, where he gave evidence that the said *C.* had confess'd to him, that *A.* lived incontinently with her, altho' he does not suggest that he spoke the words; for that is but evidence. *Pass. Jac. B. R.* between *Berrie and Miles* adjudg'd, and a prohibition granted.

4. If a man sues in the Spiritual Court for tithes, and recovers, and there costs of the suit are taxed; and afterwards the defendant procures a prohibition, but after that a consultation is granted, and the Ecclesiastical Court tax new costs against the defendant for the plaintiff's costs in the Temporal Court to obtain a prohibition; a prohibition shall be granted without taxing those new costs, because otherwise every one would be deterr'd from suing for prohibitions; and the plaintiff in the prohibition at common law shall have no costs allowed him if he recovers there. *Mich. 17 Jac. B. R.* between (b) *Stone and Read, per Curiam* resolved, and a prohibition granted, if that can appear. (b) 2 Rol. 217. the same case.

5. If a man be defamed by a whore for getting a bastard, the church-wardens compel him to enter into a bond to charge the parish according to the statute; and thereupon the party defamed libels against the church-wardens in the Spiritual Court for this defamation, a prohibition shall be granted. *Mich. 10 Jac. B. R. Berrie's case, per curiam.* (*P443)

6. If a man be indicted at the leet for keeping a bawdy house, and for that the party libels in the Spiritual Court, a prohibition shall be granted. *Mich. 10 Jac. B. R. per curiam.*

Prohibition.

7. If a man be [a] indicted in the leet upon the statute for Drunkenness, and J. S. there gives evidence that he was drunk and thereupon he sues J. S. in the ecclesiastical court for speaking these words, a prohibition shall be granted. Mich. 12 Ja. B. R. between *Anfield and Feverell adjudged.

[a] If two men are sworn to give evidence to a jury, and they do so, for which certain persons are indicted; if they who are indicted sue them in the spiritual court, who gave evidence for defamation; they shall have a prohibition. Nat. Brev. 99. letter G. * 1 Rol. Rep. 61. the same case, and S. P. the like point cited of one indicted for a scold. 2 Bulst. 269. the same case.

8. If the prosecutors in the case of felony are perjured, yet if they are sued for it in the spiritual court, a prohibition lies; for it is [b] perjury arising from a temporal cause. [b] Whether perjury, or not, is to be tried at common law. 1 Keb. 322.

9. So if a jury give a false verdict between party and party, yet if they are sued for this perjury in the ecclesiastical court, a prohibition lies. 13 H. 7. Kelw. 39. b. *per curiam*.

10. If A. a parson of a church sues for tithes in the spiritual court against B. who obtains a prohibition upon 2 Edw. 6. upon a surmise of barren lands; and thereupon a writ of habeas corpus is issued, and a verdict for A. and a consultation granted, and afterwards a sentence is given in the spiritual court and there costs are taxed upon a bill preferred, the parties whereof amount to above 10l. and there it is preferred also to have costs *pro expensis juris peritorum & sollicitudinis* 48l. and thereupon costs are assessed for the whole 45l. in this case, because A. the plaintiff refused to take his oath that nothing of the costs was for any expences at common law altho' it was so certified by the chancellor; yet upon this surmise a prohibition lies. Mich. 9 Car. B. R. between Flower and Varwer, *per curiam*. But no prohibition was granted, because the consent of parties the costs were mitigated *per curiam* to 30l.

11. Upon a libel against a woman *Causa jactationis & vituperationis*, upon a suggestion that the defendant had been indicted for marrying her, and had been burnt in the hand so that being tried by a jury, and the marriage found, a prohibition was prayed and granted. 3 Mod. 164. Boyle v. Boyle.

(*P444) (S) In what cases they shall not have jurisdiction for a collateral cause, by reason of a pardon.

1. IF A. sues B. in the Court Christian for saying, That I was a pander, &c. and after sentence is given against the defendant, and that he shall be condemned in expences. Noy 85. Latch 155. S. C. Noy 91. Palmer v. Warner S. P. 2 Brownl. 28. adjudged e contra in 3 Cro. 9. Dr. Brikenden's case, the costs being awarded to the party before the pardon, tho' they be taxed afterwards, were taken away by the pardon, and in the case of Baldry and Packard, Trin. 2 Car. Rol. 11. where a suit was for defamation, and sentence against the defendant, and 6l. assessed costs, and the defendant appealed from the sentence to the Court of Arches, and all this pending in 1662, and by the general pardon 21 Ja. the offence was pardoned, and pleaded in the Court of Arches, and notwithstanding they proceeded in the appeal, yet the first sentence was reversed, and 16l. assessed for costs to the appellant; and upon a writ of murrer to the prohibition it was resolved, that the pardon went only to the offence but not to the costs; and if they be not well assessed, the Court of Arches might well proceed as to the costs, and reverse the sentence, and award costs to the appellant, and the

Prohibition.

But before the costs are taxed to a certainty, comes a general pardon of the 21 Ja. whereby the said offence is pardoned, by this pardon the costs are also pardoned; because although there was an award of costs, yet till they are made certain the party hath no interest in them; and therefore they proceed afterwards for the costs, a prohibition shall be granted. *Mich. 2 Car. between Lewes and Whitley, per curiam.* costs were assessed after the pardon yet it was held good, the cause of those costs not being taken away by the pardon.—Where a prohibition was prayed to the High Commission for one W. sued there for incontinency, he having obtained a pardon; it was adjudged that the pardon coming before any sentence the court could not afterwards award a prohibition. *Cro. Ja. 335. Watt's case. 2 Bulst. 182. Hill. 11 Ja. 1. the same case.*

And in this case, if before the pardon, and after the sentence, the defendant appeals, and afterwards comes the general pardon, and afterwards the defendant relinquishes his appeal, upon which new costs are taxed, for thus deserting the appeal, a prohibition lies, because he hath no way to have a benefit of the pardon but this; for the first court ought to have allowed the pardon. *Mich. 2 Car. between Lewes and Whitley.*

If a parson of a church be convicted of manslaughter, and afterwards hath his clergy allow'd according to the statute of 1 Eliz. and is discharged out of prison; if he be afterwards indicted in the Ecclesiastical Court to be deprived of his benefice for that offence, a prohibition lies; for by the allowance of the clergy, by force of the statute he is purged and acquitted from the felony, and from all penalties and damages incident to the nature of a pardon, *Hob. Reports case 375. between Mole and Williams adjudg'd, and there cited, Mich. 27 Eliz. 1574. Nicholl's case* accordingly.

And the offence is unpunishable; and therefore the court will not in that case grant a prohibition, because the spiritual court refuse the plea of a pardon. *Godb. 202. Richardson's case.*

The defendant being condemn'd upon a libel in the Spiritual Court for defamation, and costs taxed to 18*l.* and upon his *significavit* an *Excommunicato Capiendo* issued, and before it was returned came a pardon; ruled that this taxation of costs for the plaintiff's benefit, 'tis not discharged by the pardon, nor the excommunication dependant thereon. *Cro. Jac. 4. Banning v. Fryer.*

That a general pardon doth not aid him for the staying a prosecution in the Court Christian, which is for *Et ad instantiam partis*; if it were sued there *ex officio judicis*, the general pardon would then discharge him, but *Glanvill* held, that for this slander an action lies at the common law; for the begetting of a writ is punishable by the statute of 18 Eliz. And the statute giving a remedy takes away from the Spiritual Court its power, but all the other justices against him herein; for where a remedy for a punishment is given by a statute, that shall not take away the punishment that was before, and questionless there

Latch 155. S. C. If the pardon comes before any sentence given, the spiritual court shall not afterward give any costs. Vide 3 Cro. 68.

Fol 305

But a pardon as to a suit for simony and corruption doth not make the church plena, but only grant a prohibition. *pl. 288. Dr.*

(*P445)

Prohibition.

there is not any punishment by the common law, where one is injuriously slandered in this case; wherefore a consultation was awarded. Cro. Eliz. 684. *Norwood's case*.

(T) *In what Cases they shall not have a Jurisdiction for a Collateral Cause.*

1. **W**HERE a layman is to forfeit a penalty either by the statute, or otherwise, there he is not (a) bound to answer upon his oath in the Ecclesiastical Court, whether he hath committed such an offence which causes the forfeiture; for otherwise he would be (b) bound to discover sufficient matter for an informer to inform against him upon the statute. (a) The Court Christian hath no power to bind a party to accuse himself, and to discover *Mich. 12 Ja. B. R. per Curiam in Bradston's case,*

any thing to his prejudice in cases of defamation, or in any case, but in cases testamentary and matrimonial, where no discredit can be given to the party by his oath. Cro. Eliz. 201. *Cullier v. Cullier*, Moor 906. the same case. (b) And therefore a man cannot be obliged to answer upon his oath concerning incontinency. Cro. Eliz. 262. *Dr. Hunt's case*, 3 Cro. 201. 4 Inst. 333. * 1 Rol. Rep. 110. the same case; the same point adjudged concerning Dilapidations, Hob. 84. 4 Inst. 333.

2. If a man be order'd in the High Commission Court to give alimony to his wife, and is also bound in a bond of 300l. to perform it; he is not afterwards bound upon a suit there to answer whether he hath given alimony to his wife accordingly, because he would thereby discover the forfeiture of his bond. (c) *Mich. 12 Ja. B. R. Bradston's case, per Curiam.* (c) 1 Rol. Rep. 110. the same case.

3. A man is not bound to answer upon his oath article concerning the *Common Prayer Book* punishable by the statute of 1 Eliz. because he would then discover matter for an informer. (d) *Hill. 13 Ja. B. R. Dighton and Hol's case.* (d) Cro. Ja. 388. S. C. Moor 840. the same case. Hob. 84. the same point, *Spendlow v. Smith*.

4. But a clergyman may be examined upon his oath for preaching against the *Common Prayer Book*; for clergymen are not within the statute. *Trin. 7 Ja. C. B. parson Mansfield's case* adjudged, *per Curiam*.

5. A man is not bound to answer upon his oath matter concerning his faith; for there is a statute by which he may be punished, if he publishes false doctrine. *Mich. 18 Jac. C. B. Jener's case, per Curiam.*

(*P446) 6. If a woman be sued in the Ecclesiastical Court for a contract of marriage, and enters into a (a) bond to the court, with a condition not to marry, or cohabit in fornication with any one *pendente lite*; she shall not afterwards be examined thereupon her oath, whether she be a single woman, for that tends to a [b] forfeiture of the bond. *Hill. 8 Ja. C. B. between Clifford and Huntley, per Curiam* resolved.

(a) Bond that he would not be in company with such a woman but at a church, or in open market; if upon a suit the Spiritual Court they exhibit interrogatories from him to discover whether he had done which would work a [b] Forfeiture of the bond, a prohibition will lie. *Hutley v. Gammon's case*, Pas. 3 Car. 1. 7. Up.

Prohibition.

7. Upon a prohibition, upon an excommunication, for not answering upon oath to articles against him, and for not taking the oath of a church-warden, to present upon all the articles contained in a book thereunto annex'd, amongst which there were some that would oblige him to accuse himself, the court held, that church-wardens ought to be sworn to do what appertains to their office, and no more; and if the Ecclesiastical Court proceed against them for a matter not within their jurisdiction, an action upon the case lies. *Hardr.* 364. *King v. Sir Edward Lake in Scaccario*, 2 Mod. 118. *Waterfield v. the bishop of Chichester*, 2 Keb. 771. *Hill v. Pinfold* the same point.

8. A prohibition was denied upon a libel, for a tax towards the repairs of a church, where the defendant inhabited, to make him pay his proportion, to which they required his answer upon oath, whether he had paid it, which he refused; for the court said, it was no more than the court of Chancery did on the like occasion. 1 Vent. 339. *Herne v. Browne*. *Farmer Qui tam, &c. v. Browne*.

9. A prohibition was pray'd to the Spiritual Court, for that they had compell'd the defendant there to answer upon oath in a suit for not repairing a church, suggesting that the Ecclesiastical Courts ought not to require answers upon oath, *Nisi tantum in Rebus Testamentariis & Matrimonialibus*; and this case being of great consequence, the plaintiff was ordered to declare, that the cause might be judicially determined upon a demurrer, which was so; and the court upon hearing the civilians and counsel of both sides granted a consultation. And if the articles comprehend things out of their jurisdiction, coupled with the excommunication for not taking an oath concerning of which they have jurisdiction, the court conceived a prohibition ought to go as to them, but said, he should have pleaded below *quod non tenetur respondere* as to those matters, and upon their refusal of such plea have prayed a prohibition. Vent. 114. *Anonymus*. *Farmer Qui tam, &c. v. Brown*, 2 Lev. 247.

(U) *In what Cases the Spiritual Court shall have a Jurisdiction of a Matter subsequent after the Suit, having Jurisdiction of the Original Suit.* (*P447)

1. IF there be a suit in the Spiritual Court for a *Modus decimandi*, if the defendant pleads payment of it, that shall be tried there, and no prohibition shall be granted, because the original suit was well commenced there. *Mich.* 14 *Ja.* R. R. between **Goslin and Harden* agreed, *per Curiam*. *Hob. Rep. case* 314.

*1 Rol. Rep. 419. 3 Bulst. 241. the same case.

2. So

Prohibition.

2. So if (a) payment be pleaded in a suit in the Ecclesiastical Court, for any thing whereof they have an original consu-
ance. My Reports 12 Ja. B. R.

But such [a]

Payment must be admitted to be proved by one witness, which is as much as the common law require; for if they refuse to admit such proof, a prohibition lies, and in the case of payment of a legacy in Carthew; so of a lease or subordination of tithes. 1 Vent. 281. Comb. 160. 3 Mod. 283. Show. 158. 2 Cro. 264. Hutton 23. Hetl. 85, 87. Lamb. 117; 217.—A prohibition was prayed to a suit for tithes by the parson, upon a suggestion of a Modus paid to the vicar, and that the vicarage had time out of mind been endowed. Coleman moved for a consultation, because the endowment of the vicaridge was not proved by two witnesses within six months, according to the statute. But it was denied, for the first part of the suggestion is not to be proved by witnesses, but only the payment of the Modus; and it was held, if the suggestion consisted of two parts, it was sufficient to produce one witness to the one, and another to the other. 1 Vent. 107. Robison's case.

3. In an action in the Spiritual Court by two church-wardens, if the defendant pleads the [b] release of one that shall be tried there. *My Reports 14 Ja. cited*, so to be adjudged 7 *Ja. taxed against the defendant for the repair of a church was held no discharge.* 2 Cro. 234. Yelv. 172. Jenk. Cent. case 305.

4. If a man sues for tithes against *J. S.* in the Ecclesiastical Court, and makes title to them by a lease made to him by the parson, and *J. S.* there also makes a title to them, by virtue of a prior lease made to him by the same parson; so that the Question there is, which of the leases shall be preferred, a prohibition shall be granted; for they ought not to try which of the leases shall be preferred, though they have consu-
 [c] 1 Rol. Rep. 61.
 Cro. Ja. 351.
 the same
 case, and it there appear'd that the prohibition was prayed, and granted to stay the plaintiff's own suit.

5. If a man having a patronage impropriate, makes a lease for years of parcel of the tithes by a deed, and the deed is denied in the Ecclesiastical Court, and issue is taken upon it, a prohibition shall be granted. *Pas. 8 Ja. C. B. per Curiam.*

6. If a parson [d] compounds with a parishioner for his tithes, and grants them to him by a deed for a certain sum by the year, according to the agreement, and afterwards he sues the parishioners in the Ecclesiastical Court for the tithes in kind, no prohibition shall be granted upon that discharge by deed, for they may well try it, having consu-
 [d] No prohibition will lie upon any composition, whether for life or years for any tithes, but the proper
 remedy is by appeal to the Arches. Bradshaw v. Swanton, Carthew 70. Yelv. 94. Cro. 137. Cro. Eliz. 188, 249. F. N. B. 43, 44. Lit. Rep. 155. Hob. 176. 2 Cro. 668. Reg. 38, 39.

(P*418) * 7. *Pas. 16 Ja. B. R. between Griffin and Bulsuff resolved, and a prohibition denied, altho' once before it was resolved otherwise for the church of Wakerly.*

Prohibition.

8. If a parson leaseth all his tithes of his benefice to a parishioner, and after sues him for his own tithes, no prohibition shall be granted; for this lease is a good discharge there.

8 E. 4. 14. *per Choke.*

9. If a parishioner grants lands to a parson for his own tithes, and afterwards the parson sues him for the tithes, a prohibition shall not be granted; for this matter will be a good discharge there. 8 E. 4. 14. *per Choke.*

10. If a parson [a] grants to a parishioner the tithe of his own lands for a certain rent by the year, upon a condition for non-payment, and afterwards sues the parishioner for his tithes in kind, no prohibition shall be granted, tho' the parson supposes that the condition is broken; for they may try it there having consufance of the [b] principal; and if they judge otherwise than the common law allows of, then a prohibition shall be granted. *Pas. 16 Ja. between Griffin and Bulst* so held.

[a] Palmer 36. Aldreth and Ray the same point adjudg'd, and a consultation granted. [b] Vide Palmer 36.

11. If a parson sues for tithes in the Ecclesiastical Court, and the defendant there pleads an award in bar, they shall try it there, and no prohibition shall be granted thereon, till they disallow the plea; for by intendment it is a good discharge there. *My Reports Pas. 12 Ja. per Curiam*, a prohibition denied: *Trin. 12 Ja. B. R. between Reynolls and Hays* adjudg'd, and a consultation granted.

RoL. 12. same case. [c] The court refused a prohibition upon a suggestion, that the lands out of which

they were demanded lay out of the parish, and that the bounds of parishes are triable at common law, because it did not appear that a plea thereof had been offer'd to the Spiritual Court, and was refused. 1 Vent. 335.

12. If a parson sues for tithes in the Ecclesiastical court, and the defendant there pleads a lease of them by deed by the parson, to him rendering rent, to which the plaintiff replies, that the rent was reserved upon a condition of non payment to be void, and the other pleads [d] payment at the day, that shall be tried there, and no prohibition shall be granted. *Trin. 16 Ja. B. R. between Griffin and Bulst* resolved by the court, and a prohibition denied.

[d] 2 RoL. Rep. 42. Barnewell v. Tracy the same point

adjudg'd, but if they will not allow of one witness, a prohibition shall be granted.

13. If a parson leaseth by deed the tithes of his parish, and after sues for the tithes in the Spiritual Court, and there this lease is pleaded, where the question between them is, whether the tithes of all the parish, or only of some particular things are to be had, yet no prohibition lies; [e] for they have consufance of the original, and they ought to take advice of them who are skilful at * common law, to direct them, as the judges of the common law do of them. But if they judge contrary to the common law, a prohibition lies after sentence. *Mich. 13 Car. B. R. between Dr. Pocklington and St. John*, a prohibition denied.

Fol. 307.

[e] Where a thing triable at law is collateral to the complaint in the libel, and of which complaint the

14. If

Prohibition.

Spiritual Court have the original jurisdiction, they shall not be prohibited; as where the libel is for the tithes of such a close, here they have an original jurisdiction, i. e. for the tithes; then when the defendant pleads that it is not his close, but the close of another, tho' this be triable at law, yet being collateral to the original cause, it shall be tried in the Spiritual Court. 1 Sid. 89. But tho' the Spiritual Court may judge matters triable at law, which happen casually and incidentally in the cause, yet they must take care that such incident matter of a temporal nature be determined before them in the same manner in that court, as it would have been tried at common law; otherwise a prohibition shall be granted; but if the matter incident be of a Spiritual nature, they are to try it according to their law; for instance, if they require two witnesses to the proof of a legacy, or a revocation of a will, a prohibition will not lie, because such proof is required by our law; but if they require two witnesses to prove the payment of a legacy, or a release, a prohibition will be granted, 1 Rol. 12. Moor 413. 2 Lev. 64. Show. 158, 172. 3 Salk. 288. 1 Vent. 281. Comb. 160. 3 Mod. 283. 2 Cro. 264. Hutton 23. Hetley 89. But it is not a sufficient foundation for a prohibition to suggest that the plaintiff had one witness to prove the fact, unless he doth likewise shew that he offer'd such proof, and that it was refused for insufficiency. Carthew 144. Shotter v. Friend. Salk 547. the same case. Cro. Eliz. 88. Bagnall v. Stokes the same point adjudg'd. Trin. 2, 3 Geo. First G. 82. The surmise of the refusal of a plea in the suggestion is not traversable, where the Modus decimandi comes in question, because in the case of a Modus, satis constat to the court, that the Spiritual Court would not refuse the plea. 2 Co. 44 b. So where a fact is brought by a parson in the Court Christian, and the defendant for a prohibition surmised that the parson assaulted the plaintiff's servant; whereupon the plaintiff in aid of the servant laid his hands peaceably upon the defendant, who then assaulted the plaintiff, who defended himself, Et si quod dampnum, &c. it was of the defendant's own assault; per Curiam, the surmise is not traversable; for here the party had good cause to beat the parson, and therefore is out of the statutes, Articuli Cleri and of circumspecte agatis. Cro. Eliz. 655. Kelly v. Walker.

14. If a man sues for a legacy in the Spiritual Court, and the defendant pleads a release in bar, and the plaintiff denies it, it shall be tried there, and no prohibition shall be granted, because it is a matter arising from an original cause, of which they had a jurisdiction. Mich. 15 Jac. C. R. between *Percher v. Webble*, per Curiam, and a prohibition denied. Hob. Rep. 255 *Anonymus*.

15. If an administrator sues for a legacy due to the testator in the Spiritual Court, and the defendant pleads a release of the testator in bar, and the plaintiff to avoid it says, that his testator was an idiot, this idiotcy shall be tried [a] there, and no prohibition shall be granted, because they had a jurisdiction on the original matter. Mich. 15 Jac. between *Percher* and *Webble*, a prohibition denied, but against the opinion of *Warburton*.

16. If a parson sues in the Spiritual Court, and the defendant there pleads, that the plaintiff was presented upon a [b] moniacal contract against the statute of 31 Eliz. it shall be tried there in as much as they had a jurisdiction of the original matter. Mich. 8 Jac. C. B. *Penn's case*. [b] Cro. Eliz. 642. the same point adjudg'd. Jenk. Cent. cases 305. e contra; but if they refuse the plea, a prohibition lies. Hob. 168.

17. If a parson of a church be outlawed, and the benefit of the outlawry is granted over to J. S. who receives the tithes of the parishioners, and afterwards the parson sues the parishioners

Prohibition.

tioners (as I suppose, and not the farmer) for the tithes, who pleads the outlawry against him, and the grant over to S. the farmer, a prohibition lies in this case, because it is (c) matter of record, which they cannot try. *Mich. 9 Car.*

R. between *Birley v. Wright per Curiam*, and a prohibition granted accordingly to the court of York.

book, upon a suit for calling the plaintiff father of a bastard in the Spiritual Court, and the defendant pleaded a conviction at the sessions, the prohibition was granted, because the plaintiff's justification is by a matter of record. 2 Rol. Rep. 82.

18. If the parson of B. in London libels in the Spiritual Court upon a custom, that if a parishioner of B. dies at B. and is carried and buried in another parish in London, and there is given to the parson a gown, a pulpit-cloth, and a pair of gloves, that the same things ought to be given to him, a prohibition lies to try this custom [d], if it be denied; for a custom may be made for a shorter time than at common law. *Trin. 15 Car. B.* between *Cooker* parson of *St. Thomas Apostles* and *Goale*, a prohibition granted.

may be tried by consent in the Spiritual Court, Latch 48.

* 19. If the parson libels in the Ecclesiastical Court for a *Modus* (viz.) for the tithes of fish carried from an island, if the defendant suggests, that the parson hath mistaken the *Modus*, and shews [a] another *Modus*, he shall have a prohibition, because the Ecclesiastical Court shall not try a *Modus*, whereby the inheritance shall be bound, and a usage for ten years is a good custom by the ecclesiastical law; and if that should be offer'd, they would defeat the Temporal Courts of their jurisdiction. *My Reports 14 Ja. B. R.* between [b] *Goslyn* and *Garden* adjudg'd.

20. So if a suit be in the Ecclesiastical Court upon the manner of tithing (viz.) upon a custom, for the owner to have five-four, and the parson five—for tithes. If the custom be denied, a prohibition lies; for they shall not try the *Modus*, being a charge of inheritance. *Hob. Rep. case 314.* between *Waller* and *Wall*, a prohibition granted.

21. If the church-wardens of the parish of *Steevenage* libel in the Ecclesiastical Court against J. S. a Farmer of a Farm all'd D. for contribution to the repairs of a church, and alledges, that part of the farm lies in *Steevenage*, and a part in *Walkerne* another parish, and alledges a custom, for that the farmers of that farm, have used time out of mind to contribute to the repairs of the church of *Steevenage* for all the said farm. If the defendant pleads, that part of the lands lies in the parish of *Walkerne*, and that he, &c. had used time out of mind to contribute for that to the church of *W.* and not to *Steevenage*, and denies the said prescription, that shall not be tried in

(c) So it seems in the case of Webb and

Webb and

because the

2 Rol. Rep. 82.

in the Spiritual Court upon a custom, that if a parishioner of B. dies at B. and is carried and buried in another parish in London, and there is given to the parson a gown, a pulpit-cloth, and a pair of gloves, that the same things ought to be given to him, a prohibition lies to try this custom [d], if it be denied; for a custom may be made for a shorter time than at common law. Trin. 15 Car. B.

[d] 5 Co. 73.

Noy 81.

Hob. 247.

Hetley 133.

A custom

& non aliter.

(*P450)

[a] Per Dod-

deridge e

contra, 3

Bulst. 41.

and, per

Holt, if a

Modus be

admitted, no

prohibition

2 Salk. 551. pl. 13. and if a Modus be confess'd as to part, and another mat-

ter shewn to oust the Spiritual Court of another part, the prohibition shall go to that part

4 Mod. 45. 1 Show. 281. [b] Bulst. 241. 1 Rol. Rep. 419. the same case.

20. So if a suit be in the Ecclesiastical Court upon the manner of tithing (viz.) upon a custom, for the owner to have

five-four, and the parson five—for tithes. If the custom be

denied, a prohibition lies; for they shall not try the Modus,

being a charge of inheritance. Hob. Rep. case 314. between

Waller and Wall, a prohibition granted.

21. If the church-wardens of the parish of Steevenage libel

in the Ecclesiastical Court against J. S. a Farmer of a Farm

all'd D. for contribution to the repairs of a church, and alledges,

that part of the farm lies in Steevenage, and a part in

Walkerne another parish, and alledges a custom, for that the

farmers of that farm, have used time out of mind to contribute

to the repairs of the church of Steevenage for all the said

farm. If the defendant pleads, that part of the lands lies in

the parish of Walkerne, and that he, &c. had used time out

of mind to contribute for that to the church of W. and not to

Steevenage, and denies the said prescription, that shall not be tried in

Vol. II.

3 H

the

Fol. 308.

Prohibition.

the Spiritual court, but by the common law, and therefore prohibition lies; for they shall not try the custom in the Ecclesiastical Court, because the inheritance is to be perpetual charg'd, (*yet note, that this is in effect but a denial of the prescription.* Trin. 16. *Ja. B. R.* between the church-wardens *Steevenage and Green* resolved, and a prohibition granted accordingly.

22. If there be a suit in the Spiritual Court for tithes of calves, a prohibition lies upon the general custom, to pay a farthing for every calf under seven, and a calf if seven and that the parson shall pay a farthing for every one above seven, with an averment that the parson cannot drive over the next year (*v. z.*) not to relinquish his tithes, till the parishioner hath ten calves, as he may by the canon law. *11. Car. B. R. Langford's* case, a prohibition granted; for the canon law it is at his election.

23. If *A.* the parson of *D.* sues *B.* for tithes in the Spiritual Court, who pleads a lease for years made to him by the parson, to which *A.* the parson replies, that he was not resident and absent for eighty days and more in such a year, from his benefice, by which the lease became void; no prohibition lies upon this plea, altho' it is grounded upon

[c] Where a statute of 13 *Eliz.* and altho' it was objected that the judges of the [c] Spiritual Court have not the exposition of the statutes: For inasmuch as they * have a jurisdiction of original cause, they have a power to try that which incidentally arises thereupon. *Hill. 14 Car. B. R.* between Sir *T. M. Lacy* and *Dr. Lacy per Curiam*, and a prohibition denied. *2 Lev. 69. Sir William Juxon v. Byron.*

[d] The Spiritual Court may proceed upon the construction of Acts of Parliament, or temporal matter, which comes before incidentally, if they proceed upon such incident temporal matter according to the construction of our law. *2 Lev. 69. Sir William Juxon v. Byron.*

24. The Ecclesiastical Court may hold plea of a thing prohibited by the statute, upon a penalty, so as they do not proceed for the penalty, *i. e.* where they have original jurisdiction of the matter. *Cory v. Pepper. 2 Lev. 222.*

25. *1 R. 3. 4. Per Hufsey*, when the original suit ought to begin in the Spiritual Court, and afterwards a thing comes in issue, which is triable in our law, yet it shall be tried by the common law; as if one sues for a horse devised to him, and the defendant says, that the deviser gave him the said horse, it shall be tried there.

26. A parishioner severs the nine parts from the tenth, being in a close where the gate was lock'd, the parson cannot come at them; for which the parson sued in the Spiritual Court, altho' the tithes be severed, and were said to be chattels; and the question being whether the gate was lock'd or no, was a temporal matter; yet by the statute these

Prohibition.

remain suable for in the Spiritual Court, and the other is but in consequent thereof; and therefore it is there triable; and if they refuse to allow his proofs, as was suggested; (it was said that he ought to appeal. *Cro. Eliz.* 843. *Blackwell's case*, the same point in *Cro. Eliz.* 607. *Leigh v. Wood, Fenner and Clinch*, that by setting out the tithes they are become lay chartels, for which he might have a remedy at common law by an action of trespass. *Garvy and Popham e contra*. For against the party himself, who set out his tithes, a suit is well maintainable in the Spiritual Court, if he detains them, tho' the parson, if he would, might have his remedy at common law; but if a stranger takes them after they are set out, the parson's remedy is only at common law.

27. Where the Spiritual Court required two witnesses to prove a presentment for adultery; and therefore sentenced against the plaintiff, who libelled for that defamation, a prohibition was denied, because they originally had conuzance of it. *Hetley*, case 11. *Eaton v. Morris*. *Pas. 3 Car. 1. C. B.*

28. Upon a libel against a married man for adultery, and getting a bastard child, it was granted as to compelling him to answer upon oath; but the Court Christian may proceed for incontinency, tho' not for the bastard child. *Comb.* 204.

29. A consultation said to be granted upon a suit in the Spiritual Court to dissolve a marriage, where a man had married the daughter of his first wife. *2 Lev.* 254. *Worthy v. Watkinson*. *Vide 3 Lev.* 364. *Honour v. Bradshaw*. *3 Keb.* 660. *2 Jones* 118. *Vaughan* 206 to 250. and 302 to 329. *2 Vent.* 9. *4 Leon.* 16. *Nelson's Litw.* 341. *2 Show.* 70. *V. Mod.* 168. *Haines v. Jescot*.

30. A prohibition was denied to stay proceedings in the Spiritual Court against a man for marrying his sister's bastard daughter; so for marrying his wife's sister. *Haines v. Scot*, *Comb.* 356.

31. Upon a suit in the Ecclesiastical Court against the plaintiff for incest, in marrying his wife's sister, suggesting that the second wife was dead, and that he had a son by her; to whom an estate was descended, as heir to his mother; and that tho' he had pleaded this matter, they went on to annul the marriage, and bastardize the issue; a prohibition was granted as to that, but they may go on to punish the incest. *2 Salk.* 548. *Harris v. Hicks*. *Hill.* 4, 5 *W. & M. B. R.* *Comb.* 200. the same case.

32. If a parson libels for tithes, and only sets forth that he is *Curatus Ecclesiæ*, tho' *Curatus* of itself does not imply that he is inducted into the church; yet if the party sued will deny that he is such a parson as is intitled to tithes, for that he is a mere stipendiary parson, he ought to * plead that matter in the Spiritual Court, and then upon the refusal of the plea a

Prohibition.

prohibition lies, otherwise not; but if he libels in the Spiritual Court for tithes, as *Curatus Ecclesie rite & legitime admissus, & legitime Investitus*, the last word *Investitus* in the common law signifies the same induction, and it is good. 3 Bur.
310. *Wrathmeale v. Gill. Mich. 1 Car. B. R.*

33. Upon a motion for a prohibition to the Spiritual Court for libelling there to dissolve a marriage *Causa præ contractu* but it did not appear whether *per Verba in presenti*, or *de futuro*, yet a prohibition denied, and my Lord C. J. Holt in report of this said, that it was first resolved in the Lord Vaughan's time, that an action would lie at common law, for a breach of an executory contract of marriage *per Verba in futuro*; which resolution Vaughan it seems *notis Viribus* opposed because the party had his remedy in the Spiritual Court which was agreed by all; but by bringing an action at law the remedy in the Spiritual Court is actually released, because in lieu of a performance of the contract the party is to recover damages. And *per Curiam*, the Spiritual Court have a jurisdiction of all matrimonial causes whatsoever, and where appears that the cause is spiritual, of which by consequence they have consueance, unless it be by reason of some collateral temporal matter, we ought not to prohibit them; and there is no reason to prohibit them, because this may be a future contract; for the breach of which, an action at law will lie no more than when they libel for laying violent hands upon a parson; for which an action at law lies for the battery, and a suit in the Spiritual Court for the irreverence to his character. 6 Mod. 155. 2 Salk. 437, 438, 553. S. C.

Jurisdiction Spiritual

Fol. 308.

(X) *Where the right of Tithes comes in Question.*

Godb. 45.
pl. 55.

1. **W**HERE the right of tithes comes in question in the Temporal Court, the Temporal Court shall be ousted of their jurisdiction. 2 E. 4. 15.

Cro, Eliz.

251. Dul-
lingham v.
Kyfeley.

V. Godb. 45.
pl. 55 20 H.

6. 17. Brooke

2. In an action of trespass by one parson against another if the defendant claims it as tithes belonging to his parsonage, the court will be ousted of their jurisdiction; for the dispute being between two parsons, it shall be intended to be for the right of tithes, 38 E. 3. 5. b.

3. If a man who is not a parson brings trespass for taking his corn against another, who claims it as tithes, he being parson the court shall not be ousted of their jurisdiction, because it is not between two parsons; and therefore the plea is but a traverse of the writ, viz. that it is not the corn of the plaintiff. 38 E. 3. 8. b. adjudg'd.

Fol. 309.

4. If a parson brings an action of trespass against an abbot for carrying away his corn; if the defendant says that the

Prohibition.

plaintiff is a *parson*, and that the defendant's lands ought to be free from tithes by a *composition*, and that the action is brought for tithes, there, the court shall not be ousted of their jurisdiction, because that the plaintiff hath not supposed himself a parson, nor that the action is brought for tithes. 38 E. 3. 8.

5. In trespass against a prior for taking his corn, the defendant pleads that he is parson, &c. and the corn was severed for tithes from the nine parts, and so he took them; if the plaintiff pleads an antient privilege to be quit of tithes, and a composition made between the plaintiff and defendant, rendering a certain sum to the defendant by the year; yet the court shall be ousted of their jurisdiction, because the right of tithes comes in question. 38 E. 3. 6. *b.* adjudg'd. (*P453)

6. But in trespass against a parson, if the defendant justifies as for tithes severed from the nine parts, and the plaintiff pleads the grant of the defendant of the tithes of the land for a year, or two years; the court shall not be ousted of a jurisdiction. 38 E. 3. 6. *b.*

7. In a writ of covenant by the parson against another, the plaintiff counts that they covenanted by a composition to tithe all his own lands, which he had not done; the court shall not be ousted of a jurisdiction, because that the action is grounded upon the deed, which cannot otherwise be pleaded, and the plaintiff is not to recover in this action the tithes, but only damages. 38 E. 3. 8. adjudg'd.

8. In trespass for taking his corn, if the defendant pleads that he is parson of *E.* and by composition between his predecessor and the plaintiff, who is an abbot, (it seems it is to be intended that he was parson of the parish where the corn was taken) that the demesne lands of every of them should be free, and that the place where the corn grew was his glebe, the court shall be ousted of a jurisdiction, because the right of tithes comes in question. 38 E. 3. 19. *b.*

(Y) Right of Tithes.

P *PRIMA FACIE* in an action between a spiritual man and a layman, the Temporal Court shall not be ousted of their jurisdiction, till the right of tithes comes in question. 2 E. 4. 15. vicar of

Pancras's case. Godb. 50. pl. 63. fol. 63. pl. 76. Cro Eliz. 136.

2. As in trespass for taking corn, the defendant pleads that he was the parson of *D.* and that the corn growing in certain lands within his parish, was severed from the nine parts, and the abbot of *W.* claiming the said corn as a portion, commanded the plaintiff to take them, whereby he took them; and the defendant retook them, and demands judgment, if the court will take cognizance, &c. The court shall not be ousted of a jurisdiction by this plea, because the plaintiff is a layman, and cannot have an action in the Ecclesiastical Court, and

31 H. 6. cited by Godfrey in the
3 Leon. 203.
1 Leon. 94.
Cro. Eliz.

Prohibition.

and the title made to the abbot is given but by way of color, which perhaps is not true. But that the plaintiff will make another title; and therefore, for aught appears, the court shall not be ousted of a jurisdiction, inasmuch as yet the right of tithes comes not in question. 2 Ed. 4. 15. adjudg'd.

3. So if a lessee of a parsonage brings an action of trespass for tithes sever'd from the nine parts, the court shall not be ousted of a jurisdiction, till the right of tithes comes in question by some plea pleaded. 2 E. 4. 15. b.

* 4. So if a parson leases his parsonage rendering rent, and brings an action here for the rent, this court shall not be ousted of a jurisdiction without a plea pleaded of the right of tithes. 2 E. 4. 15. b.

(*P454)
31 H. 6. cited by Godfrey in the case of the vicar of Pancras.

5. If the right of tithes comes in question between a layman and a spiritual man, the Temporal Court shall be ousted of a jurisdiction. 2 E. 4. 15. b.

6. In trespass by a parson against J. S. for taking corn, if the defendant justifies as servant to another parson, as for tithes sever'd from the nine parts within his parish, to which the plaintiff replies that he is a parson of a parish adjoining, and that he hath a portion within the other parish, for which he took the tithes, &c. the court shall be ousted of a jurisdiction, because that the right of tithes come in question. 31 H. 6. 11. adjudg'd.

2 Keb. 846.
e contra,
Cliffe v.
Dudny.

7. Altho' both parties are laymen in an action, yet if it appears of the parties own shewing, that the issue will be of the right of tithes, the Temporal Court shall be ousted of their jurisdiction. 2 E. 4. 15. b. By all the serjeants.

Fol. 310.

(Z) *What Persons shall have a Prohibition.*

Right of Tithes.

Spiritual Persons.

1. IF the question be in the Court Christian, whether the tithes belong to the parson or the vicar, no prohibition shall be granted, * because it is between spiritual persons. * 35 H. 6. Mich. 5 J. C. B. between Rolles and Hollyman resolved, and consultation granted accordingly. Pas. 10 J. C. B. between Mumparsons and Mern, per Curiam, it being between a parson and chaunterer.

174. Mich. 11. J. A. the same point. See the case in Godb. 45. pl. 55. where two parishes were of two several parishes, and the one claimed tithes within the parish of the other, and said, that he and all his predecessors, parsons of such a church of D. had used to have the tithes of such lands within the parish of S. and that was pleaded in the Spiritual Court; and the Chief Justice held, that he shall have a prohibition; for he claims only a portion of tithes, and that by prescription, and not merely as parson, or by reason of the parsonage, but by a collateral cause, viz. by prescription, which is a temporal cause, and 'tis not material whether it be betwixt two parsons. But if a parson libels for tithes, and the defendant pleads a Modus decimandi to the vicar, no prohibition shall be granted.

Prohibition.

the dispute is between spiritual persons, and cited to be adjudg'd so in *Bushe's case*.
Pol. Rep. 126. 2 Bullt. Mich. 11 *Ja. Draiton v Cotterill*, the same point adjudg'd.
147. adjudg'd.

2. If a man be sued in the Ecclesiastical Court by the parson, for tithes, and the defendant pleads that the vicar had used time out of mind to have the tithes, and is endow'd of them, and that the vicar hath leased them to him, and this plea is refused in the Ecclesiastical Court; yet no prohibition shall be granted, because it is between ecclesiastical persons. *Trin. (*P455)*

Ja. B. R. per Curiam. taking of tithes, the defendant shew'd them as parson, and within his parish, and the plaintiff prescribed that he and his predecessors, vicars there, had tithes of that place time out of mind, the opinion of the court was, that the right of tithes came in question betwixt the vicar and the parson who were spiritual persons, and might try the right of tithes. *Godb. 45. pl. 44. 20 H. 6. 17. Hook's Jurisdiction 80. 11 H. 4. 35 H. 6. 39 Brooks Jurin. 3.* Where the bishop alleged, that he and all his predecessors had been seised of such a manor, and that as long as it was in their possession they had been discharg'd of tithes; *Wray, Gawdy and Gower* held this prescription good in the case of a spiritual person, but not in the case of a layman. *Cro Eliz. 206. Nash v. Molins* the same point adjudged. *1 Leon. 248. case 36. Bishop of Lincoln and Cowper.*

3. If the parson sues in the Ecclesiastical Court for tithes, and the defendant pleads a *Modus* to be paid to the vicar in discharge of those tithes, and that this *Modus* antiently was due to the parson, and that within the time of memory, upon the endowment of the vicarage, this *Modus* was assign'd to the vicar, a prohibition shall be granted, because that upon the matter this plea amounts but to this, that the tithes in kind are discharg'd by the parson, and made a lay fee. *Hill. Car. B. R. between — and Sir Richard Buller*, a prohibition granted. *Contra Hill. 11 Ja. between Smith and Drayton, per Curiam.*

4. If a man as rector sues another for tithes, and another comes in *pro interesse suo* claiming the tithes by the King's letters patent; and afterwards sues for a prohibition, because that the Spiritual Court cannot try the (a) letters patent, yet he shall not have a prohibition, because they are both spiritual persons. *Mich. 14 Ja. between Adams and Sir Thomas Yassor*, rectors of *Skillingthorpe*, against *Huberjon*; a prohibition denied.

5. If a vicar sues the parson appropriate, who is a layman in the Ecclesiastical Court for tithes of saffron, supposing them to be *Minutæ decimæ*, whereof he is endow'd, and the parson there pleads that he hath used time out of mind, &c. to have the tithes of hay and corn of that land, 'till lately, within forty years, when it was sown with saffron; yet no prohibition shall be granted to try this custom, and whether saffron

2 Keb. 66;
Kettle v. Robion.

(a) A prohibition was granted in a suit for tithes where the plaintiff's

12 Co. 65.
14 Co. 66. that they may try the validity of *liverty*, which comes incidentally in question; whether one taken upon a *Capias Utlagatum* be in execution at the suit of the party. 3
Cro. 466. Nelson and Sharp. So of the validity of an Act of Parliament coming incidentally before them; and the case of *Sir William Juxon and Lord Byron Trin. 24 Car. 2.*
R. Bensley v. Lee. 3 Lev. 72. C. B.

Goldth. 149.
 the same case.

Fol 311.

are

Prohibition.

are *Minutæ decimæ*. But that shall be tried in the Ecclesiastical Court, because it is between the parson and vicar; for they may the better judge of that, and of the composition. *Paf.* 38 *Eliz. B. R.* between *Beddingfield* and *Freak* adjudg'd and a consultation granted.

6. If the vicar sues a parishioner for a *Modus*, and the defendant pleads that they belong to the parson; yet no prohibition shall be granted, because that the right of the tithes come in question. *Mich.* 28, 29 *Eliz.* between the vicar of *Pankridge* and *Bushey* adjudg'd, and a consultation granted accordingly, accrue to the vicar after endowment. *Godb.* 45. pl. 55. 50. pl. 63. fol. 63. pl. 70 the same case, 180. pl. 254.

7. If the parson, in consideration that the parishioner agrees to pay the parson ten pounds a year, agrees the parishioner shall hold his lands discharg'd of tithes, this was held a good composition for a prohibition; 1 *Leon.* 151. case 208. *Chapman v. Hurst*. The case of *Green* and *Pendleton*. cited to the same point in the case of *Pet* and *Balden*. 1 *Lev.* 235. case 318.

8. Where the suggestion was, that *W.* the plaintiff in the Spiritual Court had libell'd against the defendant for tithes and shews that *W.*'s title was by a grant without a deed, and that by law such things are not to pass without a deed, yet the court granted a consultation; for whether *W.* had right to the tithes or no, *S.* ought to set them out; but *S.* might prescribe in *Modo decimandi* without shewing a severance, and might shew that the tithes belong to *J.* *S.* with whom he hath compounded. *Worthy v. Saunders*. 1 *Leon.* 23.

(*P456)

* 9. Whether a composition for the parishioner to hold the lands discharg'd during his life is good. *V. 2 Leon.* 29. *Woodward v. Brigg*. 3 *Leon.* 257. *S. C.*

10. Upon a covenant or an agreement that the party shall hold the lands discharg'd of tithes; the party may have an action, but no prohibition. 2 *Leon.* 29. *Woodward v. Brigg* 2 *Brown* 272. the same point.

11. A prohibition was granted to stay a suit for tithes, upon a suggestion that the tithes were set out; and it was moved for a consultation that he did not alledge notice given to the parson, and adjudg'd not necessary. 1 *Ven.* 48, 49.

2 Bro. 20,
25.

12. If lands were discharg'd from the payment of tithes at the time of dissolution of monasteries, by reason of an unity of possession, then they are discharg'd by the statute in the hands of the patentee; but if by reason of the persons who were to pay the tithes, then the patentees are liable, and the unity is traversable. *Cro. Eliz.* 584. *Button v. Long*. *Cro. Eliz.* 579. *Blincoe v. Barksdale*.

Prohibition.

13. A prohibition was pray'd upon a suggestion that the tithes, for which the suit was, belong'd to the vicar, and not to the parson; and a consultation was granted; for the right of tithes is confess'd; and if they belong to the parson or to the vicar, that is merely spiritual. *Noy* 147. *Randall v. Carules.* 2 *Bro.* 36.

14. Who has a right to chuse church-wardens. *Noy* 139.

15. *Godfrey* moved for a prohibition, and suggested that the parishioners had compounded with the parson, but yet the due tithes were sever'd and expos'd, and the parson takes them and carries them away, and the parishioners take them from him; upon which the parson libels; and a prohibition was granted. *Noy* 40. *Brook's case.*

(A) Who shall have a Prohibition.

IF the church-wardens of *A.* libel against the parishioners of *B.* for the repair of *A.* their parish church, and the defendant alleges, that in that parish there is a parish church and a chapel of ease, and prescribes that they have used time out of mind, &c. to repair the chapel; and in consideration whereof they have been discharged of the repairs of the church; *no prohibition shall be granted*, because both these things belong to the Spiritual Court. *Hill.* 12 *Ja. B. R.* between the parishioners of *Ashton* and *Brumage.*

Hob. 66. 67.

1 *Rol. Rep.*

126. *S. C.*

2 *Brown. 10.*

Godb. 200.

2. If the vicar sues the parson impropriate for damages, for the cutting of trees growing in the church-yard, a prohibition shall be granted, because, if the trees belong to him, he may have an action of trespass at common law. *Mich.* 13 *Ja. B. R..* * *Bellamy's case* resolved, and a prohibition granted. * 1 *Rol. Rep.* 255.

3. If there be a parsonage appropriate, which comes to the crown by the dissolution of monasteries, and afterwards it is granted over to a common person; and there is also a vicarage endow'd in the same parish, and by the command of the archbishop's visitor in his visitation, the church-wardens of the parish make a particular of the tithes within the parish and glebe, what belongs to the parson, and what to the vicar, and prefers it in the Spiritual Court; and thereupon the vicar libels in the Spiritual Court against the parson to have it confirmed, and a sentence is given for him, and the parson prays a prohibition, and shews in his suggestion, and agrees that all which is in the particular belongs to the vicar; but some particular tithes (to wit) the tithes of carrots, coleworts, and such like * growing and being in the lands out of the gardens, (*P457) and for burials in the chancel, and for them prays a prohibition. A prohibition lies, because tho' the suit be between a parson and a vicar, and so the right of tithes will come in question between them; yet because it is not between the vicar, or parson, and a parishioner, in which case no prohibition

Godb. 149.

Pl. 75.

Prohibition.

tion lies; for that against him the proper suit is in the Spiritual Court. The prohibition lies, because the vicar may have his action at common law against the parson, if he takes the tithes set out by the parishioner. *Trin. 11 Car. B. R.* between *G. Winter* and *Pierce*, vicar of *St. Peter* and *James* in *Bristol*, *per Curiam*. *Mich. 11 Car.* it was moved again, and the court took this difference between a parson appropriate and a parson presentable; and they seem'd to incline that the parson appropriate hath it as a lay fee, by the statute; and therefore it ought to be tried between the vicar and him at common law. I urg'd that the jurisdiction of the ordinary is saved by the 31 H. 8. and that it was not the intent of the parliament to alter the course of suits for them; but the court gave no opinion as to that, but granted the prohibition on purpose to have it demurr'd to, and to be argued, as they said; otherwise adjudg'd *Mich. 15 Car.* between *Warner* and *Hailer*, *per Curiam*; and a prohibition denied, where the suit was between a parson appropriate and a vicar.

A prohibition was prayed by the plaintiff in the Spiritual Court to stay his own suit; granted.

4. If a man libels in the Spiritual Court for a matter that does not belong to the Spiritual Court, but at common law, as for a matter of freehold; yet he himself against his own suit may pray a prohibition, and shall have it. *Mich. 15 Jac. B. R.* between *Kisse* and *Pridgman* resolved; and a prohibition granted.

for that he suing for tithes in the county of Norwich, by virtue of a lease made by the vicar of *Tostes* for three years, the defendant claimed to be discharged of the tithes by a former lease and composition by deed; and the court held that the plaintiff himself might have a prohibition to stay the suit, for they are not to meddle with the trial of leases, or real contracts, although they have jurisdiction of the original cause, viz. for tithes, for the lease is in the realty, and it is not merely accidental, *Et non refert*, altho' the plaintiff in the Spiritual Court brings this prohibition to stay his own suit; for if this court hath knowledge by any means that the Spiritual Court meddles with temporal trials they ought to grant a prohibition. *Cro. Ja. 350.* *Worts v. Clyfton.* 2 *Brownl. 21.* *Robotiam v. Trevor.*

5. If a vicar sues a parishioner for tithes in the Spiritual Court, and the parson appropriate appears *pro int. resse*, and prays a prohibition, it shall be granted. *Hill. 14 Car. B. R.* *Robert's* case; and a prohibition granted.

6. If the parson of *D.* sues a parishioner of the parish of *S.* for the small tithes, as a portion belonging to his rectory of *D.* and thereupon comes the parson of *S.* *pro interesse suo*, and claims it as parson of *S.* as belonging to his rectory, it being within his parish. In this case no prohibition lies for the parson of *D.* to prohibit his own suit, because it is between spiritual persons, and the plaintiff can have no remedy at common law for these tithes, they being small tithes not within 2 *Ed. 6.* *Mich. 14. Car. B. R.* between *Scot* plaintiff, and *Wylson* and *Playter* defendants; a prohibition denied, *per Curiam*; the parish was *North Linn* in *Norfolk*.

7. If the bounds of a vill within a parish comes in question in the Spiritual Court in a suit between the parson appropriate

Prohibition.

re and the vicar of the same parish; as if the vicar claims all the tithes within the vill of *D.* and the parson all the tithes in the rest of the parish, and the question between them is, whether certain lands whereof the vicar claims tithes be within the vill of *D.* or not; yet inasmuch as it is between Spiritual * persons, viz. between *parson* and *vicar*, altho' the parson is a layman, and the parsonage appropriate a lay fee, yet it shall be tried in the Spiritual Court, and no prohibition shall be granted. *Hill. 15 Car. B. R. between Ives and Wright, per Curiam*; a prohibition denied. (*P458)

8. In some cases the party himself who libels may have a prohibition, as where the Spiritual Court award costs against him, or upon an appeal where they ought not, a prohibition shall go for the plaintiff in the Spiritual Court as to the costs. *Leon. 130. Case 177. Stransham versus Medcalf.*

(B) Prohibition.

If a man recovers in a *Quare Impedit* in *B.* against an incumbent, whereupon the incumbent brings a writ of error in *B. R.* where the judgment is affirmed, and a writ to the bishop is granted for the recovery, and by virtue thereof his clerk is admitted and instituted by the bishop, and afterwards the metropolitan grants an inhibition to the archdeacon not to induct him; a prohibition shall be granted, because it appears plainly to be for delay. *Trin. 15 Ja. B. R. between Murrey and Sir Henry Wallop*, for the church of *Langhorn* in *Cornwal*; a prohibition granted.

Fol. 312.

2. A prohibition lies against the King's farmer. 1 *Leon. 286. Gerrard v. Skennington & al.*

3. *Per Yelverton*, If a defendant in a prohibition dies, his executors may proceed in the Spiritual Court; and therefore there is the same reason that the plaintiff may have a new prohibition against the executors. *Hetley 107. Walsingham and Stone's case. Trin. 4 Car. C. B.*

4. Where *T.* the parson sued the executors of his predecessor for tithes, who moved for a prohibition, upon a suggestion that *T.* was not incumbent; for that his presentment was by the King *ratione nimoritatis* of one *Chickley*; and that the King had not any such title to present; and where the King mistakes his title, his presentment is void, and the person presented is not incumbent. But *per Curiam*, the judges cannot take notice of the ill presentment of the King; but in the case of *Simony*, whereby the statute makes the church void, and then the judges may take notice of it, and grant a prohibition, if the parson sues for tithes. But if a *Quare Impedit* be brought, and it appears that the King hath no title to present, a prohibition may be granted. *Lit. Rep. 60. Tomson's case.*

Vide 23 H. 8. Cap. 9.

5. By

Prohibition.

5. *By this statute*, no person is to be tried out of the diocese where he dwells, except in cases specified in the act, i. e. except by some ecclesiastical, or other person within the diocese, or other jurisdiction whereunto he is so cited for some offence or cause committed contrary to right or duty, or upon an appeal or other lawful cause; or when the judge dares not, or will not cause him to be cited, or is in any wise party to the suit, or at the instance of the inferior judge to the superior, where the law civil or canon doth allow it; under the penalty of double damages to the party grieved, and 10*l.* to the King, to be divided between him and the prosecutor.

Upon this statute the following cases have been adjudged.

6. If a man once submits himself to the jurisdiction of the Spiritual Court by pleading, he shall never have a prohibition upon this statute, for being cited out of the diocese. *Hayley* 19. *Comb.* 105, 106. *Salk.* 548.

(*P459) * 7. That the coming to a place to trade is not within the statute, and that it is not necessary that he be an inhabitant. *Hardr.* 421. *Dr. Blackmore's case.*

8. But a country attorney's coming up to *London* in term-time, is not a dwelling in the diocese of *London*, so as to be sued in the Arches. 2 *Brownl.* 22.

9. *Per Curiam*, there is an antient composition by usage, between the archbishop and the bishop of *London*, that the causes in one may be sued in the other's diocese. But *per Twissden*, that ought to be pleaded, or the court cannot take notice of it — the same case, 1 *Keb.* 647, 648. *per Keeling*, the jurisdiction of the Arches is a peculiar one, that the archbishop hath of fourteen parishes in *London*, and not as archbishop.

10. A prohibition denied where the party was sued out of the diocese where he lived, because it was in the diocese where the probate of the will was. 1 *Vent.* 233. *Het.* 116. *Lit. Rep.* 54.

11. That in a suit for words, the jurisdiction is not local, as to the words being spoken, if the party lives within the diocese. *Garret v. Dandj.* *Comb.* 105.

12. The plaintiff in prohibition suggests, that he inhabited within the diocese of the bishop of *London*, and was cited to appear in the court of Arches, and was cited out of the diocese of *London*, without licence of the bishop of *London* against the statute. For the defendant it was argued, that the usage of the Spiritual Court had been to cite any inhabitant that dwelt in *London* to appear in the Arches originally; for that the mischief this statute intended to prevent was that those who inhabited in dioceses remote from *London*, should not be sued there without licence from the ordinary. But *Coke*, Chief Justice said, that the mischief intended to be prevented

Prohibition.

by this statute, was further to give them other privileges which by law they ought to have ; that is, the appeal which they lose by beginning the suit in the Arches ; for they may appeal from the ordinary after the suit began here to the archbishop, which benefit is lost, if the suit be begun before the archbishop originally. *Lynch v. Porter. 2 Brownl. 1.*

13. *H. J.* parson of *B.* sued *Boyer* the executor of the former parson in the Arches for dilapidations, upon which a prohibition was prayed upon this statute, upon a suggestion that he was cited out of the diocese. But it appear'd that the vicar general of the same ordinary had made a general request to the metropolitan, to determine that matter, without shewing any cause specially ; and if the inferior ordinary may transmit any cause, but only for the causes mention'd in the statute ; and if the causes ought to be express'd in the instrument, was the question. The general words of the statute are, " Or in case that any bishop, or any inferior judge having under him jurisdiction in his own right and title, or by commission, make request or instance to the archbishop, bishop, or other inferior ordinary or judge, to take, treat, examine or determine the matter before him, or his substitute ; and that to be done in case only where the law civil or canon doth affirm execution of such request, or instance of jurisdiction to be lawful or tolerable." *Per Dr. Martin*, that these general words, and that to be done only in case where the civil or cannon law doth affirm execution of such request, or instance of jurisdiction to be lawful or tolerable, relate to the executor, *i. e.* the party, and not to the maker of the request ; that the request may be made for all causes, but ought to be made to him who hath concurrent or immediate jurisdiction, to which an appeal may be made, and that the archbishop hath ordinary jurisdiction in all the dioceses of his province, and that is the reason he may visit ; but his jurisdiction is bound and tied up to the ordinary, and when he will leave that at large, the archbishop may proceed as he is archbishop, and that the cause need not be contained in the instrument. That the * ordinary may transmit a cause, tho' the parties be unwilling, that when the ordinary makes a request to the archbishop, he may meddle without assent of parties, *a fortiori* with assent ; and that the archdeacon ought to transfer to the bishop, and the bishop to the archbishop ; but by prescription and usage the archdeacon hath used to appeal immediately to the archbishop. *2 Brownl. 27. Jones v. Boyer.*

14. If a suit is begun in the Bishop's Court, and the party lives in the diocese, but within a peculiar jurisdiction, the court will grant a prohibition ; because the party is deprived

Prohibition.

of his remedy of appeal, if the bishop remits to the archbishop. *Lit. Rep.* 277. *Leukin's case*.

15. In the vacancy of the bishoprick, whether the party cited must be cited to appear before the archbishop, as guardian of the spiritualities, or as metropolitan. *Vide 2 Brownl. 30. Toy v. Cox. Pasf. 11. 7a.*

16. *Per Holt, C. J.* in the case of *Treil and Edwards*. 6 Mod. 308. all peculiars are not inferior to the ordinary of the diocese, in which they are, and such as are not, cannot transmit any cause to the ordinary, and such transmitting must always be to the immediate superior, to that jurisdiction to which the appeal would lie, in case the cause had not been transmitted; and a peculiar *prima facie* is to be understood of him that has co-ordinate jurisdiction with the bishop.

17. *Per Windham*, in the case of *Tull and Osbaston*. 1 Ke. 367. *Mich. 14 Car. B. R.* 1 Sid. 60. pl. 11. where it was objected that the archdeacon cannot transmit his jurisdiction *per saltum*; but first to the ordinary, and then to the archbishop, generally, all peculiars are immediately subject to the archbishop, and if subject to the ordinary, there ought to be a special suggestion of that matter, that letters of request cannot come in by suggestion only, but must be entered. 1 Ke. 597. the same point, and that a remission by the official is good.

18. Where the court discharged the rule of a prohibition upon a suggestion of letters of remission, without pleading them, and *Rofs's case* cited. 2 Keb. 265. *Bolton v. Bolton*.

19. A parson dwelling in *Essex* cited to the Arches, and prohibition granted, unless the defendant would shew letters of transmissio, or that the place was within some peculiar of the diocese of *Canterbury*. 2 Keb. 340. *Slaughter v. Layfe & al.*

20. See the archdeacon of *Richmond's case*. *Lit. Rep.* 4. That the suggestion of an archdeacon's having jurisdiction is not to be allowed without pleading; because his title depends upon a prescription, which is a matter of fact.

(C) *In what Cases it lies; where the Temporal Court cannot give a Remedy, but the Consuance of the Matter belongs to another Court.*

1. IF the Lord of a manor hath the probate of wills within his manor, if any such will be proved in the Ecclesiastical

P ohibition.

ral Court a prohibition lies; because the [a] jurisdiction of it [a] The belongs to another. 5 Co. 73. *b. Orphans of London's case.* Temporal Courts may

prohibit inferior courts in matters of which the superior courts could not hold plea of themselves; if such inferior courts endeavour to bring the matter in dispute ad aliud Examen, that it ought to be determined by. So where one court infringes upon another. 2 Ball. 207. *Parson v. Cartwright.* Pas. 11 Ja. and the court may grant prohibitions, when they cannot give a remedy to the party. Lit. 42. *Archdeacon of Richmond's case.* Trin. 3 Car. C. B.

* 2. If an orphan, who is by the custom of London under the (*P461) government of the mayor and aldermen, sues in the Spiritual * V. March Court, or court of Requests for any goods, moneys or chattels due by the custom of London, or for a devise or legacy; a [a] 2 Inst. 660. March 107. 4 Inst. 249. prohibition lies, because the government of [a] orphans belongs to the mayor, &c. 5 Co. 73. *b. orphan's case.*

3. If the council of the marches of Wales hold plea of [b] 2 Rol. Rep. 495. Kiffin's case, the same point adjudg'd. [c] Vide 2 Brownl. 17. an ecclesiastical matter, which belongs to the Prerogative Court, as to bind an administrator to render an account there, which is not within their jurisdiction, altho' the [c] Temporal Court cannot give a remedy; yet a prohibition lies. Pas. 17 Ja. C. B. *Drinkwater's will, per Curiam.* Lit. Rep. 42.

4. If an executor, or administrator of goods, within the government of the court of Orphans of London, be sued in the Ecclesiastical Court, to do a thing against the custom of the court of (d) orphans to disprove that custom; a prohibition (d) Hutton 30. lies. Hob. case 213. *Lacy's case.* 1 Sid. 250.

5. If a parson in London sues for tithes of a messuage by the statute of the 27 H. 8. in the Ecclesiastical Court, a prohibition shall be granted in B. R. altho' they (e) cannot hold plea (e) Godb. 264. case of it; for the jurisdiction of it belongs to the mayor of London; for the statute hath so expressly limited it to be sued there. Pas. 16 Ja. B. R. between Doctor Googe and Bond and others, resolved, and a prohibition granted, Mich. 5 Ja. B. R. between Bell and Moyle resolved, and a prohibition granted. 344.

6. If a man sues before the pope's collector, who hath power given him by a bull from the pope, for a spiritual matter which belongs to the ordinary to determine, although the (f) temporal courts cannot hold plea of it, yet a prohibition (f) Godb. 246. Case 344. lies; for the King hath spiritual judges, who have jurisdiction to determine spiritual matters; as archbishops and their officers, deans and other ministers and conservators of privileges; as St. John's of Jerusalem and others. 2 H. 4. 10. the Vicar of Saltash's case adjudg'd.

7. If one will of his own accord put himself in the judgment of a layman, or a clerk who surmises himself to have jurisdiction, where he has not any; a prohibition lies. 2 H. 4. 10. *per Hank.*

8. Whereas

Prohibition.

8. Whereas the diocese of *Winton* extends to the borough of *Southwark*, as part of the county of *Surrey*; and the judge of the audience of the archbishop of *Canterbury* holds a court sometimes in *Southwark*, and cites a man there from the remote parts of the diocese, being sixty miles; and if they do not appear to excommunicate them, and will not absolve them; if they will not consent to transmit the cause into the archbishop's court, whereby the statute of 28 of *H. 8.* is eluded; yet a prohibition lies, altho' it be touching the jurisdiction between two spiritual persons, because the King will see that every court keeps itself within its bounds; and altho' it had been conceived in antient times, that the (g) archbishop had a concurrent jurisdiction within every * inferior diocese yet that was not as he was archbishop, but as he was *Legatus* to the pope. (For the archbishop of *York* had it not nor claimed it within his archbishoprick) and then that power is ended, it being abrogated with the pope; and the law practice, if any such there be, was a usurpation; and if the archbishop shall be permitted to erect an audience in every diocese, he might take away all causes out of inferior courts. *Hob. Rep. Dr. James's case* 24. A prohibition granted by the court. *Porter v. Rochester*, 13 Co. 4.

(*P462)

(g) 2 Lev. 212. It was held that the archbishop hath a concurrent jurisdiction with the bishop; the bishop's jurisdiction as ordinary, the archbishop as superintendant thro' the whole province of matters ecclesiastical, to correct, and also supply the defects of the ordinary; and therefore his acts are not void; because he hath jurisdiction thro' the whole province, and shall be intended to be done in default of the ordinary, till the contrary appears upon examination, and there they are voidable; but till they are avoided they are good. *Hill* 36, 37 Car. 2. Intratur *Hill* 35, 36 Car. C. B. Rol. 1501. but it must be observed, that what acts are done by the archbishop during the vacancy of a bishop, as guardian of the spiritualties, must be complete; for if there is a bishop before the act is complete, it is void; as in the case of institution by the archbishop, and a mandate to the archdeacon to induct; if he does not induct before there is a new bishop, but after, the induction is void. 3 Lev. 199. *Trin.* 29 Car. 2. B. R. *Binson v. Wooley*.

9. If a sequestration of a rectory in *London* sues in the Spiritual Court for tithes, and not before the mayor, according to the direction of the statute, of 37 *H. 8.* A prohibition shall be granted. *Dubitatur*, *Mich.* 16 Car. 1. *Cro. Car.* 59.

10. If one sues out of a peculiar for tithes before the bishop as where the archdeacon hath authority; if it is an authority by prescription, that takes away the bishop's jurisdiction, prohibition lies; but if it is an authority by composition otherwise. *Trin.* 21 *Ja. R. R. Gastrill and Jones*, 2 *Rep.* 357.

Fol. 314.

(D) In what cases it lies, altho' the same Court will grant it cannot give a Remedy; but the Cause belongs to another.

1. If a man be sued at the council of *York* for a matter within the jurisdiction of *Durham*, a prohibition shall be granted; for *Durham* is a county palatine, and hath a chance

Prohibition.

and the (a) King's writ does not lie there, nor is it within the jurisdiction of York. *Pas.* 16 Ja. B. R. between *Pierſon* and *ſally*; a prohibition granted.

(a) Vide. 1 Saund. Rep. 74. 75. the ſame point,

cited and adjudged in the caſe of *Peacock* and *Bole*.

2. If the vice-warden of the ſtannaries in *Cornwal*, when there is a ſuit in one of the dutchy courts of record in the ſame county, pretending himſelf to have power of ordering all things there depending; upon a petition made to him as chancellor, by way of equity, makes a decree, he not having any court; but upon a petition preferred, and notice given to the other party, and examination of ſome witneſſes, makes a decree *ſummarie & de plano & ſine figura judicii*; a prohibition lies, upon a ſuggeſtion that he made it out of ſome court, and before any thing was determined before him, or any court. *Mich.* 9 Car. B. R. between (b) *Adams* and *Adams*, re-ſolved, *per curiam*, except *Richardſon*; in which caſe the decree of *Coryton* the vice-warden was confirmed by the lord warden. But it appeared alſo in the caſe that *Coryton* claimed that authority, not as vice-warden, but as deputy ſteward to the lord warden; and ſo to have a power over the dutchy courts, as that court was, *viz.* *Caſtock*, where the action was brought. But *Coryton* upon examination could not make it appear that he was deputy ſteward of the ſaid courts: Alſo that caſe the decree * was made for ſome perſons which were not parties to the petition, which was in the nature of a bill, as was pretended. (*P463)

(E) *When it ſhall be granted as to part only.*

IF there was a ſuit in the Spiritual Court for a ſpiritual matter, mixed with a matter triable at common law, a prohibition ſhall be granted as to the matter triable at common law, and not for the whole; if it can be ſevered. *Mich.* 4 Ja. B. R. *Fish* and *Chamberlaine* reſolved, *contra Mich.* 8 Ja. *per curiam*, (c) *Jenor's* caſe.

(c) Godb. Mich. 11 Ja. *Jenour v. Alexander.*

2. So if there be a ſuit in the Spiritual Court by a viſcount to prevent the inſtitution of another, who is inſtituted to *A.* chapel of eaſe, as he pretends; if the other ſuggeſts that *A.* is a parochial church by itſelf, a prohibition ſhall be granted as to trying whether it be a pariſh by itſelf, becauſe they cannot try the bounds of pariſhes, but not for the inſtitution; for that don't belong to the temporal courts to determine whether it be good or not. *Mich.* 14 Ja. B. R. *Fish* and *Chamberlaine*, the prohibition ſo granted. But *Houghton* ſaid, they ſhould not well try the inſtitution, without trying the bounds of the pariſh.

Vol. II.

3 I

3. If

Prohibition.

Fol. 315.

2 Rol. Rep.
431. the
same point
adjudged—
Palm. 120.
2 Rol. Rep.
431. the
same point
adjudged.

1 Rol. Rep.
21. 2 Cro.
346. S. C.
Style 10.
Bettelworth
v. Bettel-
worth, S. P.
(a) This case
seems not to
be law at
this day, as
may be seen

hereafter by the case of Netter and Brett mentioned by Rolls, W. Jones 355. and the following resolutions are to the same purpose. In 1 Mod 90. a prohibition was moved for because they proceeded to the probate of a will that contained a devise of lands, as well as bequest of personal things; per Hale, their proving the will signifies nothing as to the lands, tho' Denn's case in 3 Cro. 114, 115, was cited; says Hale, the will is entire, and denied prohibition. Mich. 22 Car. 2. B. R. So in the following case of Bowles and Clarke in Style 228. the same point adjudged, and a prohibition denied in Pas. 3 Ja. 2. reported in Comb 46. And so in the case of Hudson v. Fisher, Mich. 10 W. & M. B. R. Comb. 170. the same point adjudged in Partridge's case, 2 Salk. 552. where the marquiss of Winchester's case in 6 Co 23. was relied on. But the court denied that case, and said, that the statute of H. 8 never intended to lessen the jurisdiction of the Ecclesiastical court, as to the probate of wills, and to grant a prohibition might be inconvenient; for without probate the executor cannot sue, which by this means may be lost, and the will unperformed; and as for granting *quoad* the land, it would be vain. (V. 2 Rol. 315. 1 Sid. 141.) this was the practice heretofore, because it is no evidence *pro* or *con* in any court of law; but a proceeding *contra* non iudice, yet it is good as to the goods. Mich. 1 Annæ B. R.

(P* 464) *6. There was a suit for tithes, and a prohibition granted upon a suggestion of the lands being barren, and newly improved; hereupon a trial was had on a declaration on the prohibition, and a verdict for the parson that the lands were not barren; and thereupon there was a consultation, and he proceeding there got a sentence from thence; there was an appeal to the Arches, and there they entered an allegation that the land was barren, and the court there was proceeding to repeal the sentence, because barren land, though contrary to the verdict at law; and upon all this matter the court granted a prohibition *quoad* the allegation of barren land. 2 Shrewsbury 195. Owen v. —.

7. The suggestion was for a *modus* for a farm. and the libel was for tithes and offerings, whereas the suggestion did not extend

3. If a will be made of lands and goods, and the suit is in the Spiritual Court for the goods; and the question is, whether the testator revoked his will in his life-time or not? a prohibition shall be granted as to the lands, and not as to the goods. Mich. 13 Ja. between Athill and Athill resolved.

4. If a man sues for the probate of a will in the Spiritual Court, and there are lands devised in the will, and other personal things; a prohibition shall be granted as to the lands, and not as to the residue. Mich. 14 Ja. B. R. Bancroft's case a prohibition so granted.

5. If a man does by his will devise all his lands and goods to a stranger, and dies, and after his death administration is granted to another, upon a suggestion that the deviser was *non sana memoria* at the time of the devise; a (a) prohibition may be granted to stay the probate of the will, as well for the goods as for the lands; because otherwise the proof of the will for the goods will be an evidence for the lands; and here there is an administrator, who may sue the executor at the same time, and so the will may be tried at common law. Pas. 12 Ja. Sir John Egerton's case resolved, and a prohibition granted.

Prohibition.

extend to offerings; therefore, *per curiam*, the prohibition shall be but *quoad*; and the case of *Coleman* and *Gilbert* cited to that purpose. 1 Sid. 251. *Lash v. Webb*, March 81. the same point.

(F) How it shall be granted.

IF a man does devise goods and lands, upon a suggestion that the deviser was *non compos mentis* at the time of the devise; a prohibition shall be granted as to the lands only, and not as to the goods; because, if it shall be granted as to the goods, the executor cannot have any action in the mean time, which would be inconvenient. *Pasf.* 14 *Ja.* B. R. a prohibition granted. 2 Cro. 346. S. C. Vide 2 Rol. Rep. 431. *Falbio v. Gilbert.* Comb. 46, 170. 2 Salk. 552. contra.

2. If a man makes his will in writing, and thereby devises several legacies; and doth likewise thereby devise certain lands to his executor there after named in fee, for the payment of debts and legacies; and after names the executor, who proves the will, and another appeals to revoke the probate; no prohibition lies either for the lands or goods, or otherwise, upon a demise that the testator was not *compos mentis*; for the inconvenience that will ensue as to the legacies and personal estate; and the probate is no evidence, as to the lands at common law. *Prin.* 1650, between *Bowles* and *Clarke*, adjudged by the whole court; and a prohibition denied to the Prerogative Court. 2 Cro. 346. the same point adjudged. Style 228. the same case. V. Antea.

3. If a man makes a will, and disposes of his goods, and then makes *A. B.* his executor thereof, and after devises his lands; in this case, if the executor be cited in the Spiritual court to prove the will as to the lands, a prohibition lieth as to the lands, for those are several wills. *Mich.* 10 *Car.* B. R. resolved, *per curiam*; and a prohibition granted upon *Stephen Brett's* will, between *Brett Nectar* and *Stephen Brett*. But *Hill.* Cro. Car. 395. a consultation was granted upon a solemn argument in that case, upon view of the will; by which it appeared that it was one will, although in several parts; and it was granted by *Jones* and *Berkley* against the opinion of *Croke*; and they said, that in the case of the marquiss of *Winchester* in *Co.* a consultation was also granted as well to the lands as to the goods. *Intratur Mich.* 10 *Car.* Rol. 132.

prohibition granted as to the lands, but not as to the legacies.

4. If the Spiritual court in a suit there give sentence for the plaintiff, and give him treble damages, whereas by the statute they ought to give him but double damages, a prohibition shall be granted; but it shall not be generally as to the whole cause. (*P465) but that they shall not proceed to the execution of the sentence as to the treble damages, without any thing more; and if they can by their law sever them, they may proceed to execution for the double costs. *Hill.* *Ja.* C. B. between † *Baldwin* and † *Godb.* 245. *per curiam* resolved; and a prohibition so granted. Hob. 39.

Prohibition.

5. If a man makes a will in writing for his lands only, and thereby disposeth of his lands, and does not make him executor of his goods by the same will, but that is a distinct will of itself, and there is an endeavour to prove it in the Spiritual Court; a prohibition lies, because that it is made devisable by the statutes of 32 and 34 H. 8. and concerns things real whereof the Spiritual Court hath nothing to do, and those were not wills at common-law. *Hill. 10 Car. B. R. between Berr and NeStar*, agreed by the whole court.

6. If a man libels in the Ecclesiastical Court for two things, one whereof belongs to the jurisdiction of the Ecclesiastical Court, and the other is triable at common law, and thereupon sentence is given. If thereby the punishments are intermixed for both, so that the sentence cannot stand for one, unless for both; a prohibition shall be granted for both. *Mich. 38 39 Eliz. B. R. between Butler and Bartlet*.

7. As if a man libels for saying to him, *Thou art fitter for the pillory than for a preacher*, and that he spoke the words in the time of divine service; and thereupon sentence is given, that the defendant shall recant the words, &c. If the defendant shews to the Temporal Court, that he speaking of a certain release, &c. said, that the plaintiff had forged the said release, and by reason whereof he spoke the said words; so that he might have an action for the words at common law, in this case, altho' the suit is maintainable in the Ecclesiastical Court for speaking of the words in the time of divine service; yet because the sentence is given that he shall recant the words, that is for the whole; a prohibition lies for the whole. *Mich. 38 39 Eliz. B. R. between Butler and Bartlet* adjudged. *74 Anonymus. Mich. 1 Ja.*

A prohibition granted, where the words were, *She is a bitch, a whore, and an old bawd*; because some of the words are actionable at law, and one entire sentence. *3 Mod.*

8. In 1 *Mod. 167.* in the case of *Horton and Wilson*, *Mich. 25 Car. 2. C. B. 3 Keb. 203.* a prohibition was denied, upon a suit by the proctor in the Spiritual Court for his fees, so as to extend to the whole; but granted *quoad* particular items in the bill of a temporal nature.—But see the case in 4 *Mod. 256.* of *Johnson and Oxenden*, *Hill. 5 K. W. & M. in B. R.* when the court held that custom, and not the authority of constitutions entitle proctors to their fees; and a prohibition granted, and a rule that the party declare upon a prohibition. *Com. 137.* the same case. 1 *Ven. 165. Anonymus.* Granted upon a suit by an apparitor for his fees due by custom, upon a suggestion denying the custom. 5 *Mod. 238. Johnson v. Lee.* No judgment given on that point.—*V. 2 Keb. 810. per Hale*, when there is no question about the custom, the suit may be in the Ecclesiastical Court for fees. *Doyly v. Dod* adjourned. But the same case adjudged, *Mich. 23 Car. 2. 2 Keb. 845. per curiam*.

Prohibition.

the custom being denied, the issue must be tried at common law, and a prohibition granted.

9. A prohibition granted *quoad* the distribution only, upon a suit in the Spiritual Court, to account and make a distribution. 2 *Keb.* 258.

10. A prohibition granted after sentence, upon a libel for a mortuary; but the sentence to stand as to the obligation. *Braid v. Piper, Comb.* 166.

* (G) *The Continuance of a Prohibition.*

(*P466)

IF a prohibition was granted by Queen Elizabeth, it seems it continued in the time of King James, so that the court could not proceed. *Mich.* 14. *Ja. B. R.* between *Johnson* and *Poppinger*, it was doubted by the court, because it was granted for a contempt to the Queen.

2. In *Latch* 114. *Watkins's* case, it was adjudged that a prohibition from the Court of King's Bench was discontinued by the demise of the King; and a difference is there taken, between a prohibition awarded from the Court of King's Bench, and one awarded from the Court of Common Pleas: That because out of the Common Pleas a prohibition shall not be awarded, without a suggestion first entered of record, and by that it becomes the suit of the party. But out of the King's Bench it is awarded without any suggestion upon record; in such cases it is only a commission prohibitory; and another difference was taken, that when a prohibition issues out of the King's Bench, if there be no other process there, it is discontinued by the demise of the King. But if an attachment issue, and be returned, or, as the chief justice said, (if the party put in bail) then it is become the suit of the party, and is not discontinued by the demise of the King; and *Dodderidge* took notice, that an action of *Scan. Mag.* was not discontinued by the demise of the King, because the contempt was collateral; but in an action where the King is to recover part, there it is discontinued by the demise of the crown. The same point adjudged, and it seems to be the same case tho' a different name, in *Palm.* 422.

(H) *By whom it may be granted.*

AMONG the petitions in parliament of 18 E. 1. fol. 1. there is such a petition and answer thereto.

2. In *queremnia populi*, &c. *cancellarius aut capitalis justiciarius habet potestatem cognoscendi quæ placita supersederi possunt in casibus ecclesiasticis.*

3. A

Prohibition.

Fol. 316. 3. A prohibition may be granted by the Court of Common Pleas, to the Ecclesiastical Courts, to the court of the council of *York, &c.* upon a suggestion made to the court, altho' there be (a) no plea depending in the same court for the same thing. *Hill. 6 Ja.* between *Banks* and *Wharton*, *per curiam*, *contra* *Walmesley*, *Pas. 7 Ja. C. B.* between *Robinson* and *Bisse* adjudged. *Warburton*, upon a prohibition to the marches of Wales, that the suggestion is an action sufficient; and *Coke* said, if they hold plea of a thing out of their instructions, he would grant a prohibition. (a) Without an action hanging; but if they proceed erroneously on a matter within their instructions, he would not grant it without an action depending. *V. 12 Co. 59, 109. 4 Inst. 100. Noy 153.*

4. A prohibition may be granted by the Court of Common Pleas to the Court of Delegates, for suing there to avoid an institution of a parson to a church in *Lancashire*, after induction granted him thereto, altho' the *quare impedit* for the church cannot be brought there, but only in the county of *Lancaster*, because the title of the advowson is not to be questioned by that prohibition; but it is an intrusion upon the common law, of which it is the duty of this court to take care, and the Court of Delegates is to be restrain'd. *Hob. Rep. 23. Hutton's case*, a prohibition granted to *Chester*, where the suit was.

(*P467) * 5. The company of *Horners* in *London* sued in the mayor's court by bill concerning a house in *Middlesex*, grounding their bill upon a trust; a prohibition was granted notwithstanding it was objected, that the trust was personal, and concern'd the company in *London*; but it was answered, that the suit arose from the land; for the court of *Chester* cannot meddle with a trust of lands here, tho' the persons dwell there; and so *converso*; and it was said, it is the proper power and honour of the Court of King's Bench to limit the jurisdictions of all other courts. *2 Rol. Rep. 471. The company of Horners of London.*

6. But prohibitions for encroaching jurisdiction may issue as well from the Court of Common Pleas, as of the King's Bench. *Vaughan 157.*

7. There must be a suit in the Ecclesiastical Court before a prohibition shall be granted, and not upon a petition, or such like. *March 22, 45, 67.*

(I) To Temporal Courts. In what Cases it lies.

Fol. 317. 1. IF there be an entire contract for above 40s. and the suit for it is in a Court Baron, severing it into several small sums under 40s. a prohibition shall be granted, because it is done to defraud the King's court. *19 H. 6. 54. (Note, there have been several prohibitions granted in such case of late times.) Vide the statute of 11 H. 7. cap. 19. accordingly.*

New Nat. Brev. 107. 2. If an inferior court of record, which hath a power by charter, or by prescription of things and actions arising within the jurisdiction of the court, if they hold plea of a Contract, Buttery,

2 Rol. Rep. 379. Inferior courts have not conu-

Prohibition.

Battery, or a *Bond*, or other thing done out of the jurisdiction of the court, tho' it be transitory, yet the cause of action not arising within the jurisdiction of the court, a prohibition lies. *Mich. 15 Car. B.R. per curiam, præter Berkley*, who thought the contrary, for the common usage that such courts hold plea in such cases.

P. N. B. 45. But then it is not sufficient barely to surmise such matter for a prohibition, but a plea to that effect must be rendered in the inferior court, and that before any imparlance taken (whereby the jurisdiction would be admitted) and it must be upon oath; and when refused, a prohibition shall be granted. *1 Ven. 181, 333. 1 Mod. 63, 81. 1 Sid. 464. 1 Lev. 50, 69, 96, 104, 137, 153, 208, 289. 2 Mod. 131. 1 Saund. 74. 2 Inst. 230.*—And a prohibition was denied against the sheriffs of London, upon a foreign suggestion, videlicet, that the matter was out of their jurisdiction; for the garnishee after an imparlance cannot plead to the jurisdiction of the court. *Comb. 109. 1 Sho. 9. Andrews v. Sir Robert Clarke.* A prohibition was denied to a suit in the inferior court, till they refused a plea there, that the cause arose out of their jurisdiction; and an affidavit thereof by Twisden and Moreton contra Rainsford, who said, that it is grantable upon an affidavit that the matter arose out of their jurisdiction. *2 Keb. 72. Salmon v. Wilworth 845. Creiwyck v. Hayman.*

3. If a man sues in the marches of *Wales*, and shews a matter which the defendant hath done to the plaintiff's great damage; a prohibition shall be granted, because it is not shewn in the bill to what the damages amounted; for that court could not hold plea by their instructions above the value of 40*l.* and here the damages may exceed that sum; and it ought to appear, that they have a jurisdiction of the matter to oust the King's court of its jurisdiction, *Pasf. 14 Ja. B. R. between Gennings and Brimage* resolved, and a prohibition granted. *Comb. 468. Frauter v. Bugger.*—The like point adjudged, where the defendant not appearing there, his lands were sequestered. *Vaughan v. Evans. Mod. Caf. in L. and Eq. 374.*

*4. If a man recovers a debt and damages in *B. R.* and afterwards brings an action of debt against the bail in an inferior court, or upon that judgment, a prohibition lies. *Trin. 12 Ja. B.R. 1 Rol. Rep. 54.*

5. An action was brought in the court of the marches of *Wales*, in the nature of an ejectment, and a prohibition was granted, because they are not to meddle with mens possessions, but only with respect to force. *2 Rol. Rep. 369. 2 Brownl 29.*

6. A prohibition was granted to a suit in an action of debt brought in the marches of *Wales*, because the plaintiff did not shew the matter to be within their jurisdiction. *2 Rol. Rep. 311.*

7. No prohibition is to be granted to an inferior court, without a suggestion, tho' it appears to the court that it is a matter of which they have no jurisdiction; as debt in a county court for tithes, which is not a debt *ex contractu*, but *ex delicto*, and founded upon a statute, whereof they hold no plea. *1 Lev. 253. Bishop v. Corbet. V. 2 Brownl 17. 12 Co. 59, 109. 4 Inst. 100. Noy 153.*

8. A prohibition was denied to the court of *London*, for that the cause of action arose in *Middlesex*, after a verdict and judgment.

things transitory, which arise in places out of their jurisdiction, as in

—A prohibition was granted to the grand sessions in *Wales*, on service of process, upon a person living out of their jurisdiction.

(P*468)

Prohibition.

judgment. 2 *Mod.* 271. *Mendyke v. Stint.* 2 *Lev.* 230. *Jack-son v. Neale*, the same point adjudged. *V.* 1 *Keb.* 946. *Rond v. Smith contra*; but granted *nisi causa* only. Granted after judgment to the sheriffs of *London*, on their refusal of a plea to the jurisdiction; it being, as *Hale* said, *coram non judice.* 2 *Keb.* 853. *St. Aubin v. Cox.*

9. A prohibition was granted to *Chester* upon an *English* bill, suggesting that *J. S.* was indebted to the plaintiff there, and the defendant had promised to pay it, which he had confessed in his answer there, but that he paid it; the court granted a prohibition, because the now defendant might have his remedy at law. 1 *Ven.* 212. *Mekins v. Minshaw.* 1 *Vm.* 330. the same point.

10. Where the court of the council of *York*, which is a court of equity, decreed against a maxim of law, as against a jointenant, who had the estate by survivor; that the heir of his companion shall have the moiety, a prohibition was granted. *Winch* 79. *Portington v. Beaumont.*

11. A prohibition was granted to the university of *Cambridge*, for that they pretending by their charter to the clerkship of the market, had a power by their office to make orders, and to execute them; and they made an order that no chandler should sell candles for more than 4*d.* *h. per* pound; and because a person sold for 3*d.* they imprisoned him; the court granted a prohibition; but a *habeas corpus* had been more proper. *Het.* 145. for *quasi* clerks of the market, the university had nothing to do with candles, but with victuals only.

(K) *To what Court it may be granted.*

1. IF a writ of right of dower be sued in *B.* where the lord hath a court to hold plea, the lord may sue a prohibition directed to the justices of *C. B.* that they shall not proceed upon that plea. *Fitz. Nat. Brev.* 8. *b.*

1 *Roll. Rep.*
42, 71.

Fol. 318.

2. A prohibition may be granted by the King's Bench to the court of the dutchy, if they hold plea of any lands, not parcel of the dutchy. *Trin.* 12 *Jas. B. R.* between Sir *Thomas Beaumont* and the *Hospital of Wigston* adjudged, *Mich.* 13 *Jas. B. R.* between *Coates* and *Suckerman* plaintiffs, and Sir *Henry Warner* defendant, adjudged. *Hob. Rep.* 106. between *Owen* and *Holt* in *C. B.*

3. If a man sues in the chancery of *Chester* for a matter triable at common law; yet no prohibition shall be granted by the Court of King's Bench, because the King's writ does not lie there; and there is a Court of King's Bench to grant a prohibition, for there are all courts as there are here. *Mich.* 13 *Jas. B. R.* and

(P*469)

Prohibition.

and Hill. 13. *Ja. B. R.* between *Vawdry* and *Pannel* resolved, and a prohibition denied. But *Trinity* 1651. between *Fitton* and *Richardson* resolved otherwise, and a prohibition granted accordingly. *Contra Mich.* 12 *Ja. C. B.*

4. If a bond be made in *Cheshire*, (but it is not so dated) and the parties dwell there, and an action of debt is brought upon that bond in the Common Pleas; and thereupon the obligor exhibits a bill in the Exchequer at *Chester* to be relieved, and an injunction is awarded against the plaintiff not to proceed at common law, a prohibition may be granted out of the Court of Common Pleas to them, for such transitory actions may be sued in any place, altho' the parties dwell in *Cheshire*.

Trin. 7 *Ja. C. B.* between *Powey* and *Ales*, per *Curiam*.

5. If a *Quare Impedit* be brought in the court at *Lancaster*, after an incumbent is inducted, and after there is a suit in the spiritual Court to avoid the institution, yet no prohibition lies.

6. If there be a suit in the Ecclesiastical Court of *Chester* to void an Institution, after that the clerk is inducted to the benefice, within the County Palatine of *Chester*, altho' it be within the county, and so the King's writ does not lie there; and although that the common law courts within the County Palatine may grant a prohibition, yet a prohibition may be granted here in the Common Pleas or King's Bench; for it is not to reform the usurpation that they commit upon the common law. *Mich.* 10 *Ja. C. B.* between * *Sir Timothy Hutton* * Hob. 15, and the *Bishop of Chester*, per *Curiam*. 16.

7. Tho' there be a decree made in the grand sessions; yet the court will grant a prohibition, if there appears no equity in the bill. *Cooper v. Gardner*, 1 *Keb.* 160.

8. A prohibition was granted to the council of *York*, for holding plea of replevins. 1 *Bulst.* 110. *Pas.* 9 *Ja. Baker v. Dickenson*.

To the Court of Admiralty.

WHERE goods are tortiously taken upon the sea by piracy, it gains not any property in them against the owner; and being sold upon the lands, unless it was in (a) (a) 2 *Brown*. Market Overt, it doth not alter the property; and when the owner found them in his possession, he may well sue in the Admiral Court; for the court of Admiralty hath no authority to meddle with things upon the land; yet when the original cause ariseth upon the sea, and other matters upon the land depending upon the original cause, these matters, tho' done upon the land shall be tried in the Admiral Court, as H. 6, 7. *Godb.* 193. So an obligation to appear and answer in the Admiral Court, or to stand to a sentence in that Court, is suable there. *Cro. Eliz.* 685. *Anonymus*. 2. If

Prohibition.

2. If a ship be taken by pirates, it is originally within the admiral jurisdiction, and so continues, notwithstanding the sale of the ship is upon land; but said to be otherwise, if taken by enemies; for that alters the property. *1 Ven. 308. Hardr. 183. Sparke v. Stafford*, the same point adjudg'd.

3. The court of Admiralty is not to try a suit relating to a ship, upon a charter-party. *Godb. 104. Leighton v. Green & al.*

4. It is necessary in the court of Admiralty, to shew in the libel there, that the ship was *super altum Mare*. *1 Ven. 308.*

(*P470) *5. And a prohibition was granted upon a libel in the court of Admiralty, supposing a ship lying at anchor at Lime-house, because it is in *Corpore Comitatus*. *Cro. Jac. 514. Violet v. Blague.*

6. The court of Admiralty may proceed against the ship, sails and tackle, as part of it (when on shore) but upon a claim of property, and a refusal of the plea, a prohibition will be granted. *1 Show. 179. Edmonson v. Walker.*

7. It was ruled upon a plea for a consultation, that the ship was hypothecated at *Rotterdam* by the master, for the necessity of repairing her, upon the statute of *R. 2* that the consultation ought to go. *Comb. 135. Corset v. Husely.*

8. The court of Admiralty may punish one that resists the process of the court, and may fine and imprison for a contempt; but if they proceed to give the party damages, a prohibition lies. *1 Ven. 1. Mich. 20 Car. 2. Sparks v. Martyn.*

9. *Per Rolle*, Chief Justice, If the cause were maritime the court of Admiralty may examine a contempt to the court, but cannot proceed against one that rescues him, that did the contempt. *Style 171. Mich. 1649.*

10. A prohibition denied on the party's being proceeded against for a felonious matter. *Style 233. Dethick's case Mich. 1650.*

11. The court of Admiralty have no power to take a recognizance upon a petition to them, by way of stipulation of a matter not incident or dependant upon a suit there. *Hardr. 473, 474. Noy 24.*

12. But if the court of Admiralty on a proper suit there take bail by way of stipulation, they may proceed thereon, and against executors in their own way. *1 Show. 14. Vid. Godb. 260. Greenway v. Barker. 1 Keb. 500. Evans v. Parry* they may levy the condemnation money. *1 Keb. 489.*

13. A smith libels in the Admiral Court for mending a ship for the defendant's intestate; and the administrator pleads that she hath fully administered, and the plaintiff arrears the ship; the administrator had a prohibition. *1. Because they*

Prohibition.

- they did not shew that they arrested the ship within the admiralty jurisdiction. 2. Because an action upon the case lay for the debt at common law. 3. Because *Plene Administravit* is triable only at common law. *Lit.* 166. *Ashton's case*.
14. If the court of Admiralty refuses a plea of the statute limitations, and does not give sentence thereupon, as the common law requires, a prohibition lies; but not for returning a copy of the libel, nor being within the statute. *Hardr.*
15. *Barkley v. Morrice* 302. 2 *Salk.* 553.
15. Where the court of Admiralty refused a plea that they ought to have omitted; yet upon an offer that the court of Admiralty would allow the plea, the court granted a conditional consultation, 2 *Leon.* 182. *Somers v. Buckley*.
16. Whether the court of Admiralty hath consuance *intra eorum & refluxum Maris*. 1 *Keb.* 14. *Ball v. Blackmore*; a prohibition granted *nisi Causa*.
17. Tho' the government of beacons belong to the admiralty jurisdiction, if the party sues for the profits, it ought to be tried in the courts of law; so if the right of the thing comes in question. 1 *Keb.* 576.
18. If one ship falls foul of another, and the party grieved sues in the court of Admiralty, *Hide* doubted, whether a prohibition lay, in regard that part of the owners of the ship could not be known, and no remedy at law; but, *per Keeling and Twisden*, this is no colour to give a jurisdiction where there was none; and upon delivering in the names of the owners, a prohibition was granted. 1 *Keb.* 700. *Martin v. ...*
19. Upon a suggestion that the contract was made on land; this is sufficient for a prohibition, without pleading it below. *Keb.* 786. *Green v. Colduck & al.*
20. Where the party libels upon an agreement relating to the profits arising from letters of Mart, &c. there a prohibition lies, suggesting that the agreement was made on land; but if the suit be only for an account arising on letters of mart, and the agreement but an inducement; *Quere* if a prohibition lies. 2 *Keb.* 442.
21. If the admiralty proceed for the non-performance of an agreement, a prohibition shall be granted; *aliter* (as it is said) they proceed there for the damage, upon a promise to deliver goods in a bill of loading. 2 *Keb.* 498. *Caule v. Cook*.
22. Upon a libel in the court of Admiralty for mariner's wages, the plaintiff suggested for a prohibition a contract in writing; but a prohibition was denied, the court taking notice that they had always indulged mariners to sue in the admiralty, because by the course of that court many of them may

Prohibition.

may join in the suit; and 'tis the cheapest and most expeditious method to recover their wages, if there is any special contract as suggested, the defendant may plead it in the court; and if they do not allow that plea, then it may be proper time to move *B. R.* for a prohibition; for if it should be granted before the plea is disallowed, 'tis prejudging the justice of that court: But if the master and seamen join in suit against the owners for wages, a prohibition will be granted. *Mod. Caf. in Law and Eq.* 379. *The Mariner's case.* 1 *Ven.* 146, 343. 2 *Ven.* 181. *Alleston v. Marsh.* *Comb.* 72. 2 *Show.* 86.

Fol. 319.

(L) *At what time a prohibition shall be granted after Sentence.*

1. IF a man be sued out of the diocese, and answers in the Spiritual Court without taking that exception, and afterwards sentence is given against him, he shall not have prohibition; because he did not take the exception to (a) the jurisdiction, but hath thereby affirm'd the * jurisdiction there. *Pas. 15 Ja. B. R. per Curiam*, a prohibition denied between *Pudsey* and *Richardson*.
(a) *Cro. Car.* 97. 6 *Mod.* 252. * Vide the *cases before* *Pudsey* and *Richardson*.
on the statute of H. 8. for citing out of the diocese.

(b) *Cro. Car.* 97. 6 *Mod.* 252. *Comb.* 356. *Mod. Caf. in L. and Eq.* 194. *Carth.* 97. *Fax.* 132. 2 *Salk.* 548. 3 *Salk.* 287. *Comb.* 254, 356.

(c) But if a sentence be given in the Spiritual Court, and the defendant brings an appeal; yet if the suit did not belong originally to them, as tithes of trees spent in fuel, a prohibition shall be awarded as well the costs as to the principal suit, notwithstanding that the 32 H. 8. cap. 7. says, that ecclesiastical judge shall compel the appellant forthwith to pay costs; for that is, when the cause belongs properly to the Spiritual Court. *Noy* 137. If a person comes in *Interesse suo*, upon a suit by another parson for tithes, and says, that the land for which tithes are demanded are within his parish of *Stonham*, and not within the parish of *Stam*; and upon this they are at issue, and found for the defendant in the Spiritual Court, and sentence given for him, and the plaintiff appeals to the archbishop, and pending the appeal costs are assess'd against him in the court of N. according to the statute of 32 H. 8. cap. 7. now in this case, tho' the issue was triable at law; yet he having removed it before the archbishop by appeal, a consultation was granted, *Cro. Eliz.* 178, *Transham* case.

(*P472) * 4. If a suit be in the court of admiralty, upon a contract supposed to be done *super altum Mare*, and the defendant makes answer, and sentence is given, no prohibition shall be granted, upon a bare surmise that it was not done *super altum Mare*, unless it appears so by the libel, or by some writing or other matter apparent. *Mich. 12 Ja. B. R.* between *Tourson* and *Tourson*. 1 *Roll. Rep.* 80. 12 *Co.* 77.
1 *Keb.* 153. 165. otherwise if it appears only *de hors* the libel *Mod. Caf. in L. and Eq.* 194.

Prohibition.

5. *Vide* the case of *Tremorlin and Sands*, *Comb.* 462. *per Holt*, it doth not appear here in the libel, that the Admiralty Court hath any jurisdiction, and wherever they have not original jurisdiction of the cause, tho' there arise a question in it that is proper for their consuance; yet that alters not, nor takes away the power of the common law. But if they have jurisdiction of the original, tho' a question ariseth proper for the common law, yet they shall try that, and after sentence, it appear that the matter contained in the libel is triable at common law, we will grant a prohibition, at another day, being moved again; *Holt* and *Rookby* were for a prohibition, *Morton and Eyres contra*. *V. 2 Brownl.* 30. the case of *Jennings v. Audley*, the same point adjudg'd according to the opinion of *Holt* and *Rookby*.

6. In the case of refusal of proof, 'tis not known 'till the sentence is given; and therefore in that case 'tis time enough after sentence, *per Holt*, *Shotter v. Friend*, 1 *Show.* 161.

7. A sentence was given in the Spiritual Court at *Litchfield* against the plaintiff, who afterwards appeal'd to the Arches, where the sentence was affirmed, and adjudged against the plaintiff; whereupon he sued out a commission of delegates, and the matter was re-examined, and sentence there given for the plaintiff; and thereupon another commission was sued out to re-examine this matter, and now a prohibition was lay'd to stay this suit; for it was said, that by the statute of *H. 8.* it is appointed that a sentence before the delegates shall be final, and then this second commission is not well awarded. But it was thereto answer'd, that the Queen had by law an absolute power to grant commissions to re-examine, which is not restrained by that statute, and that it had been so ruled before three times, and of that opinion was *Hampham*; but because it was a new case they would advise thereof. *Cro. Eliz.* 571. *Gervis v. Halliwell*.

8. In the case of *Smith*, and the executors of *Pondreil*, a suit for a legacy in the Prerogative Court, and the party lived in another diocese; but because the will was proved in the Spiritual Court, and the suit in the same court where the probate was, and there a sentence given for the legacy; and afterwards upon an appeal to the delegates, the sentence affirmed, costs taxed, and an excommunication upon the sentence; upon an appeal, the court held that as the party had so long acquiesc'd under the jurisdiction of the court, they came too late for a prohibition. 3 *Cro.* 97.—2 *Cro.* 429. the same was adjudg'd, and a difference there taken, that where a prohibition was granted, and the party neglects to serve it, and sentence of excommunication is pronounced, for want of answer there, upon the matter, he shall have the benefit of this prohibition, but not where he suffers a definitive sentence.

9. *Per*

Prohibition.

9. *Per Holt*, Chief Justice, for suing out of the diocese, if you admit the jurisdiction, you shall not have a prohibition after sentence; so if it appears upon the whole proceedings in the Ecclesiastical Court, that the whole matter was of ecclesiastical consueance, a prohibition lieth not after sentence; but if a custom was pleaded there, a prohibition may well lie after sentence. *Comb.* 448. *Chicken v. Dickson*. *Cro. Eliz.* 595. *Somerset v. Markham*, the same point.

(P473) 10. And *Holt*, Chief Justice, in the case of *Parker and Clerke* said, he knew no case where one comes too late for a prohibition after sentence; * but in the case of suing out of the diocese, or where there is a suit for a *Modus*, and the defendant pleads payment, and there he comes too late to deny the *Modus*, for by pleading payment he admits it. *6 Mod.* 252. *Far.* 132. *Salk.* 548. *Gardner v. Booth*, *S. P. Comb.* 356. *Horris v. Scott* 254. *2 Sho.* 145. *Mich.* 32. *Car.* 2. *Tomlinson v. Freeman*. *2 Sho.* 155.

11. This difference is likewise taken, that if upon the face of the libel it appears, that the spiritual Court could at first have no consueance of the cause; and if it appears that the party cited lived out of the diocese, there the sentence makes no alteration; but otherwise where no such thing appears upon the face of the libel, mentioned in the case of *Vanacre and Spleen*, *Carth.* 33. the same point before adjudg'd in *Carth.* 97. *Broad v. Piper*. *1 Ven.* 611. *God.* 163.

12. If a prohibition be granted before sentence in the Spiritual Court, and not delivered till after the sentence, the matter being of ecclesiastical consueance the court will grant a consultation; for it is a prohibition after the sentence. *Comber* 448. *Gibbon's case*.

(M) *At what Time it lies after Sentence.*

1. **G**ENERALLY, if there be a suit in the Spiritual Court, and sentence is there given for the plaintiff; and thereupon the defendant appeals, and afterwards prays a prohibition; it shall not be granted, tho' if he had come before (a) sentence, it might have been granted; because it is inconvenient after so great an expence, and no exception taken to the jurisdiction, to grant a prohibition. *Hill.* 9. *Car. B. R.* between *Frizerwell* and ——— *per Curiam* said, that all the judges of *England* had agreed under their hands lately, when prohibitions were in question, not to grant them in such cases. (a) *Cro. Eliz.* 571, 595. *Cro. Ja.* 249. *Cro. Car.* 97. *1 Ven.* 61. *God.* 163. *2 Show.* 145. *15.* *2 Brown* 30. *6 Mod.* 252. *Comb.* 254, 356, 448, 462. *Carth.* 97. *Far.* 132. *2 Salk.* 548. *3 Salk.* 287.

2. But if there be a suit in the Spiritual Court for tithes, where the question is, whether the lands, out of which the tithes are issuing, be within the parson's parish, or out of it, and

Prohibition.

and within the King's forest; after a sentence for the plaintiff, and an appeal by the defendant, a prohibition shall be granted, *(b) because it is always out of their jurisdiction* to try the bounds of parishes; and also it concerns the King; for if it be within the King's forest, he shall have the tithes, & *nullum Tempus occurrit Regi.* Hill 9 Car. B. R. between *Frizerwell* and ——— which concern'd the Lord *Darcy* and *North.* *(b) The same point.*
2 Salk. 548.
if it does appear in the libel, or by the proceedings in the cause, that the cognisance thereof does not belong to the Spiritual Court; there a prohibition shall be granted after sentence. 3 Salk. 287. Where it appears that the matter suggested for a prohibition is collateral, and *dehors* the libel, tho' it may prove the Civil Court had no jurisdiction, a prohibition will not be granted. Mod. Caf. in L. and Eq. 194.

3. After sentence in a suit for tithes of mills, a suggestion of a *Modus* comes too late; for tho' the court takes notice that they allow no *Modus*, yet a *Modus* must be suggested and pleaded in time. 2 Keb. 721.

4. On a motion for a prohibition, the court will not take judicial notice of a custom in *London*, after sentence; for they ought to have pleaded it to the jurisdiction of the Spiritual Court at first. Mod. Caf. in L. and Eq. 176. *Brook v. Wingfield.*

• *(N) Where he shall not have it, because he may have a more speedy Remedy.* (*P474)

WHERE a man by intendment shall have a remedy by an appeal, no prohibition lies.

2. If a man devises a legacy to *B.* to be paid to him within a year after his death; provided, that he dies within that year, then the legacy shall be void; and it shall be divided between *D.* and *E.* and afterwards *B.* dies within the year, and his executor sues for the legacy, and sentence is given for him, because they held there the condition to be void; yet no prohibition lies, because by intendment he shall be aided by appeal. Mich. 21 Ja. B. R. *Clark's* case resolved, and a prohibition denied. *Ayliffe v. Brown.*
Godb. 243.
the same point adjudg'd.

3. The court doubted, whether a prohibition should be granted after sentence, though they agreed that the defendant, notwithstanding the sentence might bring an action in *London*, or the same words, to which the sentence could not be pleaded in bar; and by that means the party might be doubly punished for the same thing. *Hawkins v. Cook*, Hill. 3 of W. & M. Carth. 213.

(O) After

Prohibition.

(O) After a Consultation.

At what time it lies.

1. IF a prohibition be granted, upon a discharge of tithes, upon the statute of 31 H. 8. in the hands of the abbot, and upon issue joined, it is tried at common law; and thereupon the plaintiff is nonsuit, and a consultation is granted; and after the consultation granted, the plaintiff in the prohibition pleads in the Ecclesiastical Court the same plea, in discharge of payment of tithes, which was alledged in the prohibition, which the spiritual judge accepts, and proceeds to try it there, a prohibition lies, for the trial at law is final upon the libel, and shall not be tried in the Spiritual Court again; because it was proper for a trial at law. *Hob. Rep. case 372. fol. 286. Farmer's case.*

2. When a consultation is lawfully granted, *i. e.* upon the right of the thing in question, there a new prohibition shall not be granted upon the same libel; but when a consultation is granted upon any fault of the prohibition in form, by misprision of the clerk, or by mispleading of any statute, or such like; there a new prohibition may be granted upon the same libel. *2 Brownl. 247. 2 Brownl. 26. Dorwood v. Eirkinden*

—35. *Anonymus*—the same point. And if a man libels for tithes for several years, and a prohibition is granted for part of the years, and a consultation is awarded; yet the plaintiff may have a new prohibition for the residue of the time. *Ibid. 1 Leon. 130. Case 177. Stranham v. Medcalf.*

3. After a consultation by the defect of collateral matter, and not granted upon the right, a new prohibition may be granted by another court, as well as by the same where the first suit was brought. *2 Keb. 719. Briggam v. Robsin.*

4. *Per Holloway*, After a consultation awarded, for not proving the suggestion, the party shall be for ever barr'd from having another prohibition on the same libel. *Comb. 63.*

(*P475) 5. Where a consultation is granted in one court, the party shall not afterwards move for a prohibition in another court. *Cro. Eliz. 277. Lys v. Watts.*

6. If a consultation be granted, for not proving the suggestion by two witnesses, according to the statute of 2 Ed. 6. and not upon the substance of the suggestion, for want of variety, or for the insufficiency thereof; it is not within the statute of 50 Ed. 3. cap. 4. For that is intended where a consultation was granted upon the substance of the suggestion; which being proved insufficient by a verdict, or nonsuit upon evidence, and not where it is granted for the insufficiency of the suggestion. *Cro. Car. 208. Stroud v. Hoskins. W. Jones 231.*
7. Where

Prohibition.

7. Where the defendant in the spiritual court suggested a modus for 2s. for all tithes, and upon a prohibition failed in his modus; upon which a consultation was granted, and upon the sentence against him he appeals, and then suggests a new modus of 2s. for tithes of corn and hay only; he shall not have a new prohibition. 3 Bulst. 182. Biggs against J. S. Parson of D. Pas. 14 Ja.

Consultation;

(P) In what (a) Cases it shall be granted.

Fol. 320.

1. IF a prohibition be granted upon a good suggestion, and the parties go to issue upon the suggestion, and the (b) issue is found against the plaintiff in the prohibition; yet if it appears to the court, upon the finding of the jury that there is a good discharge of the tithes upon a modus decimandi, although the plaintiff has mistaken his issue, (c) no consultation shall be granted; because it appears they ought not to have jurisdiction of it in the spiritual court. Hob. Rep. 259. Berry's case.

(a) A Consultation doth not lie properly; but where a man cannot have his remedy in the King's courts. Godb. 446. pl. 514. (b)

Cro. Eliz. 819. the same point adjudged. Beal v. Webb. 2 Cro. 576. 3 Cro. 113. Lit. 151. Toddard v. Tyler. Trin. 4 Car. 1. C. B. Hetley 100. the same case.—
(c) If the declaration be insufficient, or if the plea does not support the spiritual jurisdiction claimed below in the one case; the prohibition drops; and in the other a consultation is awarded; though upon issue joined, the plaintiff in the one, or the defendant in the other case had obtained a verdict. 5 Co. 133, 163. cited in the case of Dr. Bentley. Trin. 5 Geo. 2. B. R. Fitz-G. 307.

2. As if upon a prohibition the issue is, whether all the lands within such a parish ought to be discharged from tithes for a certain (d) modus decimandi; and the jury find that all the lands præter certain acres ought to be discharged, &c. but not those acres; although the issue be found against the plaintiff in the prohibition; yet no consultation shall be granted for any of the lands, but for those acres; inasmuch as it appears that there is a good discharge and a real composition for that. Mich. 15 Ja. C. B. between Perry and Bawfrej adjudged. Hob. Rep. 259. but yet there, inasmuch as the suit was for tithes in kind out of the land excepted only, the consultation was granted; for there the suit was well founded.

A prohibition was moved for to stay a suit for tithe lamb, upon a suggestion of a (d) modus to pay 2d. for every lamb falling in the plaintiff's farm in

that parish, whether to be granted after there had been a prohibition before, upon a suggestion for 2d. to be paid for every lamb which fell in the parish, and found for the plaintiff; and a consultation awarded. Vide 1 Ven. 47.

Prohibition.

(*P 476) *3. If the plaintiff in a prohibition declares that he is seised in fee of two messuages and two mills; and that he, and all those, whose estate, &c. had used to pay 20s. to the person in lieu of all the tithes issuing out of those two messuages, and two mills; and that he had erected * de novo two new mills within the said two messuages; for which also he ought to be discharged from the payment of any tithes by law, and the defendant hath sued in the court christian for the tithes of four mills; to which the defendant pleads for a consultation, and traverses the prescription as to two messuages and two old mills; whereupon they are at issue, and as to the two new mills a demurrer is joined, and after the plaintiff is * nonsuited upon the trial of the prescription which determines the demurrer also; and therefore (a) a consultation shall be granted for the whole. Mich. 13 Car. B. R. between Goodwin and Smith, per curiam, adjudged.——This concerned the Torrington mills in com. Devon.

* 1 Keb.

286. (a) If

the plea for

a consulta-

tion be good

as to part,

and void as

to part, the

consulta-

tion shall go

as to that part,

which is good;

but you must

enter an ulterius

prosequi for

that part which

is void. Cro. Eliz. 1.

Foster v. Peacock & al'. Upon a

libel against the bishop of Landaff setting forth that the plaintiff was presented by the

dean and chapter of G. and refused to admit him; the bishop moved for a prohibition,

and shewed quod non habetur talis rectoria cum cura animarum in eadem diocesi, sed

perpetua vicaria; a consultation was granted quoad the institution of J. but that they

should go no further; for whether there be such a rectory or not, is triable at law;

and to that point was cited 2 H. 4. 30. 1 Leon. 181. Case 255. Stagg v. Bishop of

Landaff. V. 1 Leon. 277.

(c) If an

issue be

joined upon

a collateral

point, and

the plaintiff

be nonsuit,

or a verdict pass for the defendant; yet if it appears upon the record, that the defend-

ant hath no cause for an ecclesiastical suit, he shall not have a consultation. But

where the plea for the consultation was, that the testator made a will, and the de-

fendants his executors, and he sued them to prove the will, and an issue thereupon,

and the plaintiff was nonsuit here; inasmuch as he hath cause to sue in the spiritual

court (i. e.) to prove the will for the goods; for otherwise he cannot maintain an

action; a consultation was granted.——And if an issue upon a custom or prescription be

found for the defendant, or the plaintiff be nonsuit, though collateral to the matter in

dispute; yet if the prohibition be founded upon the custom or prescription, a consulta-

tion shall be granted. 2 Cro. 576. 3 Cro. 113. Norton v. Jenner. Trin. 5 Geo.

Fitz-G. 308. Dr. Bentley's case the same point. If an issue be joined in a prohibi-

tion, that it is perfectly good and apt; yet if it be found against the plaintiff, a con-

sultation shall be granted, or if the prescription claimed, is not good. Cro. Jac. 596.

Joice v. Parker

4. If a declaration in a prohibition be good, and the plea for a consultation insufficient, and yet (c) an issue be joined, and a special verdict is found, by which the plaintiff hath no cause for a prohibition; yet, if that which is so found be impertinent to the issue, no consultation shall be granted. 11 Co. 15. Priddle v. Napper adjudged.

5. After a prohibition, if the party will submit himself to the judgment of one, who supposes himself to have a jurisdiction,

Prohibition.

dition, who hath none; yet no consultation shall be granted.

1 H. 4. 10.

6. If a man hath a prohibition upon a libel for the tithes of faggots, upon a suggestion that the faggots were made of great trees above twenty years of age, and in the suggestion the quantity of the faggots are mistaken; yet if it appears that he hath made his suggestion according to the copy of the libel given to him by his proctor, no consultation shall be granted; for by the statute 2 H. 5. he ought to have a true copy of the libel. Mich. 4 Ja. B. R. between Swinnerton and Man adjudged.

7. On a prohibition for suing for tithes of faggots of oak and elm, *cautele* making his libel for faggots, which were of beech and thorn; the defendant prayed a consultation, *ita quod* he should not meddle with the faggots of oak and elm; for otherwise the party that maketh the faggots may, *per cautelam*, put in a stick or two of great wood into the faggots, and so prejudice the parson of all the tithes of the residue; but the court said, if it be so, the party must shew the special matter **pro consultatione habenda*; that the oak and elm are so intermixt, that he cannot do otherwise, and pray a consultation as to that, which was thorn and beech; and so it was done in Molyns and Dawes's case, where such a special consultation was granted upon such special plea; but as it is here, he can have no prohibition for any part. Cro. Eliz. 347. Backhurst v. Newnton. (P* 477)

8. There was a suit for tithes, and a prohibition granted upon a suggestion of the lands being barren, and newly improved; hereupon a trial is had on a declaration on the prohibition, and a verdict for the parson, that the lands were not barren; and thereupon there is a consultation.

9. Though there be sufficient matter before the court, for the court to grant a consultation upon the matter; yet if it appears to the court, that there are not proper parties before the spiritual court, the temporal court will not grant a consultation, as where the libel sets forth that the parson or farmer of the rectory of L. ought to pay to the vicar tithe corn; and it appeared upon the libel, that the defendant in the spiritual court was neither parson or farmer of the rectory, but of part of the rectory, and the residue was in the hands of S. against whom the suit was not brought; a consultation was denied. Sutton v. Dowse, 1 Leon. 10.

10. If a custom is alledged to pay 4d. for every acre in discharge of tithes, and by a verdict it is found but 3d. though in that case it is found against the party, yet it appearing to the court that no tithes ought to be paid, no consultation will be granted. Lit. 154. But if another modus be found, and that modus that is found is quite uncertain, it is as if no modus had been proved, and there a consultation shall go; as where a modus is suggested to pay 4d. for every cow, and 2d for every calf,

Prohibition.

calf, and the party proves that there never were any tithes paid in specie, but that some of the inhabitants paid 6d. some 7d. a consultation was granted. Lit. 151. Toddard v. Tyler. Trin. 4 Car. 1 C. B. Hetley 100. the same case.

4 Mod.
336. Hicks
Woodefon.
Comb. 403.
the same
case. Carth.
393.

11. In a prohibition, the plaintiff suggested that the parish of Huntspill is an antient parish, of which he was an inhabitant, and used lands there; that in the said parish there is a custom to pay several small sums to the parson in lieu of small tithes, which sums are particularly set forth, that this parish was within the hundred of Huntspill; and that there is a custom also for every inhabitant and occupier of lands within the said hundred of Huntspill, to be discharged of tithes, for the pasture of barren and unprofitable cattle; the defendant traversed the customs, and issue thereon being joined, it was found for the plaintiff; and now it was moved in arrest of judgment, that a custom alledged in *non decimando* in a whole hundred is void in law, admitting it to be good; yet it was not well pleaded here, because the plaintiff had not shewn that there was a sufficient maintenance for the person, besides those tithes: the court said, it would be difficult to shew a * *non decimando* for any tithes, unless those of wood; for all the cases that incline to such a custom, are put severally, that a county or hundred may thus prescribe, but don't mention what tithes are in question; and they said further, that where tithes are paid for things, which do not arise by annual profit, they must be due by custom; but such a custom in *non decimando* cannot be good; therefore a consultation was granted.

* 2 Bul.
285. 1 Rol.
Rep. 22.
Palm. 37.
1 Salk. 655.
Skinner
560. 3 Mod.
336.

12. *Per Fenner*, spiritual persons may prescribe in *non decimando*; for there it is no prejudice to the church. 1 Leon. 241, 248. the same point.

Cro. Car.
238, 239.
Hinde v.
the bishop
of Chester.
(P* 478)

13. Where the plaintiff in his declaration, upon a prohibition shews, that the defendant had sued after a prohibition, which is a contempt, and ought to be answered; the court held, that no consultation ought to be granted without answering to the prohibition; (but said the court) *perhaps in some cases, when the prohibition appears to be unduly granted, the defendant before appearance having committed no contempt, may have a consultation upon a motion.

It may not be improper before we conclude this chapter of Prohibition, to insert a few observations concerning tithes, for the better understanding the several cases before mentioned relating thereto; wherein the utmost brevity is made use of, and yet will be found useful references to the several cases mentioned in the books.

Tithes.

Of common right payable in kind.

1. Tithes of things that are tithable are due of common right in kind, unless they are charged or discharged.

2. Tithes

Prohibition.

2. Tithes may be changed by a custom in a particular place, How changed.
a modus or prescription, or by agreement or composition. What is a custom,
3. A custom is local, and must be limited and confined to some particular place; a prescription or modus is at large, and not confined to a place; and therefore in pleading a custom, the manner is to say, that time out of mind, there hath been such a custom used and approved of in such a place, that, &c. what a prescription.
 But in a prescription you only alledge, that such a one, and all those whose estate he hath, have used time out of mind to pay so much, &c.
4. But in this they both agree, that if there have been frequent interruptions they can obtain no force; but after a custom or prescription has once duly obtained, a disturbance or interruption for some years will not destroy it; and about these customs or prescriptions the civil, and common law differ, which is the reason that they are to be tried by our law (always to be preferred) wherever they come in question, and are the gift of the suit; for by the civil law, forty years concurrence, and much less, will make a good custom or prescription; but by our law they must have been used beyond the memory of any man living to the contrary; for if any man living, or any authentic record, or other evidence prove it was otherwise, the custom or prescription will fail. 2 Inst. 653, 654. Wherein they agree.
5. As where the plaintiff, a bishop, suggested that he, and all his predecessors had been seised of the manor, and that as long as it was in their possession, it had been discharged of tithes, and shewed that in Edw. 6. the said manor was conveyed to the duke of Somerset in fee, and afterwards was regranted to the bishop and his successors; it was held that this prescription was not gone by this interruption. 1 Leon. 248. Case 336. Bishop of Lincoln and Cowper. How the common and civil law differ in their construction.
6. A custom or modus must be reasonable, or be naturally supposed to have a reasonable commencement; it must also be certain, and the parson or vicar who is thereby to be excluded from the tithes in kind, must receive a benefit by it, so that the benefit must not accrue to another. Hob. 197. 2 Salk. 656. That a custom or modus must be reasonable, certain, and a benefit to the parson.
7. As a custom to pay tithes in kind for sheep, if they continue in the parish all the year, and if they be sold before sheering-time, but a halfpenny for every one so sold, was held an unreasonable custom; for by this means the parson may be defeated of his tithes. March, Case 128. Custom unreasonable.
8. So a suggestion upon a suit for tithes of wool, that the tenants had used, between Michaelmas and Allholland-tide, to clip the necks of their sheep to preserve them from vermin, and so to make the fleece better, and that the parson had the tenth fleece in shearing time, was held not good. 3 Bulst. 242. Fosse v. Parker, Mich. 14 Ja.
9. A modus to pay a part of the very thing that is tithe is (P* 479) not good, nor can the payment of tithes of one specie be a good modus for other tithes. 2 Salk. 657. Moor 454, 909. 1 An. 199. A modus when not good.
10. As

Prohibition.

- The like.** 10. As a suggestion of a usage to pay a penny yearly for every milch cow, and a halfpenny for every other cow, and a halfpenny for every mare in lieu of all tithes of cows, horses, steers, and other cattle, was adjudged not good. *Moor* 911.
- The like.** 11. A suggestion, that all the occupiers of land within such a vill, have used to pay 2s. 6d. in lieu of all the tithes in the vill, was held ill and unreasonable. 2 *Keb.* 280.
- The like.** 12. Upon a suggestion, that all persons having lands within such a town, but not inhabiting within the same town, shall pay 4d. an acre only in satisfaction of all tithes, was held an unreasonable custom; for that it gave greater privileges to foreigners, than to inhabitants. 1 *Lev.* 116. *Bawdry v. Bushell.* 2 *Ven.* 3.
- Void for incertainty.** 13. A modus or prescription may be void for incertainty, as a modus to pay 4s. for every day's ploughing of wheat, and 2s. for every day's ploughing of barley, was held to be void, for the incertainty, it not being averred, how much every day's ploughing did contain. 1 *Keb.* 612.
- The like.** 14. So a modus payable on, or about such a day, is not good; for the day ought to be certainly alledged. *Mod. Caf. in L. and Eq.* 375, 376.
- The like.** 15. So if a man prescribes to pay one penny, or thereabouts, for the tithes of every acre of arable land; this is not good by reason of the incertainty. 2 *Rol. Abr.* 265. *Allen's Case,* per Curiam.
- The like.** 16. The modus must be as certain as the tithe destroyed, or lost by it; and therefore a modus to pay 2s. in the pound of the improved rent, in lieu of tithes, is ill. 2 *Salk.* 656, 657.
- Good by way of composition.** 17. But tho' it be generally true, that unless a modus goes to the person, who by law ought to have the tithes, or unless it be for his benefit, 'tis not good; yet if it was originally paid to the prior, who was seised of the tithes, as of a portion of tithes, before the dissolution of monasteries, and afterwards to the king and his assigns, it is good: for the composition being made with the prior, it is enough for the party to shew payment to him, and to those who have his right. 2 *Mod.* 340. *James v. Trollop.*
- Not good to pay that which is the tithes, in lieu of tithes.** 18. A modus to pay one thing for another, or a part of the same thing in another manner may be good; but a modus to pay the very thing itself, that is the tithes, is never a good modus, unless payable in some other manner, i. e. so as that the parson, or he who has the right to the tithes, has some benefit by it. 3 *Cro.* 609. 3 *Bul.* 326. 2 *Cro.* 47. *Hob.* 250. *Ray.* 277. 1 *And.* 799. 1 *Mod.* 229.
- * Denied, upon suggesting a custom to pay a 20th part for the 10th tithes, being due of common right. 7 *Keb.* 71.

Prohibition.

19. As to pay the tenth cheese made from May to the first of August, in lieu of all tithe milk for the whole year, is good; for the man's labour is added to the thing itself, but to pay the tenth quart of milk is not good, unless (per Popham) it was to pay it at the parsonage house, or at any other place. Cro. Eliz. 609. Austin v. Lucas. Moor 909. the same case. Ray 277. Latch. 122. 6 Mod. 261.

The like. So a prescription for all the tenants and occupiers to make the grass into hay, and

the parson to have the tenth cock, may be a good discharge of tithes of the after-math; for the parson is to have the tithes, as of the growth of the ground, but not of the labour and industry of the farmer. Het. 233. Hide v. Ellis, Hill. 4 Car. 1. That milk ought to be carried to the parsonage house. Ray. 277.

20. A suggestion for a modus, that he paid the tenth fleece of wool in lieu of all locks and tithes due for wool, is good as to the substance, and not like the case of the tenth sheaf, in lieu of the corn and raking,* in 33 of Eliz. in the case of Shakerley and Marvin; but this suggestion was ill it seems, for want of the words usually paid, which are issuable. The same point adjudged in the case of Gryfman v. Lewes, parson of Kingland, Cro. Eliz. 446. 415. Sherrington v. Fleetwood.

Where good as to the substance. (P* 480)

but defective in form.

21. A modus upon payment of so much to the parish clerk, unless it is said to the use of the parson, is not good. Cro. Eliz. 71. Moor 908. 1 Leon. 94. S. C. So to suggest, that the owners of such lands had found straw for the body of the church, unless you shew that the straw was given to the parson, and he bestowed it on the body of the church. Cro. Eliz. 276. Scory v. Baber.

That it must be to the benefit of the parson.

22. So where the vicar sues for tithes, and the parishioners suggest a modus to pay so much to the parson, and that plea was disallowed; a consultation was granted; for the modus between him and the parson, is no discharge of tithes to the vicar. 3 Bulst. 220. Wintell v. Childe. Mich. 14 Ja. Yet a modus to the rector has been held a good discharge against the vicar for tithes of willows. 1 Mod. 216. Vide as to this point. Yelv. 86. March 11. Winch 44. 45. 1 Ven. 61. Moor 761. pl. 1055. 780. pl. 1081. 907. pl. 1267. Lit. Rep. 61.

A modus to the rector, no discharge to the vicar. Where it is.

Where Modus's, Customs and Prescriptions have been held good, and where not, either for the matter or the manner thereof, relating to the following particulars.

Of tithes of cows and calves. } Sherrington v. Fleetwood. 1 Rol. Abr. 651. pl. 15, 18. Moor 909. Cro. Eliz. 475, Anonymus. Latch 254.

To

Prohibition.

- To be discharged of the tithes of milk. { *Wifeman v. Denham*, Godbolt 329. *Cafe* 424. 1 Cro. 609. cited in the case of *Austin v. Lucas*. Moor 909. the same case. The same point cited, Raym. 277. 2 Salk. 656. *Hill v. Vaux*. Modern cases in law and equity 117. 2d part cited in the case of *Smithson and Dodson*.
- A modus for eggs. { *Lee v. Collins*. 1 Rol. Abr. 648.
- Of wood. { *Anonymus*, Moor 910, 911. the same point cited in *Awberie's case*. Cro. Eliz. 702. *Green v. Hun.* 2 Lutt. 1052. *Dyer* 349. 2 Salk. 656. *Archbishop v. Duke of Newcastle*. 3 Bulst. 242. *Fosse v. Parker*. Lit. Rep. 31. *Cicil v. Scot*. Cro. Eliz. 363. *Jesop v. Payne*.
- Of hay. { *Scory v. Baber*, Cro. Eliz. 276. *Ingolsby v. Johnson*, Cro. Eliz. 786. *Hutton* 58.—Cro. Eliz. 660. *Johnson v. Awbrey*. Moor 910. 1 Keb. 684. *Richardson v. Fawconbridge*, Noy 15. *Parry v. Chauncey*. 2 Keb. 212. *Brown v. Haywood*.
- Of agistment of cattle. { Cro. Eliz. 446. *Gryfman v. Lewes*. 475. the same point cited. Cro. Jac. 575, 56. *Jouce v. Parker*. 2 Salk. 655, 656. *Hard*. 184. *Gouldsb.* 147. case 66. Moor 910. the same point cited in *Awberie's case*, case 1280. f. 911. *Cafe* 1232. 1 Rol. Abr. 641. pl. 19.
- Of under-wood. { 4 Mod. 341. 4 Aff. 25.
- (P* 401) *Of a park disparked. { Cro. Eliz. 467. *Bedingsfield v. Feak*. —Hob. 40.—Moor 909.—the same case, Moor 863.
- Whether a copyholder of a Bishop discharged, shall prescribe to be discharged of tithes, by reason of a bare prescription in the lord, his farmers and copyholders. { Cro. Eliz. 784. *Crouch v. Fryer*. 1 Rol. Abr. 653. *Moore* 618. *Yelv.* 2. Noy 132. 1 Keb. 886. *Wilkinson v. Richardson*.
- To pay the 10th cock of barley. { Cro. Eliz. 702. *Green v. Hun.*
- To be discharged of tithes of box. { *Palm*. 37. The earl of *Clanrickard* against *Denton*.
- For a layman to have decimas garbarum, or decimam garbam. { 2 Co. 45. Cro. Eliz. 599. *Pigot v. Hearne* 763. Cro. Eliz. 293. cited in the case of *Sherwood and Winchcombe*. 4 Affize 25. Moor 483. pl. 685.

Prohibition.

Of a prescription de non decimando.	{	1 Rol. Abr. 654. Letter I. pl. 11.
		Letter H. pl. 13. 655. pl. 2. C. 53.
		Letter H. per Tot. Hob. 42.
		266. Faulkner v. Andrews. 2
		Bulft. 249, 285. Moor 425.
Of geese. ———	{	Wright's case. Cro. Eliz. 475.
		the same case. Moor 219. Branche's
		case. 13 Co. 15. 4 Mod. from
		536 to 344. 2 Salk. 655. Skin-
		ner 560. Winch 65. Cro. Eliz.
Of mills. ———	{	511, 512. Palm. 38.
		3 Keb. 705.
		1 Rol. Abr. 654. 3 Bulft. 312.
		1 Rol. Abr. 654.
		Noy 108. Holland v. Heale. 1 Rol.
Of bread. ———	{	Rep. 419. Goslin v. Harden. 1
		Lev. 179. Shephard v. Penrose. 1
		Sid. 278. the same case. 2 Keb.
		2. the same case.
		2 Bulft. 238, 239, 240.
Of barren cattle. ———		2 Keb. 319. Croucher v. Collins.
Of wood. ———		

Of Lands discharged from the Payment of Tithes.

1. LANDS may be discharged from the payment of tithes, either by an agreement, or real composition with the parson, or by the statute of dissolved monasteries, where the lands were discharged before that statute. By agree-
ment or
composition.

2. This real composition is, when an agreement is made with the parson or vicar, with the consent of the patron and ordinary, that certain lands shall for the future be discharged from the payment of tithes in * specie, by reason of a recompence agreed to be paid, or made to the parson, &c. in lieu thereof, either as an entire sum, or an annual payment, or by a settlement of lands upon the incumbent and his successors for ever, or by doing some other thing that will be of advantage to the parson or vicar, to whom the right of tithes doth otherwise belong. March 87. 368. What is a
real com-
position.
(P* 482)

3. But such compositions to make it binding as to the successors, must be made either by deed under hand and seal, or by matter of record, as by fine in the king's courts. Hob. 176. And if by the parson, patron and ordinary to charge the inheritance, the patron must have a fee, and not for life, or in tail. Bridg. 95. How to
make it
binding.

4. Per Hutton, a parishioner compounding for his tithes for life, is naught without deed. Het. 107. in Walsingham and Stone's case.

5. If

Prohibition.

Lands discharged in the hands of the lessee.

5. If one contracts with the parson for a discharge of the tithes of his lands for years, and lets those lands to another, they are discharged in the hands of the lessee, because the discharge runs with the land; but otherwise, when one takes a lease of his tithes from the parson, and makes a demise of the land, he shall have the tithes of the lessee. Hutton 31. Booth v. Franklin.

What is not.

6. If a lay impropricator, or a parson lets the glebe, that is not a discharge of the tithes in the hands of the lessee. Ibid. 11 Co. 13. Owen 39. Bridg. 33. And if a parson release to his parishioners all demands in the land, yet the tithes are not thereby released. Owen 39. Style v. Miles. 1 Leon. 411. the same case.

Not good without a deed.

7. An agreement to hold the lands discharged, during the time the parson should continue incumbent, was held ill, without a deed. Owen 103. Woodward v. Nelson.

Titheable in the lands of the lessee.

8. Per Dodderidge and Haughton, if a parson be a tenant of the lands, and at that time the land is discharged from the tithes in his hands; yet if he lets, or sells the trees, they are titheable in the hands of the lessee, unless he sells the tithes also. Palm. 38.

A composition suable in the spiritual court if for tithes in kind.

9. A prohibition was prayed to stay a suit for tithes, suggesting a plea and refusal of an agreement for a year, which being by way of contract, and not in bar, as an agreement for life or years, is not suable in the spiritual court. But, per curiam, it is all one, and both are triable in the spiritual court, if the suit be for tithes in kind; aliter, if for money, then a prohibition would lie. 2 Keb. 6. Buckley against the Bishop of Chester.

What a good composition.

10. Where A. suggested, that he held lands of B. for a term, that the defendant, in consideration that A. the plaintiff promised to pay him 10l. a year, promised the plaintiff he should hold the lands without tithes, this was held to be a good discharge for the time, and a good composition to ground a prohibition. 1 Leon. 151. case 208. Chapman v. Hurst, and that it was not like a covenant. 2 Leon. 29. Woodward v. Buggs.

How they are not extinguished. 1 Leon. 334. the same point.

11. Tithes are not properly said to be issuing out of lands; therefore unity of possession does not extinguish them, nor are they extinguished by a release of all the right to the land. 1 Leon. 248. case 336. 1 Leon. case 411. the same point.

Where not good without a deed.

12. But where the parson, in consideration of 12d. granted to one of his parishioners, that he should hold his lands discharged, this was not held good without deed; but if the parson sue against his promise, the defendant might have an action upon the case. Leon. 73. case 98. 2 Leon. 29. case 32.

Prohibition.

See more of composition in the law of tithes, and Danvers 2d vol. of his abridgment of Rolls Tit. Dismes.

13. R. parson of D. by a deed indented between him and S. promised and undertook, upon the receipt of 11s. that he would acquit the said S. and his assigns of all tithes, so long as R. should continue parson. S* covenanted by the same deed (P* 483) to pay the 11s. S. assigns the tithes to A. for a year, and from year to year *tamdiu partibus placerent*, and afterwards the farmer of the parsonage sues for the tithes. A had a prohibition, but upon debate a consultation was granted; the council for the consultation argued; that 1. by the deed to Sayer, no interest in the tithes passed to Sayer, but that he shall not pay them; so at most but a covenant to hold discharged. 2. If an interest did pass; yet, that no prohibition lies, it being a contract, that he shall be discharged for life. 3. That tho' the lessee himself might possibly be entitled to a prohibition, his assignee shall not, who hath part of the interest only: And the case of Shadron and Clinch was cited, that if a lessee covenants for him and his assigns to repair a messuage, his lessee of part is not to repair. Woodward's case, Pas. 13 of Eliz. was likewise cited, as a case in point; that if a parson promises A. in consideration of 10s. to be paid annually, that A. shall be discharged of tithes, that a prohibition shall not lie; but A. is put to his action, and his assignee shall not have it. Palm. 36, 37. Aldresh v. Ray, Hill. 16 Ja. 1 Rol. 267. adjudged. Mich. 17 Ja. B. R.

Where the assignee shall not hold the lands discharged.

14. A suggestion of an agreement between B. and the parson, that B. should retain lands free of tithes, in consideration of 10s. per annum, and ten loads of wood, payment and acceptance was held good, by way of retainer; and that the assignee might have an advantage by it, tho' by parol; but if upon a contract, quære if the assignee may maintain an action of covenant. Godb. 33. pl. 426.

Cro. Ja. 669. Honeycombe v. Sweet. W. Barnwell and Pelfie's case in Godb. 272. pl. 384.

Of lands discharged from the payment of tithes, by the several acts of dissolving abbeys, and vesting their lands in the crown, and what lands are discharged by those acts respectively.

27 H. 8. Cap. 28 of the lesser monasteries.

{ Cro. Car. 424. 1 Jones 2. 368, 370, 373. 1 Sid. 320. 1 Lev. 185. 1 Keb. 162. 2 Keb. 28, 60, 85, 162, 175, 472. Cro. Eliz. 422. 1 Rol. Ab. 654. 1 Rol. Rep. 54. Hob. 113, 295, 306. 2 Cro. 422, 607. Noy 97. 2 Show. 184, 439, 460. Hetley 133.

31. H.

Prohibition.

31 H. 8. Cap. 13. of the greater monasteries.

Hob. 295, 307. 1 Jones 2. a. b. 368.
2 Cro. 607. Dyer 349. 2 Bulst. 248.
1 Rol. Rep. 53. 1 Leon. 241. Noy
97. 4 Mod. 337. a Co. 47, 48,
559. 4 Leon. 47. Moor 219, 528.
Bead 143, 164, 168, 169. Hardr.
190, 315. Hetley 133. 2 Leon. 71.
Owen 56. 2 Keb. 29. 1 Lev. 185.
3 Keb. 45, 217. Raym. 225.

32 H. 8. cap. 24. of the hospital of St. John of Jerusalem.

2 Brownl. 8. Dy. 277. 2 Co. 46. 2 Cro.
57. Moor 913. 2 Brownl. 8, 20.
Godb. 392. Bend. 168. 1 Jones
182. Latch 89. Raym. 225. 3
Keb. 208, 217.

37 H. 8. cap. 4. and 1 of Ed. 6. cap. 14. of college and chauntry lands.

2 Co. 46, 49. Moor 219. 11 Co. 14.
2 Rol. Abr. 269. 2 Keb. 459. 3
Keb. 45, 217. Raym. 225. Bridg.
33. Latch 89. Goldsb. 395. 1
Jones 181 to 191. 2 Brownl. 8, 23.
Cro. Ja. 57. Moor 913.

2 & 3 of Ed. 6. cap 13 as to barren lands improved, derelict lands, fenny lands, thorney lands, &c.

2 Inst. 655, 656. Dyer 170, 171. 3
Bulst. 65. Hetley 147. 1 Rol.
Rep. 354. Moor 430, 909. 3 Cro.
475. 10 Co. 86. 6 Co. 18. 2.
1 Keb. 253, 387. Repert. Ca-
non. 387.

(P* 484.) *Cases where disputes have arisen, whether tithes ought to be paid, relating to the following particulars.

Of stone, pit-coals, turfs, slates, bricks, tiles, earthen pots.

2 Mod. 77. 2 Keb. 596.

Of fish.

Palmer 517.

Of marl, sand, lime, chalk.

Cro. Eliz. 247. March 56. 6 Mod.
223. 2 Mod. 35.

Of mine, ore.

1 Chan. Cases 272, 282. 2 Vern. 46.

Of the after-mowths and rakings of corn.

Moor 910. 1 Rol. Abr. 640. 2 Ed.
6. Cap. 13.

Of birds and beasts *feræ naturæ*.

Moor 909. Lit. Rep. 311. Hetley
147. 1 Rol. Abr. 640.

Of hounds, apes, parrots, &c.

2 Inst. 651.

Of new mills.

2 Inst. 622. Lit. Rep. Cro. Car. 523,
524. 3 Bulst. 212.

Of

Prohibition.

Of woollocks, neckings, } Cro. Eliz. 363. Moor 911. 3 Bulst.
tailings, or birlings of } 242.
sheep.

Of green tares given to } 2 Leon. case 30.
horses.

Of fuel spent in the } Cro. Eliz. 609.
house

Of timber-trees *aride* & *pu-* } Plow. 470. Cro. Eliz. 477:
tride. } 2 Inst. 621, 624. 11 Co. 48.
Cro. Jac. 100, 133. 2 Leon.
80. 3 Cro. 477. Gould. 145.
Moor 541. 2 Cro. 100. 1
Rol. Rep. 100. Moor 908.
Lit. 149.

Of cattle brought up for the } Cro. Eliz. 702.
pail or plough.

Of pigeons. } 2 Mod. 77. Lit. 311. Hally
147.

Of horses for pleasure only. Popham 126. 1 Bulst. 171.

Of lopping trees. } 2 Brownl. 33. Moor 541, 908.
2 Leon. Case 105. 1 Leon.
79. 1 Sid. 300. 3 ro. 477.
Goldsb. 135. 2 Cro. 100. 1
Rol. Rep. 100.

Of conies in a warren. — 2 Rol. Rep. 458.

Of young plants in a nursery. W. Jones. 416.

Of waste ground, if it affords } Lit. 311. 3 Bulst. 165.
an annual profit.

Of agistment of cattle. — 2 Keb. 293. 1 Mod. 216.

Of a park disparked. } 1 Rol. Abr. 651. Noy 148.
Hutton 57. 3 Cro. 476.
Owen 34, 74. Moor 909.
1 Brownl. 31. Hob. 39.
Watson 513, 514. Parson's
Law 248, 249. 2 Bulst.
240. 1 Rol. Rep. 176.
Winch 2. Clay 91.

Of

Prohibition.

(P* 485) * Of the Libel, Suggestion, Writ of Prohibition, Declaration, Pleadings, Trial, &c. Of the Libel.

Upon a libel insufficient the prohibition shall stand, tho' the declaration made is sufficient.

1. IF the libel be insufficient in the spiritual court, tho' the declaration aids the matter, and makes it sufficient, yet the prohibition shall stand; as where the libel is, that by the spiritual law every person having the tuition of any infant under age, committed to him by the will of the father, *vel per judicem competentem*, ought to have the custody of such infant, and there be a suit in the spiritual court for detaining him, and that comprehends a commitment by the father, upon the statute of 12 of Car. 2. which appoints the remedy in other courts; and also comprehends all guardianships at common law, of which the ecclesiastical courts have no cognisance, and tho' the declaration be with this exception, viz. (except where they are in the custody of any other, by reason of tenure, or appointment of the father) yet that will not mend the libel. 2 Lev. 219. Lory v. Reynes.

Is to be in court.

2. The libel is to be in court before a prohibition can be granted. Comb. 135. Corset v. Hufely.

Of the Suggestion.

Insufficient suggestion does not put the party to demur.

3. If upon a libel in the Spiritual court, the defendant makes a suggestion to have a prohibition, if such suggestion be insufficient, the other party need not demur to it, and so have it entered upon record; but as an *amicus curia*, he may shew the same to the court, and the court ('tis said) will discharge the rule, 1 Leon. 10. Sutton v. Dowse. 1 Leon. 181. Case 255. the same point cited.

Where there must be an affidavit, and where not.

4. Where the matter suggested for a prohibition appears upon the face of the libel, there needs no affidavit; but if you move for a prohibition, as to more than appears upon the face of the libel, to be out of their jurisdiction, you must have an affidavit of the truth of the suggestion. 2 Salk. 549. Godfrey v. Llewellyn.

Ill for duplicity.

5. If the suggestion contains two different matters, each of them a foundation for a prohibition; as the one for not granting a copy of the libel, the other upon the merits; such suggestion is ill, and the court ('tis said) will not grant a prohibition. 6 Mod. 308.

When to be amended, and when not.

6. A suggestion cannot properly be amended after a prohibition is gone. 2 Show. 67.

7. But

Prohibition.

7. But if the court sees that there is a foundation for a prohibition, they will give liberty to amend the suggestion. 5 Mod.

96.

8. Upon a suit for tithes of wood, the plaintiff suggested, that he had a house in the parish, and that the wood was cut for fuel burnt in his house. But the suggestion was held insufficient, unless he shews that the house was for maintenance of husbandry, by reason whereof the parson had *uberiores decimas*. 1 Vent. 75. Where the suggestion was insufficient.

9. The suggestion founded upon a suit on the statute of Edw. 6. of barren lands newly improved, and therefore exempt from tithes for seven years is to be proved within six months, otherwise a consultation. 2 Show. 92. Thomas v. Gifford, Hill. 31, 32 Car. 2. To be proved within the six months.

10. The suggestion must be certain as to the ground of the complaint; as if a man does suggest, that he had pleaded a release in the court christian, and had only one witness, that is an uncertain suggestion, and a consultation was granted; for tho' he had but one witness, if it don't appear, that he offered that one witness, who was refused, he is not hurt; but if the suggestion had been, that he had but one witness to prove it, which they refused, a prohibition would have been granted. Cro. Eliz. 88. Bagnall v. Stokes. 666. Mallory v. Marriott. Uncertain as to refusal of proof.

11. But tho' a suggestion must be certain, yet such precise certainty is not necessary as in a plea, or even in a declaration upon a matter at common law; as if it is suggested, that P. the proprietor of the rectory of B. and his predecessors had twenty acres of pasture, and another close of twenty acres of wood in lieu of tithes; it was held sufficient, without shewing of what estate, or how. Cro. Eliz. 736. Austen v. Pigot, the same point in 2 Cro. 501. Moore v. Bullock. (P 486)
But such certainty required, as in a declaration or plea.

12. Nor is there such precise proof necessary in the case of a suggestion, as in some other cases, as if the suggestion be upon *modus* to pay 4s. a year, in discharge of all tithes, and the proofs are, that he used to pay 5s. 6d. yet no consultation shall go; for it appears that the party libelling had not any cause to sue for tithes in kind. Cro. Eliz. 819. Of certainty of the proof of the suggestion.

13. So if the prescription be, that the parson holds an hundred acres of land in lieu of tithes, and the proof is, that he holds sixty only; it is well enough. Cro. Eliz. 736. Austen v. Pigot, of which see hereafter under title evidence. The like.

14. The suggestion must not vary the matter complained of in the libel, if it does, the court will grant a consultation; as where E. the farmer of a rectory impropriate libels in the spiritual court *pro sedili in dextra parte cancellæ*, and in his additional libel he libels *pro loco primo*, and principally *in dextra parte cancellæ*, the defendant suggests for a prohibition, *quod est antiqua parochia & antiqua cancella*, and that he is seized of an ancient messuage in that parish, and that he and all those, &c. had used to sit in *dextra*. That it must not vary from the libel.

Prohibition.

tra parte cancellæ prædictæ, to hear divine service. *Resolved*, that of common right the parson impropriate, and by consequence his farmer, ought to have the chief seat in the chancel, because he ought to repair it, but that by prescription another parishioner may have it; but in this case a consultation was granted, because the libel is *pro primo loco*, and the suggestion is only *pro sedili in dextra parte ecclesiæ*, and not *pro loco primo* therein. Noy 133. Hall v. Ellis.

The like. 15. A suggestion must not vary from the count, for a variance between the surmise and declaration, is ill; for a surmise is instead of, and *quasi a writ*. 1 Leon. 128. Cro. Eliz. 136.

Variance. 16. In a suit for tithes of barren ground, a prohibition was denied for the defect in the suggestion, in not alledging that it was *suapte natura sterilis*, and not pleaded so in the spiritual court.—6 Mod. 86.

In a suggestion to be discharged, because the abbot held them discharged, must shew how. 17. If a man in a suggestion for a discharge from tithes, by reason of an abbot's holding them discharged at the time of the dissolution of monasteries, and so conveys it to the king; it is not enough barely to say, that the abbot held them discharged of tithes, but he must shew how; for a claim of discharge of tithes is against common right, and therefore it shall be taken strictly, and the statute of 31 of H. 8. cap. 3. is, that the king, &c. shall hold it in as large and ample manner as the abbot, &c. held it therefore he ought to take notice in what manner it was discharged from tithes. Noy 97. Slade v. Drake.

Must shew that the lands were parcel of the will. Nor is it sufficient for the patentee of lands that were in the abbot, at the time of the dissolution of monasteries, to say in discharge of tithes, that he holds the lands in his own hands discharged; but he must shew that they were in the hands of the abbot at the time of the dissolution, and are now in his own, nor is it sufficient to say, that such vills were so, unless he goes further, and shews that those lands are parcel of the vill. 1 Keb. 85. Barrington's case.

Letters patent to be pleaded or produced. Arable and to be shewn to be discharged from tithes for the feeding of cattle. 19. Nor is it sufficient to shew in the suggestion, that *virtute literarum patentium*, &c. he was seized, but they must either be pleaded *in hæc verba*, or produced in court. Noy 127. 2 Keb. 760. the same point. 1 Ven. 120. the same point.

20. Where a suggestion was held ill, setting forth that by the custom of England no tithes are to be paid for the agistment of cattle kept for plow or pail, not adding that he had arable land in the parish. 5 Mod. 96, 97.

P* (487) *21. Held that there might be an averment that the parties were sued out of the proper diocese, if the same does not appear in the libel; so where one is sued in the court of admiralty for a matter done upon land, there may be an averment that the contract was made *intra corpus comitatus*. Godb. 214. Hughe's Case.

Where may be an averment that it was intra Corpus comitatus.

Prohibition.

22. If an action be brought in an inferior court, upon a contract for 40s. where they have not jurisdiction to hold plea of 40s. and in order to oust the superior court, id. is acknowledged to be paid; it is proper in your suggestion for a prohibition to say, that the id. was not paid, but that it was so acknowledged on purpose to oust the superior court. Palm. 564. Clarke v. Corke. Trin. 4 Car. B. R.

What to be alleg'd to oust the superior court.

23. A suggestion for a prohibition to the admiralty, that if there was any contract, it was made on land within the body of a county, is not sufficient; for it should have been, that the contract was made upon land. Style, 1 Hill. 21 Car. B. R. so in the spiritual court for words, upon a suggestion that if the words were spoken, it was held ill; for the words must be confessed to be spoken. Vent. 10, Hill. 20, 21 Car. 2. B. R. Day v. Potts.

But not sufficient to say, if such a contract was made &c. it must be confessed.

24. If a parson libels for tithes, and only sets forth that he is *curatus ecclesie*, tho' *curatus* of itself does not imply that he is inducted into the church; yet if the party sued will deny that he is such a parson, as is intitled to tithes; for that he is a mere stipendiary parson, he ought to plead that matter in the spiritual court, and then upon the refusal of the plea, a prohibition lies, otherwise not; but if he libels in the spiritual court for tithes, as *curatus ecclesie rite & legitime admissus & legitime investitus*, the last word *investitus* in the canon law signifies the same as induction, and it is good. 3 Bulst. 310. Wrothmeal v. Gill, Mich. 1 Car. B. R.

Not sufficient to say he is *curatus ecclesie*, without more.

25. In a suggestion for a prohibition to the ecclesiastical court in a cause for tithes and other spiritual profits, the suggestion must be made good to the court by two sufficient witnesses within six months after such prohibition granted, provided the suggestion doth not contain a negative. 2, 3 Ed. 6. cap. 13. 2 Inst. 66. a.

Or the proof of the suggestion.

26. Those six months for proving the suggestion according to the statute are kalendar months, and to be computed from the teste of the prohibition. 2 Show. 308. 2 Salk. 554. v

The like

27. And it hath been held, that if it be proved in the action before a judge within the six months, 'tis good, tho' not recorded till after the six months. Noy 30. Skinner's Case.

The like

28. If a suggestion be not proved within the six months by legal witnesses, a consultation will be granted. 2 Bulst. 154. Brown v. Crasbaw, Mich. 11 Ja.

The like

29. This statute for the suggestion to be proved within the six months, does not extend to matters at common law. Hetl. 145. as upon a personal agreement between the parson and parishioner for the tithes, *per totam curiam*. Lit. 297.

The like

30. A precise and strict proof is not necessary in the case of a prohibition, as in other cases, as we mentioned before, under title suggestion, and *vide* Noy 28.

The like

Prohibition.

- Proof of a modus.** 31. If a suggestion be, that the inhabitants of D. of which he is an inhabitant, had paid a *modus*, and upon issue the proof is only, that he paid it, that was held to be good; for every particular is included in the general, and proved by it, and is a sufficient matter for a prohibition to oust the spiritual court of their jurisdiction. Noy 28.
- Of the suggestion.** 32. A suggestion that the Mills were antient Mills, need not be proved within six months. 2 Keb. 134. Eaton v. Naylor.

Of the Prohibition itself.

- Variance.** 33. A suit in the spiritual court by the name of Gregory Lovegrove, and the prohibition by the name of George, &c. is such a variance as abates the writ, Cro Eliz. 105.
- Abatement** **To part.** *34. A prohibition may go to part only. 2 Show. 461. Lashand [P* 488] Webb's Case. 1 Sid. 251.
- For what granted.** 35. Prohibitions are granted sometimes *pro defectu jurisdictionis*, sometimes *pro defectu triationis*, as in the case of a prohibition, if a custom denied. 1 Ven. 274.
- A difference between this writ in the king's bench and in the common Pleas.** 36. A prohibition out of the king's bench was awarded in the time of the then late king, and held it was discontinued upon this difference; that a prohibition in the common pleas, is upon a suggestion that must be first entered upon record, and is a suit of the party. But in the king's bench it is upon no suggestion of record, and the prohibition is but a prohibitory commission, and till there has been an attachment, all is discontinued by the demise of the king. Latch 114.
- Whom may join.** 37. *Per* Yelverton, if two are joined in the libel, they may join in the prohibition; *per* Hutton, they may join in the writ, but must sever in the declaration. Hetley 147. Comb. 448. — 2 Brownl. 7. the same point adjudged. 2 Keb. 744. there must be several prohibitions, unless the parties are tenants in common. Thornton v. Teisdale.
- Joinder in the writs.** 38. The Abbot of Langley let lands to R. for years, who demised to W. for years, who granted part of the land to C. for the whole term, and B. libelled against them both for the tithes; and joined in the prohibition, and held good. Owen 13. Barnes's case.
- Consultation without a plea.** 39. If the prohibition appears to be void upon the face of it, the court will grant a consultation without a plea. 1 Keb. 501. Rogers v. Wescot.
- Where a superseadeas only.** 40. Buttho' the prohibition be not good, but defective in form, or in the manner, if there is sufficient matter for a prohibition, the court will not grant a consultation, but a *superseadeas* to the prohibition. 2 Keb. 404. Archbishop of York v Taylor.
- Where a suit is to be depending.** 41. In Noy 153. it is said' that no prohibition might be originally granted out of the common pleas, unless there be a plea there depending for the same thing, but not upon a bare suggestion,

Prohibition.

on, except in the case of a *modus decimandi*, because the spiritual court will not allow it, and the cases there cited are, Reg. 34. N. B. 43. 1, 2 Ed. 4. 11. 22 Ed. 4. 20.

Of the Declaration in Prohibition.

42. A declaration upon a prohibition was held ill, setting forth that the plaintiff was instituted to the church of D. and the defendant sued him in the ecclesiastical court, libelling that he himself was instituted to the same church, and inducted before the plaintiff, and that the plaintiff had obtained a super-institution upon him, but does not shew that the plaintiff was also inducted. 2 Lev. 125. Monday v. Porter.

Declaration ill, not shewing the plaintiff inducted.

43. If the declaration varies from the suggestion, a consultation shall go of course; for it is a discontinuance. Far. 114.

Not to vary from the suggestion.

Of the Pleadings in Prohibition.

44. Where the party in his plea to the declaration in prohibition varied from the libel, by which he had claimed in the spiritual court two third parts of the tithes due to him for dry cattle, and it being found for him, a consultation was awarded; tho' this variance from the libel was objected in arrest of judgment, yet the court held it not material: for that the consultation is no more than setting aside the prohibition, and giving the plaintiff in the spiritual court a liberty to proceed on his libel. Mich. 7 Geo. 1. Mod. Caf. in Law and Eq. 133. Stratford v. Neale.

Variance in the libel from the declaration does not hinder a consultation.

45. Upon a suit for the surpluse of profits, the plaintiff in his prohibition shew'd that his fee-simple lands and other lands were charged with the payment of fifteenths, and 5s. yearly to the poor, and that the residue was to his own use; to which the defendant cleads, that the surplus was to go to the repairs of the church, and the residue to charitable uses, *absque hoc*, that the surplus of the profits was to be* to the plaintiff's own use. Upon a demurrer this was held a good traverse, notwithstanding an objection by Croke, that where a man pleads in bar, and takes a traverse, he thereby waves his plea in bar, and that what was traversed here, was but an inducement to the plea, and not the plea itself. 2 Bulst. 20. Austin & al' v. Clifton & al', Mich. 10 Ja.

[P* 489]

What held a good traverse.

46. A prohibition had been granted against the defendant, for that he had libelled in the court christian for the tithes of furze, that the plaintiff in prohibition had converted in *focales & combustibile*; and the suggestion was, that the plaintiff dwelt in a messuage of husbandry, and that those furzes were cut and burnt in the messuage, by reason of which the parson had

Prohibition.

Where a traverse was held well taken.

superiores decimas of corn, &c. and that the custom in such cases is, that no tithes should be paid; the defendant appeared and pleaded, that the plaintiff sold those furzes, *absque hoc*, that he converted them *in focale & combustibile in domo sua mansionali*; upon a demurrer this traverse was held good, notwithstanding the objection that the traverse was not good, because contrary to the libel; for the libel is, that the plaintiff converted them, and now by his traverse he denies it, and (say they) there are two customs in the vill; one for the discharge of tithes of furze burnt, &c. the other for the tithe of furze sold; and if this traverse would be good, inasmuch as the plaintiff had framed his suggestion, which barred the defendant from the tithes of furze burnt, the plaintiff would lose the advantage of a prohibition for the furze sold. But the court said, that as the libel is, that he converted *in focale & combustibile*, but does not say *in domo sua mansionali*, and if he burned bark with them, for burning of land, &c. in another place, not in the house of husbandry, he shall pay tithes; and therefore it is not wrong for the defendant to say, that they were sold, *absque hoc*, that he converted them *in combustibile in domo sua mansionali*. Lit. 367, 368. Pas. 7 Car. 1. C. B. Rooket v. Gomershall.

• Estoppel.

47. In the case of Thornton and Pickering, there was a prohibition upon a suit in the spiritual court for saying, the defendant was the father of a bastard child, to which the plaintiff pleaded, that what he said, was in the sessions; the defendant for a consultation pleaded, it was out of the sessions; to which the plaintiff replied, that there is an order of * sessions, that the defendant was the reputed father, and that the defendant is estopped to say, that he spoke the words out of sessions, and the consultation denied. Winch 6. 3 Keb. 200.

Replication to pursue the declaration.

48. If a replication does not pursue the prescription laid in the declaration, though the plea be bad, yet a consultation shall be granted, 2 Bulstr. 240. Suckerman & al' v. Warner. 1 Rol. Rep. 53. the same case. Trin. 12 Ja.

Of the Trial, Evidence, and Damages.

Where the omission of the finding of the jury is not material.

49. The omission of the jury's finding proceedings by the defendant *contr. prohibitionem*, though it be part of the issue, yet it was adjudged not material, so as to hurt the verdict, but is like the jury's not finding any thing as to the *vi & armis* in trespass. Mod. Caf. in L. and Eq. 1, 2, 3. Stratford v. Neale.

Prohibition.

50. In a prohibition on a suit for tithes of hay, upon fifteen acres of land, ten acres of meadow, and seven acres of pasture; and a suggestion that he, and all those, &c. had used time out of mind to pay 4d. yearly in lieu of all tithes of hay there cut, &c. and upon that issue the jury find the prescription, but that part of the land was never mowed, but don't shew what part in certainty; the question was, if this verdict be certain enough, and for whom it was found; it was adjudged for the plaintiff; for both parties are agreed, that all the land had been mowed, and the finding contrary to it is void, and the verdict is certain enough. Cro. Eliz. 333. Foliot v. Ridge.

Where the finding of the jury contrary is void, and the verdict certain enough.

51. There were no costs in a prohibition before the 8 & 9 (P 490) of K. W. 3. cap. 12. which gave them. Cumb. 20. Vide the statute.

52. Upon a prohibition against the proprietor of the parsonage of T. to be discharged of tithes, the plaintiff claimed, and shewed the precinct of the wild of Kent, that time out of mind it was discharged of tithes, and the prescription was traversed, and found for the plaintiff; and also in the same record, that another place out of that precinct was discharged of the tithes of hay called P. M. which prescription was traversed, and a special discharge was given in evidence by a bull from the pope there shewn, and produced in evidence, to Thomas the abbot, that he was so discharged at the time of the dissolution; and it was held, that such a general prescription to be discharged of tithes could not be maintained by such a special prescription given in evidence. Palmer 37, 38. Mich. 17 Ja. B. R. the Earl of Clanrickard against the Lady Denton.

General prescription not maintained by a special prescription in evidence.

Of the Judgment and Execution.

53. After judgment, upon a writ of enquiry, upon an attachment in prohibition the judgment was reversed, because there was no place alledged where the writ was delivered. 1 Ven. 350. Anger v. Brewer.

Judgment reversed for want of a place alledged. Damages and costs after an attachment.

54. In judgment by default, upon a declaration in prohibition, after an attachment, damages are taxed, and held good. 3 Lev. 360. Heywood v. Foster.

55. Prohibition upon a suit for tithes of corn, wool, and calves, and for the corn, makes suggestion that they had used in the parish to pay the tenth sheaf, in satisfaction of all tithes for corn to the parson, and that he set them out, and the parson had them, and that he pleaded this plea in the court christian, and they would not allow it; and it was held by the court, it was a good suggestion; for if he set out the tithes, and the parson

Prohibition.

parson would not take them, there is no reason he should be charged again; and therefore Godfrey said, he would take issue upon it; and it was held he might; for the wool, he made another suggestion; for the calves, he said, they used to pay within the said parish, &c. two-pence for the milk of every cow, in satisfaction of calves, and the proofs were, that there was such a usage for all the land, except five farms; and for this cause it was held he had failed in his prescription; for it may be these lands were parcel of the five farms; but if it had been proved that the lands were not parcel, it had been otherwise; and for this cause a consultation was granted. Cro. Eliz. 206. Benner v. Shortwright.

Costs in the
spiritual
court.

56. The spiritual court, upon a suit on the statute of 5 Edw. 6. cap. 4. for a disturbance in the church-yard, may give costs *pro expensis litis*, and no prohibition shall issue; otherwise, if they give them *pro damnis*. Cro. Jac. 462. Large v. Alton.

Where by
the probi-
bition the
costs are
discharg-
ed.

57. If the sentence be given for the plaintiff in the spiritual court, where they ought to have punished the party, and he appeals to the delegates, and they assess costs for the wrong appeal, if the court of law grants a prohibition, the costs are not discharged; per Hutton; per Richardson e contra. For if the costs are to be executed by the delegates, the prohibition will stop them; if by discharging the appeal with costs, the cause carries the costs back with it to the inferior court, then the prohibition to the inferior court will stop them there, so *quacunque via data* the costs are to be discharged; agreed *per curiam*. Het. 167. Crompton v. Waterford.

Costs in the
spiritual
court.

58. Whether the party prosecuted *ex officio judicis*, & *per instantiam curiæ*, is liable to costs, though a person be assigned by the court to prosecute. Hard. 503. Brown v. Sir Edward Lake.

REFERENCES

R E F E R E N C E S (F 491)
T O
Precedents in Prohibition.

F O R T I T H E S.

To the Spiritual Court on Customs and Prescriptions.

FOR a modus of tithes by a tenant for life, upon a prescription to pay yearly (at such feasts) nine cheefes in lieu of tithe of milk of milch cows, lying upon the premiffes; and that there is a custom within that parish to pay 2d. for every acre of meadow ground in H. 4d. for meadow in L. yearly, for tithes of pay, and a hen for tithe of wood. 1 Bro. 272. Co. Entr. 564. — Godb. 44.

Upon a suggestion of an ancient parol agreement between the predeceffor of D. and the proprietors and terre-tenants of the parish, and others who agreed thereto. 2 Lut. Entr. 1057.

By the lord of a manor upon a prescription to pay 4d. yearly for all tithes upon the demefne lands of that manor. 2 Bro. 183. Co. Entr. 464.

For a lessee upon a prescription to pay 20s. yearly for all tithes of messuages and lands. 1 Bro. 283. 3 Bro. 231.

For a lessee of a sheep-walk, upon a prescription to pay 30s. yearly for tithe of lands and of the wool of the sheep, depasturing and fed in and upon the demefne lands of that manor. Tho. 225. The same precedent 243.

For a tenant in fee upon a prescription to pay 3s yearly at such feasts, to the prebend of the prebendary of M. for the tithe of grain of the lands. 2 Bro. 188.

The like prescription to pay 2s. 10d. to the vicar for all tithe of land and pasture. Bro. Red. 394.

The like to pay 5l. in discharge. Cl. Man. 303, 305. Bro. Vad. 278.

The

References to Precedents in Prohibition.

The like upon a prescription for the rector or farmer to take the first crop of one meadow for the tithes of another. Wi. Entr. 599.

By the proprietor of a park upon a prescription to pay 2s. and a shouder of every third deer killed yearly, to the vicar, for the tithes of an ancient park. Wi. Entr. 575. Hob. 39. Moo. 863. Wi. 596.

Upon a prescription for all tenants and occupiers of meadow to pay the first mowing in discharge of the tithes as well of the first math as of the last. Wi. Entr. 577. Hob. 250. Judgment for the plaintiff.

Upon a custom within the parish for all inhabitants to pay to the rector 4d. yearly, at such feast, for every milch-cow, for the tithes of calves, milk and cheese, &c. Wi. Entr. 528.

Declaration upon a prohibition upon a suit for tithes of milk, &c. upon a suggestion of a modus to pay 2s. for the tithe of every cow. Thes. Br. 196.

Upon a custom within the parish that the inhabitants should pay a halfpenny for every calf under seven fed there; and for every one not fed there 10d. for the tithes of calves, and one calf for the tithes of calves above the number of seven. And the tithes of grain in kind. 1 Bro. 279. Reg. 51.

That the plaintiff was occupier of a farm called S. and that there was such a custom within the parish, that all occupiers of the same farm should pay 40s. yearly to the vicar for all tithes of that farm. Tho. 258. Co. Entr. 457.

Upon a custom that the proprietor or farmer of the manor of B. within the parish of W. should pay 14l. 13s. 4d. yearly to the rector, for all tithes of that manor. Tho. 261.

Upon a custom within the parish that the inhabitants paid 1d. for every calf under seven, and several other modes of tithing. Wi. Entr. 537. Clift Entr. 509.

Upon a custom for every foreigner occupying pasture within the parish, to pay to the vicar yearly at such feast, 10d. for every acre of pasture for all tithe growing thereon. 2 Bro. 194. 6.

The like where divers modus's of tithes are set out. Clif. 590. The like B. R. 400. Thes. Br. 78. Cl. Man. 346.

(P* 492) *For the tithe for the agistment of barren cattle. 2 Bro. 192. b. vide Ro. 393.

Upon a custom by a modus for barren and fat cattle, and for wood for firing, and repairing hedges, and for rakings. Thes. Br. 212. 3 Cro. 702. Noy 15. 1 Rol. Rep. 399. 3 Cro. 702.

Upon a suggestion for tithes of lattermath of clover-grass, upon a suggestion of a custom to another purpose, and a prohibition

References to Precedents in Prohibition.

hibition granted. 2 Lut. Ent. 1071. 2 Bro. 50. 2 Inst. 552.
2 Cro. 42.

On a modus for tithes in London upon the stat. 27 and 37 H.
1. and orders thereupon were made for the archbishop of Can-
terbury and others for the payment of tithe there. 2 Bro. 189.
b. Yelv. 86. Hetl. 98. Hob. 250.

Upon a custom within a parish in London to pay 13d. for
every rent of 6s. 8d. Vid. 238. the like Han. 189.

Upon a custom within a parish that the inhabitants should
pay 1d. for every calf under seven, and for every one
beyond that number 2s. for every pound of wool 3d.
for every lamb under seven an $\frac{1}{2}$. and for every one beyond
1s. 2d. for every colt above seven 1d. for grain in specie,
for barren cattle 1d. as to plow cattle, that they were free;
for every acre of meadow 1d. for a garden or orchard 1d. for
fuel wood 1d. in the name of heath silver, &c. Wi. Entr. 537.
Clift 590.——1 Rol. Abr. 642.

Upon a modus to pay for the tithes of grain and hay 2s. 4dh.
for every wether one $\frac{1}{2}$. for every cow having a calf to the num-
ber of five cows 1d. for six having calves 2s. 6d. for ten having
calves 2s. 8d. and for every cow not having a calf 1d. in lieu of
all tithes of cows, &c. Adjudged ill. 2 Lutw. 1043.

That the inhabitants had paid the tithes of grain in specie,
in discharge of the tithes of rakings, and 1d. in lieu of tithes
of the tithes of furze and trees cut for fuel, and the tithes of
calves in discharge of the tithes of barren cattle, and the tithes
of lands and wood in discharge of the tithes for the herbage of
sheep. Wi. Entr. 571.——3 Cro. 702. Noy 15. Mo. 910.
1 Rol. Rep. 379.——Cro. Eliz. 475, 690, 70. 3 Bulst. 243.
3 Keb. 251, 284.

A suggestion upon a modus of the tithing of wool. 2 Mo.
Entr. 269, 276.——2 Keb. 293. Latch 254. Poph. 197.

The like for the inhabitants to pay the tithes of grain and
hay in specie, and that in consideration thereof they were ac-
quitted of tithes of the after-grass of lands, meadow and pasture.
Wi. Entr. 601. Co. Entr. 469.——Cro. Car. 404. Cro.
Eliz. 660. Mo. 910. Cro. Ja. 42, 116. Yelv. 86. Het. 98.
Hob. 250. 2 Bulst. 238.

The like where inhabitants paid the tithes of grain, hay,
and calves in kind, and were acquitted of the tithes of the
after-grass of arable lands, and of young and barren cattle.
Wi. Entr. 569.

The like for barren cattle. Ro. Entr. 393.

Upon a prescription to give the vicar a buck and a doe for
the tithes of an antient park. Wi. Entr. 596.

Upon a prescription for the occupiers to pay yearly (at
such a feast) to the vicar 1d. for antient headlands of every
yard-land, and for antient headlands of every half yard-land $\frac{1}{2}$.
2 Brown 186.

Upon

References to Precedents in Prohibition.

Upon a prescription, that the rectors had parcel of the woodlands, for all the tithes of wood and underwood growing within that parish. Tho. 238. Wi. Entr. 530. The like for the proprietor of a rectory. Wi. Entr. 530.

Upon a prescription that the rectors had fifteen acres of meadow for all the tithes of hay within the vill. Wi. Entr. 523.

The like for all tithes of hay and milk. Vid. 245. Han. 296. — Godb. 36. Cro. El. 609. Moor 909. Raym. 277. Latch 222. 6 Mod. 621. 2 Salk. 656. See antea in Roll's Abr. 648, 651.

Upon a prescription to pay the rector 6d. for every acre of pasture, in discharge of all tithes, except tithes of calves. Vid. 229.

The like for inhabitants to pay to the rector the tenth fleece of sheep, and to carry the said fleeces to the church, for the use of the rector, for the tithes of wool. Vid. 232. Han. 183.

— Moor 758. Raym. 277.

For a lessee, upon a prescription to pay to the vicar 6s. 8d. yearly (at such a feast) and to allow him the pasture of one beast yearly, for all the tithes of a close of pasture. Vid. 240. Han. 191.

To pay 1d. for every ewe and lamb fold within the parish, and for every sheep fold before shearing-time; for the tithes of sheep, and for sheep kept after shearing time, according to the rate of 4d. for every hundred sheep, and for every skin of a sheep dying an $\frac{1}{2}$. Wi. Entr. 578. — Latch 254. Popham 197. 3 Bulst. 242. Lit. Rep. 31. Moor 909. Godb. 174. 3 Cro. 446.

(^e* 493) *For a modus decimandi by the lord of a manor, upon a prescription to pay 40s. yearly to the proprietor of the rectory, for the tithes of grain and hay arising and growing in the manor. Co. Entr. 464.

For a lessee for life of two mills under one roof, upon several prescriptions (to wit) to pay for each of the mills 3s. 4d. yearly, in discharge of tithes. 3 Brownl. 363. — 2 Inst. 622. Cro. Car. 523, 524.

That the plaintiff was an occupier of a messuage, and such lands called C. and that all the occupiers thereof paid yearly 5s. for the tithes day, and that there is a custom within the parish to pay 12d. for every milch cow for the tithes of milk, calves and cheese, and the statute as to great trees. 3 Brownl. 255. — Moor 911.

Upon a custom within the parish, that the inhabitants paid 5s. to the vicar for the tithes of hay within the vill. Co. Entr. 457.

Upon

References to Precedents in Prohibition.

Upon a custom to pay the tenth part of five fleeces of wool, or more sine visu vel tactu of the residue by the rector. Hob. 107.——Moor 454, 909. Cro. Eliz. 440, 475. Goldsb. 147.

Upon a custom that the inhabitants within the parish paid to the rector the tithes of calves, and of cattle feeding between such feasts, and the tithes of wool arising from sheep dying, or killed between such feasts, and the tithes of honey and wax arising from bees. Reg. 51.——Popham 197. 1 Rol. Abr. 642. Moor 910. 3 Cro. 702.

Of the tithes of pannage of wood,——and of butter and cheese, and butter-milk in winter-time. Reg. 51.

For the tithes of great trees. 2 Brown 193. b. Tho. 224, 235. Wi. Entr. 594. Vid. 228. Han. 180. Ra. Entr. 488, 489, 490. Plow. 469. 2 Inst. 644. Vet. Entr. 84, 171. Ash 357.——Plow. 470. Cro. Eliz. 477.

Where the defendant pretending wood to arise from tithable trees, whereas they were great trees, drew the plaintiff into a suit in the court christian for the same; whereupon a prohibition. 1 Saund. 136. Thes. Bre. 203, 80. Ra. Entr. 495. Ash. 364.

Where the inhabitants paid tithes of grain and hay in specie, and were discharged of tithes for wood burnt in the house, or used for hedges. Wi. Entr. 604.——The like for tithes of silva cædua cut for hedging. 1 Saund. 136. Mo. Intr. 267. 275. Reg. 43. Ash. 365. Co. Entr. 460.

The like for underwood burnt, or used for hedging, or for rakings. Thes. Brev. 212.

Of tithes of lime, whereas by the law of the land they are not due, and the rector libelled upon a custom to pay two bushels of lime for every furnace for tithes. Wi. Entr. 568. 1 Brownl. 147.

For the tithes of bricks by the farmer of the rectory; whereas the inhabitants upon a custom paid 2s. 6d. to the rector, and 6d. to the vicar for every acre of pasture yearly, for all tithes. 1 Brown 290.

By the lord of a manor, parcel of the possession of the late priory of R. upon a composition made by the bishop, to pay 2s. 8d. yearly to the vicar, for the small tithes of the manor. 1 Brown 287.

Upon a contract between the rector and the inhabitants, to pay 40s. yearly, for all tithes, for two years. Wi. Entr. 525.

The like for the lessor, to pay the vicar 2s. 6d. yearly, for all tithes, for the residue of the term. 1 Brown 270.

The like between the lessee and the farmer of a rectory, to pay 4s. per acre for wheat, and 2s. per acre for all other kind of grain, and 1s. per acre for hay yearly, at such a feast, so long as the

References to Precedents in Prohibition.

the lessee and farmer should thus continue. Demurrer thereto. Wi. Entr. 558.

A suggestion to stay a suit, for the tithes of glebe lands, brought by the curate and sequestrator—a prohibition lies, but denied in this case, upon affidavits that the lands were not glebe lands. 2 Lut. Entr. 1062.

A suggestion, because tithes are not due by the law of the land, for a dwelling house out of the city of London. Thef. Brev. 200.

Upon a modus for the tithes of conies. Vid. 226. Han. 178.

Where conies were suggested to be *feræ naturæ*, and no tithes payable for them, Thef. Brev. 195.

Of Lands discharged of Tithes.

Of lands held discharged of tithes at the time of the dissolution. 1 Brown 277. Ra. Entr. 487. Upp. 63.

Where an abbot of the cistercian order held lands in his own hands at the time of the dissolution, a discent thereof to **(P* 494)** D. Mary, that Ph. *and Mary granted to J. who sold to R. who sold to T. from whom it descended to the plaintiff. Co. Entr. 450. Tho. 231.

That a prioress seised of tenements and a rectory, held lands discharged of the payment of tithes, that the college was dissolved by this statute anno primo Ed. 6. who granted the lands to G. from whom it descended to W. who demised to the plaintiff. Co. Entr. 457.

Of tithes granted and confirmed to a prior by noblemen and kings; for which the parson sued in the court christian.—Reg. 72.

Of lands held discharged of tithes by the prior, at the time of the dissolution, and a discent thereof to Q. Mary; that Ph. and Mary granted to T. in tail, who died without issue, and the lands reverted to Q. Eliz. who granted to the plaintiff. 1 Brown 273.

Of lands and tenements, and all cattle levant upon the tenements, and feeding in 1000 acres of moor, held discharged of tithes by the prior, at the time of the dissolution. 2 Brown 197.

Upon a unity of possession that the prior seised of the lands and rectory, held the lands discharged of the payment of tithes; that the priory was dissolved by the statute of 27 H. 8. who

was

References to Precedents in Prohibition.

was seised simul & semel, and granted to the abbess and convent of B. who surrendered to the king, who by the surrender and the statute of 31 H. 8. was again seised of the rectory and tithes simul & semel, and granted the lands to B. which by divers mesne conveyances came to the plaintiff as rector; defendant demurs thereto. Wi. Entr. 609. Hob. 306.—The like of a priorefs. Vid. 233. Han. 184. Thes. Brev. 207.

Of an antient corn mill held discharged of tithes by prescription. Tho. 257. Han. 171.—The like of two antient mills, per legem terræ. Wi. Entr. 518.

That the rector of the church of S. seised of glebe lands in T. held them discharged of tithes by prescription, Wi. Entr. 501.

That king Ed. 6. seised of the forest of S. held the same discharged of the payment of tithes, and granted to the duke of Somerset; from whom it descended to his son, who demised to the plaintiff. Wi. Entr. 607.

That an abbot seised of monastery and tenements held the tenements discharged of tithes at the time of the dissolution. A discent thereof to Q. Eliz. who granted to N. who granted to the use of W. who granted to P. who demised to the plaintiff. Wi. Entr. 615. A demurrer thereto. Vide Hob. 295. Cl. Man. 321.

The master of an hospital seised of the hospital and lands held them discharged of tithes, and anno 36 H. 8. demised the whole hospital and lands to J. for ninety-nine years; a confirmation thereof by the bishop and chapter, which afterwards by several grants, assignments, and mesne conveyances came to the plaintiff, and the farmer of the rectory prosecuted the plaintiff in the court christian for the tithes. Wi. Entr. 532.

That king Ed. 6. was seised by the statute of chauntries, of the free chapel of L. to which the tithes in L. belonged; a discent thereof to Q. Mary, that Ph. and Mary granted to P. who enfeofed M. and from him descended to A. who demised to the plaintiff, that the defendant as rector claimed the tithes. Ro. Entr. 371.

For lands parcel of the priory of St. John of Jerusalem, and adjudged they must pay tithes. Cl. Man. 343.

Upon a suggestion that the king was seised of tithes in right of his crown, and granted them to the plaintiff. Thes. Brev. 186.

Of the tithes of young hinds and deer being *seræ naturæ*; whereof tithes ought not to be paid per legem terræ. Vid. 236. Han. 187.

That a master of a college seised of lands, and the rectory, held the lands discharged of tithes, that the college was dissolved by the statute anno 1 Ed. 6. who granted the lands to E. from whom

References to Precedents in Prohibition.

whom they descended to W. who demised to the plaintiff. Co. Entr. 457.

That a bishop seised of the manor, held the scite and the demesne lands discharged of tithes, that the bishop demised a moiety of the demesne lands to R. who devised to S. who demised to the plaintiff, and the farmer of the rectory sued the plaintiff in the court christian for tithes, and after an appeal died; and the executor sued after his death. 2 Co. 38.

On Institutions and Inductions.

The plaintiff being the vicar of the church of N. of the queen's presentation, the defendant nevertheless pretending a title impleaded the plaintiff in the spiritual court. 1 Brown 276.

(P* 495) *The plaintiff being lawfully instituted and inducted into the vicarage, and the defendant suggesting that the plaintiff had taken another benefice to the value in the act of pluralities, gained the presentation thereof from the Queen, and impleaded the plaintiff in the spiritual court, praying to be admitted thereto. Ro. Entr. 385.

That the plaintiff seised of a manor, to which &c. presented R. and after his death to A. who resigned, and the church being vacant presented W. who was inducted; the defendant pretending a title by the presentation of the Queen, was likewise admitted, and impleaded the plaintiff in the court christian for the tithes.—An appeal thereon to the delegates. Idem 382.

Against the official, who impleaded the plaintiff in the spiritual court, to present a person to the bishop, to a church donative then vacant.—A prohibition thereon. Idem 386.

That a prebendary became vacant for non-payment of a pension, or an annual rent; whereupon the Queen presented the plaintiff, who was installed; nevertheless the defendant pretending a title impleaded the plaintiff in the court christian. Idem 368.

The defendant removed from the church for simony, impleaded the plaintiff (who is lawfully admitted into the same) in the court of arches, by appeal;—a prohibition granted. Ro. Entr. 402.

That a proprietor of a rectory appropriate had the tithes, by reason whereof he found a fit curate to celebrate divine service; and the defendant pretending himself to be rector, impleaded

References to Precedents in Prohibition.

pleaded the plaintiff in the spiritual court for tithes;—a prohibition thereon. Vid. 249.

That the plaintiff obtained a judgment in a quare impedit, and had a writ to the bishop, and his clerk was admitted thereon; and nevertheless another pretending a title sued the plaintiff in the court christian. Reg. 41. Br. 142.—The like after an appeal. Reg. 43.

The plaintiff brought a prohibition for a lay fee, and the defendant caused him to be excommunicated for bringing the prohibition. Reg. 44.—The like Reg. 39, 42.

Of the advowson of a church. Reg. 33, 34, 42. Pas. 4 Ed. 3. 29.

Of the advowson of a grammar school. Reg. 35.

The defendant obtained a presentation by a judgment in a quare impedit, and had a writ to the bishop, who did not admit the clerk; for which the plaintiff prosecuted the bishop in the common pleas, and likewise in the court christian;—wherefore a prohibition. Ra. Entr. 492.

The plaintiff impleaded the defendant by a quare impedit, and the defendant to hinder the suit drew the plaintiff into a suit in the court christian. Ra. Entr. 491. Ash 361, 363. Br. 142.

The like of an advowson of a priory, the convent whereof was of the nomination of one, and the presentation of another. Reg. 46.

The like of an advowson of an hospital; whereupon there was a suit, and the defendant drew the plaintiff into the court christian to disturb the presentation 491.

Of the visitation of an hospital, which consisted all in temporalities, and nothing in spiritualities. Reg. 41.

Concerning the Seats, and repairs of a Church.

By churchwardens of a church, who by the command of the bailiffs had pulled down the seats in the church, and erected new ones; and the defendant libelled against them for the same. 2 Lut. Entr. 1032.

By churchwardens of a church, upon a custom, for the disposal of seats in the church at their will and pleasure.—Clift 596.

For the inhabitants of the parish of St. L. taxed towards the repairs of the chancel of the church, without the consent of the major part of the parishioners. Idem 581, 584.

Upon

References to Precedents in Prohibition.

Upon a custom for an equal taxing of the inhabitants of the parish, according to the number of acres of land, towards the repairs of, and necessary ornaments of the church; and the defendant libelled the plaintiff in the court christian, upon a custom that the inhabitants of one side of the ditch, and the inhabitants of the other side of the ditch are equally taxed within the parish. Ro. Entr. 375.

That the inhabitants within the vill of C. in the parish of W. used to repair the chapel of C. and by reason thereof were discharged from all taxes, for the repairs of the church of W. Vid. 247.

(P* 496) A suggestion upon a suit in the spiritual court, by reason of *tenure, to repair the fences of the church-yard, which they had not repaired. Thef. Brev. 185. Clift 588.

A suggestion relating to a seat in the church, that all ejections belong to the common law, and a prohibition awarded to the archbishop of York.

Upon a suggestion after an appeal, that no person by law ought to be taxed to the repairs of the church of P. and for the division of the church-house, and for payment to the poor prisoners of the king's bench and marshalsea. 2 Lutw. 1019. a prohibition denied.

For one inhabitant in the parish of W. taxed towards the repairs of the parish church of T. by reason of lands. 5 Co. 64. Ash 373.

For the inhabitants of a chapel parochial, having sacramental rites, (except burying the dead) taxed to the repairs of a church. 3 Brownl. 245.

On Suits for defamatory Words.

2 Brown 180. Tho. 246. Wi. Entr. 561. Clift 383. a Lut. 1037, 1039, 1053. Item 544.

The like where the plaintiff alledged the words were spoken in the execution of his office of a justice of the peace, and in his answer in the star-chamber; for which he was fined and imprisoned. Wi. Entr. 617. Ro. Entr. 361.

The like that the defendant was a bastard. Ro. Entr. 365.

The like of special bastardy. Vid. 239. Han. 190.

Upon citing the plaintiff out of the diocese for defamatory words, against the statute of 23 H. 8. whereby the spiritual judge forfeited 10l. with averments. Wi. Entr. 535.

Upon

References to Precedents in Prohibition.

Upon defamation by a testimony upon an inquisition.——

Reg. 42.

The like by an information to the jury in the leet for adultery. 12 Co. 43.

The plaintiff sued in the king's bench against the defendant for forging deeds, and the defendant asserting himself to have been defamed by the suit, impleaded the plaintiff and one of his counsel into the court christian for defamation. Ra. Entr. 486.

That the plaintiff accused the defendant and others for stealing and receiving his goods before justices of peace, and the defendant drew the plaintiff into a suit for defamation. Ra. Entr. 486.

The plaintiff prosecuted the defendant in the king's bench for mayhem, and the defendant sued the plaintiff in the court christian for defamation thereupon. Ra. Entr. 487.

On Suits for Temporal Matters.

The plaintiff sued the defendant in the king's bench for an assault, and carrying away his goods, and the defendant presented the plaintiff in the court christian for certain causes touching the premisses, and which are not testamentary or matrimonial, and for defamation. Ra. Entr. 487.

The like for carrying away the plaintiff's wife, and his goods. Ra. Entr. 487.

The like for trespass. Ra. Entr. 492. Reg. 35, 38, 39. Ash. 364. Ro. Entr. 358.

Co. Entr. 487.——The like for carrying away tithes. Reg. 36. Tho. 236.

For laying violent hands upon a clerk. Ra. Entr. 483.—Reg. 42.

To a suit in the court christian for debts. Ra. Entr. 484, 485. Reg. 36, 37. Vet. Intr. 14.

The like for detainue. Ra. Entr. 485.

The like for debt and detainue. Ra. Entr. 485.

That the plaintiff impleaded the defendant in the common pleas in debt, and the defendant drew the plaintiff another executor into the court christian, *de firma rectoriæ insolut*; the consuance whereof belongs to the common law.

That the plaintiff impleaded the defendant for a debt in the common pleas, and the defendant being a clerk, supposed himself not to be sued before a secular judge, drew the plaintiff into a suit in the court christian to hinder his suit;——whereupon a prohibition. Ra. Entr. 484.

That the plaintiff impleaded a commissary and others upon a *præmunire* for holding pleas of debt; and nevertheless the
Vol. II. M m m defendant

References to Precedents in Prohibition.

defendant proceeded to hinder the plaintiff's suit. Ra. Entr. 485.

The plaintiff as executor impleaded the defendant in the common pleas for a debt; for which the defendant drew the plaintiff, &c. alledging him to be perjured. Ra. Entr. 490.

(*P 497) That the plaintiff impleaded the defendant in the common pleas for lands, and the defendant pretending the plaintiff to have sworn to him that he should hold the lands, sued the plaintiff in the court christian pro læsione fidei. Reg. 43.

That the plaintiff for a just cause took the goods of A. deceased, and the executor drew the plaintiff into the court christian for a trespass. Ra. Entr. 492.

That E. was condemned in the court christian in a certain sum to be paid to M, and afterwards died, and he impleaded the plaintiff husband to E. as her executor, for part of the monies unpaid, and R. impleaded M. and others (*de præmissis*) in the king's bench. Ra. Entr. 490.

That the defendant, to defeat a judgment in assise against him, sued in the court christian to prove his son born before the marriage to be legitimate, and not a bastard. Da. 52.

The like in a suit there for legitimacy, pending a suit in the king's court, and before a plea. Da. 52.

For the king's bailiff impleaded by an abbot in the court christian for rent demanded of the tenants. Reg. 38.

Upon a suit in the court christian by a prebendary against the rector of a church, for an annuity by prescription. Ra. Entr. 483. ——— The like by a prior against an abbot. Ra. Entr.

483. Reg. 38. for chattels and debt, which are not testamentary or matrimonial. Reg. 34.

Where a judge spiritual proceeded after a prohibition. Ra. Entr. 483.

For a lay fee. Reg. 34, 35. Vid. 231.

For a mortuary. Ra. Entr. 484. Lut. 1066.

For an annuity. Ra. Entr. 483.

For the bounds and limits of parishes. Wi. Entr. 527. Tho. 239. 2 Mo. Intr. 280.

That pleas concerning incroachments in the church-yard ought to be determined in the king's courts. Clift 588.

That the plaintiff was impleaded before the commissioners as for causes ecclesiastical, whereas it was concerning trespasses and assaults, and costs thereupon taxed; ——— whereupon a prohibition. Ro. Entr. 380.

The plaintiff prosecuted the defendant in common pleas for a trespass, and the defendant sued the plaintiff in the court christian to excommunication, and a prohibition to revoke the sentence. Ra. Rntr. 966. Wi. Entr. 535. Han. 181.

For an assault. Vid. 229, 261. Han. 180.

To

References to Precedents in Prohibition.

To stay Waste.

For a patron, as the rector, and others not to commit waste in the glebe lands. Tho. 246.

On Suits to prove Wills.

For an executor, where the testator devised lands in tail, and the executor proved the will in the common form, and the donee prosecuted the plaintiff in the court christian to compel him to prove the will per testes. Ra. Entr. 486.

For citing out of the Diocese.

For citing the plaintiff as executor out of the diocese for a legacy unpaid to the testator's daughter, who died pending the suit, and the husband prosecuted the suit as administrator to his wife; and whereupon the plaintiff exhibited an information against the spiritual judge for 10l. forfeited by the statute. Co. Entr. 448.

For citing the plaintiff out of the diocese for defamatory words against the statute of 23 of H. 8. whereby the spiritual judge forfeits 10l. with several averments. W1. Entr. 535.

For refusing a copy of the Libel.

That the plaintiff impleaded R. in the common pleas for a debt upon the statute of usury, and R. drew him into a suit in the court christian, where the judge refused to deliver him a copy of the libel. Ra. Entr. 491.

For refusal of a Plea.

For an executor on a suit for a legacy unpaid, who pleaded a retainer for the debt, and no assets ultra, which plea was not allowed. Vid. 242. Han. 293.

The like alledging, that at the time of the citation he had fully administered; a plea thereto of assets, and an issue. Vid. 156.

References to Precedents in Prohibition.

(P* 498)

*Relating to Costs.

That the plaintiff impleaded the defendant before the bishop's official, and condemned to defamation, an appeal to the arches before costs taxed; and then a general pardon issued; a prohibition to the arches not to proceed to the taxation of costs. Ro. Entr. 360, 399,

Where the commissioners for ecclesiastical causes ex officio objected articles against the defendant for finding a curate in a chapel within the hamlet; and adjudged that the plaintiff should pay costs to the defendant. A plea that the commissioners objected articles to the defendant at the instance of the plaintiff, and in default of sufficient matter, adjudged that the plaintiff should pay to the defendant costs, and a traverse that the commissioners objected the articles ex officio; a demurrer thereto. Co. Entr. 465.

Where the plaintiff was impleaded before the official of the bishop, for the subtraction of tithes, and costs taxed to 7l. 10s. to the defendant, an appeal to the arches, and afterwards a prohibition from the exchequer; whereupon is a declaration plea and a consultation: and although the defendant expended only 10l. in the court christian, and 70l. in the exchequer, yet the official taxed the costs to 80l. The plaintiff appealed to the delegates, where the defendant took his oath of the monies expended in the several courts; and a prohibition awarded as to the 7l. for the costs in the exchequer. Co. Entr. 449.

To the Spiritual Court concerning Marriages.

A prohibition to stay a suit in the ecclesiastical court, upon a man's marriage of the daughter of the sister of his first wife, granted in order that the legality of the marriage might come in debate, and the statute of 32 of H. 8. of marriages recited.— Lev. Entr. 129. 2 Lut. 1075. — 2 Lev. Rep. 364.

Upon a contract of marriage. Ra. Entr. 484.

A declaration in prohibition, for that the rector claimed a sum of money by the custom of London, for every woman married out of the parish. Thes. Brev. 250.

A suggestion for a prohibition to prohibit a suit for a marriage fee, supposed to be due by custom, that if any woman an inhabitant within the parish married any man there, or elsewhere with a licence, that the man shall pay 5s. and a prohibition granted. 2 Lut. Entr. 1059.

On

References to Precedents in Prohibition.

On a Suit concerning Administrations.

For an administrator who first exhibited an inventory in the court christian, and upon process in the king's bench to a trial where the plaintiff pleaded plene administravit, and had a nonsuit at the trial, that notwithstanding the defendant impleaded the plaintiff in the spiritual court to exhibit an inventory. Ro. Entr. 391.

The like where an administrator is sued for an account after he had accounted in the spiritual court, and was discharged.—Thes. Bre. 182.

Upon a suit to have a distribution of the intestate's estate.—Tho. 223, 248, 252. Vid. 253.

Upon the statute of 32 of H. 8. for granting administration to the next of blood. Bro. Red. 396. Thes. Bre. 176.

Upon a suit against an administrator de bonis non of the goods of the testator. Vid. 253.

For an executor of a legacy unpaid, who pleaded a retainer for a debt, and that he had not assets ultra, and an issue. Vid. 256.

Against an administrator, who sued the plaintiff in the court christian for goods given to him by the intestate in his life-time. Vid. 259.

A suggestion, &c. on a suit to repeal letters of administration to the aunt, and to grant them to the godmother of the intestate; and the rule for the prohibition discharged. 2 Lutt. 1055.

For Executors.

For the executor of A. where the defendant falsely libelled that A. was the executor of another. Vid. 258.

For an executor upon the custom of London for orphans, where the daughter of the testator was married, and had her portion in the life of the father, and after his death sued the plaintiff in the court christian for the same. Vid. 237. Han. 188.

*To the Court of Admiralty.

(P* 499)

For a contract made ashore. 1 Brown 282. Ro. Entr. 345. Vid. 223. Hen. 174 Ra. Entr. 24.

For money received to the use of the admiralty within the body of a county. Vid. 224.

For

References to Precedents in Prohibition.

For the property of a ship. Bro. Red. 404.

The like for a breach of covenants. Tho 254.

The like for the freight of a ship; whereupon a recognizance was there taken to appear and answer. Tho. 250. Thes. Brev. 174.

The like for things done and committed within the body of a county. Vid. 221, the like Han. 176.

For scandalous words. Up. 74.

For an executor for goods taken. Ra. Entr. 24.

To the Court of Requests.

On a suit there upon a judgment in the common pleas. Tho. 242.

To that court by an attorney of the common pleas. Off. Bre. 187.

For a merchant impleaded for monies supposed to be due to the defendant, for merchandizes bought by the plaintiff's factor. Ro. Entr. 357. 1 Brownl. 144.

For an administrator impleaded for the arrears of an annual rent due by the intestate. Idem 354.

Upon a suit for the non-performance of a promise. Tho. 29 Ro. Entr. 377. Hern 543.

Upon the statute of usury. Ro. Entr. 355.

For an heir impleaded for a debt of his father, upon a contract without specialty. 1 Brownl. 143.

To inferior Courts.

A suggestion by a sheriff's bailiff, for a prohibition to the duchy of Lancaster, Savoy; being prosecuted there by the bailiff of the duchy for entering and arresting in his liberty. Lev. Entr. 133.

A suggestion for a prohibition to the mayor's court of London, to prohibit a suit commenced in one of the counters, that the cause of action arose out of their jurisdiction. But denied, because a *capias utlagatum* was produced against the plaintiff. 1 Lut. 1023.

For a trespass *vi & armis* prosecuted in an inferior court.— The like after judgment. Ibid.

For a debt above 40s. prosecuted in the county court. *Sine brevi*. Reg. 145. bis.

Upon a covenant above 40s. Reg. 146. bis,

Where

References to Precedents in Prohibition.

Where several plaints were levied for one debt upon the same contract. Reg. 145, 146.

For detaining charters concerning a freehold. Reg. 159. F. N. B. 139.

To the court of the stanneries upon a judgment there in debt, where neither part was a stannator. Co. Entr. 467.—Noy 86.

For a tallow chandler against the proctors in Cambridge, upon a suit before the vice-chancellor of goods forfeited for the breach of an order against their law for selling candles at such a price. 3 Brownl. 353.

Against a commissary who held plea. Ra. Entr. 465.

A declaration in the county of York, upon a custom in a vill in the county of Lancaster. Co. Entr. 457.—The like in the county of Durham. 3 Brownl. 231.

A prohibition awarded of lands in the county of Lancaster. Poph. 156.

Pleas thereto.

The defendant maintaining his libel that he is the rector, and by reason thereof the tithes thereof belong to him, traverses the seisin of the proprietor of the rectory.—A special demurrer. Vid. 352.

That the plaintiff does not proceed in his action, for consultation, that the plaintiff had assets at the time of the citation. Vid. 258.

That the plaintiff is not prosecuting his suit, plea for a consultation, that the plaintiff used to pay the tithes in kind, and a traverse of the agreement alledged. 2 Lut. 1049.

That he is not prosecuting his suit, and a demurrer to the declaration. Idem 1076.

That he is not prosecuting his suit after the king's prohibition, and an issue thereon, and a demurrer to the prohibition. 1 Saund. 140.—The like per legem, and a defect de lege, 2 Instr. 664.

That he doth not prosecute his suit in the court christian after a prohibition, &c. And as to the several *customs for (P* 500) the tithes of cows, milk, calves and colts, judgment by default; and as to all the other tithes demanded by the libel, a plea that the tithes were paid in kind, and a traverse of the several customs, and issue thereon. Wi. Entr. 588.

The defendant pleads that the tithes are payable in their proper kinds, and a traverse of the prescriptions. Thes. Brev. 197. The like Cl. Man. 315. and an issue upon the traverse.

As

References to Precedents in Prohibition.

As to the prescription to pay 2s. 6d. to the rector for every acre of pasture; a plea that the occupiers had paid tithes in kind, or compounded for the same, and a traverse of the prescription, and as to the custom to pay 6d. yearly to the vicar, the like plea, and a traverse of the custom, replication maintaining the count, and a traverse of the custom to pay the tithes of bricks in specie, a special demurrer. 1 Bro. 293.

That the tithes were paid in kind, or compounded. 2 Mo. Intr. 283. and traverses the modus. Idem 285.

As to the prescription to pay 4d. to the rector for all the tithes upon demesne lands; a plea that the occupiers paid tithes in kind, and a traverse of the prescription; an issue upon the traverse. 2 Brown 185.

That the defendant was farmer of the tithes within the prebend of M. to whom all tithes whatsoever ought to be paid in kind; and because the plaintiff did not pay, the defendant drew him into a suit,—and a traverse of the prescription.—an issue upon the traverse. Idem 189.

Protesting, &c. for plea, that the defendants were proprietors of the tithes of grain and hay within the parish, and used to take the same in kind, and for non-payment of the tithes of hay they brought their suit in the court christian, and a traverse of the custom. Idem 187. b.

Protesting that within the manor there is not any such custom, &c. for plea, that the occupiers of the tenements of P. paid their tithes in kind, and a traverse that the tenements of P. were within the manor or parcel thereof, Tho. 26.

That the inhabitants of the parish paid their tithes in kind, and a traverse of the custom alledged. Idem 260

That all persons keeping sheep within the vill, paid their tithes of sheep in kind, and a traverse of the custom alledged. —The like plea for tithes of wool, sheared and received from the sheep within the vill after lady-day, and a traverse of the custom. Wi. Entr. 580.

That the trees and boughs were not fit for wood, or for any other use but to burn, and a traverse that they were above twenty years growth. 2 Brown 194. b.

Protesting that there is not any such custom; for plea, that the plaintiff cut and lopped several loads of fallows, hawthorns and willows, and sold them; a replication, that he cut the wood for fuel, and for making and repairing hedges, and a traverse that he sold them, and an issue thereon. Wi. Entr. 606.

As to the custom to pay 1d. for every cow, and for every calf under seven 12d. and above 2s. for the tithes of milk and calves; a plea that the occupiers paid their tithes in kind, and a traverse of the custom. As to the custom to pay such sums for tithes of wool and lambs, a plea that the occupiers paid their

References to Precedents in Prohibition.

their tithes in kind, and a traverse of the custom. The like plea as to the several other customs for a *modus decimandi* for dogs, colts, geese, &c. with several traverses, and several issues taken upon the traverses. *Idem* 543.

That the occupiers paid their tithes in kind, and a traverse that the prior held discharged of tithes at the time of the dissolution; and issue thereon. *Idem* 567.

That the prioress paid no tithes for the lands, for that she had the rectory, and a traverse that she held the lands otherwise, or in any other manner; a demurrer thereto. *Vid.* 235. The like in *Han.* 186. 2 *Co.* 48.

That the defendant is rector of the church of J. to whom all the tithes in the parish belong, and a traverse that the tithes of L. belonged to the free chapel of L. an issue therein. *Ro.* 374.

The defendant pleads that the place is within another parish; a replication and issue. *Thef. Bre.* 199.

That the tenements are within the parish of K. a replication that the tenements lie out of any parish, and a traverse that they are in the parish of K. and an issue thereon. *Tho.* 260.

The defendant maintains his libel, and traverses the prescription to pay the tithes of the first crop in discharge of tithes, as well of the first as of the latter crop, and an issue. *Wi. Entr.* 578. Judgment for the plaintiff. *Vid.* *Hob.* 250.

Protesting that there was no such prescription; for plea, that (P 301) the park was disparked, and the deer killed therein, and the land of the park was converted into arable and pasture; a demurrer thereto. *Wi. Entr.* 577. *Hob.* 39. *Mo.* 663.

That the occupiers of the park as well before as after the disparking thereof, paid tithes in kind of lands mowed and cut therein; and a traverse of the prescription to pay two bucks yearly for tithes. *Wi. Entr.* 598.

That the trees whereof the tithes were demanded by the defendant were hase, willows, thorns, maple, birch, *silvæ, cæduæ*, and a traverse that he impleaded the plaintiff for great trees, and issue thereon. *Idem* 595.

A plea that the plaintiff re-pastured barren cattle bought by him for sale, and to profit thereby; for which the plaintiff refused to pay tithes; a replication maintaining the declaration, and a traverse that he fed cattle to make them fat for sale; and issue thereon. *Idem* 395.

To a declaration by a prebendary, and by protestation, &c. — For plea, that the defendant was prebend of the prebend aforesaid, and the plaintiff pretending it to be vacant in the absence of the defendant (not lawfully cited) procured himself

References to Precedents in Prohibition.

to be installed; whereupon the defendant appealed, and a traverse that the pension was demanded; an issue thereon. Ro. 396.

That the defendant and the commissary after several writs of prohibition directed to them, did not proceed until the defendant obtained a writ of consultation out of the Court of Chancery. Ra. Entr. 489. Vet. Intr. 171.

Bar by the defendant that he followed his suit for monies taxed by the bishop, for want of repairing the houses of the rectory, chancel, &c. until the prohibition, and then, not till after a consultation, and that he is not following his suit, for the detaining, &c. The commissary pleads that the prohibition never was delivered to him. Ra. Entr. 485.

That the spiritual judge allowed the plaintiff's plea and proofs, and a traverse that he refused them; a demurrer thereto. 2 Co. 42.

That the trees whereof the tithes of the boughs were demanded were hornebeam pollingers; and before lopped and topped; a demurrer thereto, and judgment for the defendant. Ra. Entr. 490. Plow. 459. Ash. 357.

As to the prescription to pay 15d. for the tithes of hay; a plea that the occupiers paid tithes of hay in kind and traverse of the prescription as to the custom to pay for every cow 11d. in discharge of the tithes of calves, milk, butter and cheese in specie, and a traverse of the custom as to the tithes of wood and trees; a plea that they were the tithes of small trees within twenty years growth; and a traverse that they were great trees within twenty years growth. 3 Brownl. 359.

That the occupiers of the farm paid tithes in kind, and a traverse of the prescription to pay 20s. for all tithes. 3 Brownl. 234.

That the inhabitants of the vill paid tithes of hay in kind, and a traverse of the custom alledged. Co. Entr. 458.

As to one mill, a plea that tithes were paid in kind, and a traverse of the prescription to pay yearly for the same mill 3s. 4d. and the like for another mill under the same roof. 3 Brownl. 265.

That the abbot did not hold the lands discharged at the time of the dissolution. Upp. 63.

The defendant makes to himself a title to the rectory, and traverses that the lands were discharged from the payment of tithes by union, at the time of the dissolution of the priory. 11 Co. 9.

As to part, the defendant pleads that the plaintiff had other lands than those which were the abbot's at the time of the dissolution; and as to another part, that the lands were purchased
after

References to Precedents in Prohibition.

after the council of Lateran; a replication that they were purchased before. Co. Entr. 452.

That the prioress paid not tithes for the lands, because she had the rectory, and a traverse that she held the lands discharged from tithes, *ali ter vel alio modo*; a demurrer thereto. Co. Entr. 455.

A plea *per legem*, that he is not prosecuting in the court christian after a prohibition, and a pone thereupon for prosecuting after a tender of wager of law, and before a perfect legem. Reg. Judic. 38.

*Judgments in a Prohibition.

(*P. 502)

A special verdict therein. Co. Entr. 453.

Judgment for the plaintiff upon a verdict. Co. Entr. 439.

³ Brownl. 296. Jud. 99.

For the plaintiff concerning taxes for the repairs of a church. Jud. 99.

For the plaintiff as to part, and for the defendant as to the residue concerning tithes. Jud. 101.

Judgment for the defendant upon a demurrer. Co. Entr. 457. Jud. 105.

The like with a *nolle prosequi* upon an issue. Judg. 103.

Upon a non pros at the assizes. Jud. 95. Ash. 376. Ro. 352. 2 Mo. Intr. 286. Ro. 352. 2 Mo. Intr. 286. 2 T. Jud. 170.

A non pros entered upon the roll by itself, and a consultation awarded. Herne 541.

Judgment upon a demurrer. 1 Saund. 140. Vid. 261. 2 Mo. Intr. 286. 2 T. Jud. 171, 172.

Judgment for the plaintiff as to part upon a verdict, and for the defendant as to the residue for tithes. Vid. 261. 2 Mo. Intr. 286. 1 T. Jud. 172, 173.

A verdict for the defendant, and a curia advisare vult as to tithes of the agistment of barren cattle, and a consultation awarded for that the suggestion is insufficient, and judgment for the defendant as to the residue of the tithes. 2 T. Jud. 170.

Consultation thereupon.

Consultation for part of the tithes upon a verdict at the assizes. Vid. 261. Thes. Bre. 80. Off. Bre. 185.

Con-

References to Precedents in Prohibition.

Consultation of the tithes of Underwood upon a prohibition of the tithe of green trees. Off. Br. 185. Vid. 1 San. 142.

Consultation granted for part, with costs, for that the plaintiff did not prove his suggestion within six months. Thef. Br. 80. Mo. Intr. 148. and damages assessed. 2 T. Jud. 174. 1 Mo. Intr. 148. 2 Mo. Intr. 287.

Consultation for default of due proof of the suggestion. 1 Mo. Intr. 148. Ash. 376.

Consultation, for that the suggestion is insufficient. Off. Br. 186. Thef. Br. 71, 82. Mo. Intr. 146, &c.

Consultation granted, for that the plaintiff was non-proffed at the nisi prius. Ro. 352.

Consultation to the Court of Admiralty; whereas the suggestion of the prohibition was of a bond made on land. Id. 353.

Consultation upon a prohibition in debt. Off. Br. 187.

Defendant maintained his plea, and traverses, that every occupier of land was used to be taxed according to the number of acres of land by him occupied. Issue thereupon. Idem. 398.

Consultation granted upon a motion in arrest of judgment after a verdict for the plaintiff. 2 Lutt. 1053.

The like where an administrator is sued on an action depending, of which he was discharged in the spiritual court. Thef. Br. 182.

Consultation for that the party traverses the prescription alleged in the prohibition, and the other would not answer thereto. Thef. Br. 81, 82.

Consultation where the elected church-wardens refused to receive the sacrament. Clif. 583.

Consultation awarded as to subtracting of tithes, notwithstanding the verdict. 2 T. Judg. 174.

Consultation, for that the witnesses that proved the payment of tithes, did not prove payment thereof to the vicar. Ash. 376.

For the repairs of a church, where the suggestion for the prohibition was that it was a lay fee. 5 Co. 65.

For proceedings in causes of defamation after several inhibitions and appeals. Reg. 29, 56.

For subtracting tithes in the time of the vacancy of a church. Reg. 51, 48, 46, 49, 45.

For usury. Reg. 49.

For a clerk promoted by the Pope to a benefice, and expelled therefrom; who thereupon appealed to the court of Canterbury, and the plaintiff brought an indicavit upon a suggestion of a title to the advowson. Reg. 272.

A con-

References to Precedents in Prohibition.

A consultation upon a prohibition to shew cause why the queen's vicar should not be invested into the actual possession of the vicarage. Thef. Bre. 82.

The like after judgment upon a demurrer. Ibid.

A consultation for the tithes of silva cædua, upon a prohibition of the tithes of great trees. Off. Bre. 185. 1 Saund. 142.

For a clerk presented, not being admitted after judgment (P 503) in the common pleas for the patron in a quare impedit. Reg. 55.

For tithes and a mortuary, unde spoliatio brought in the spiritual court, and an indicavit, suggesting a title to the advowson. Reg. 45. The like of tithes. Reg. 47, 49. F. N. B. 51.

Of tithes where the suggestion for a prohibition was, that the suit was for chattels, and not for matters testamentary or matrimonial. Reg. 46, 49.

For a parson hindered in carrying away his tithes upon the like suggestion. Reg. 47, 48.

The like directed as to part of the suit for the tithes of wool upon the like suggestion. Reg. 47, 48.

Of divers tithes against several parsonages upon the like suggestion. Reg. 48.

For subtracting of tithes in the time of the vacancy of the church. Reg. 51.

For an abbot upon a suit for spoliation of an annual pension payable to him by the parson of a church by prescription, upon the like suggestion. Reg. 47, 53. F. N. B. 51.

The like for the master of an hospital. Reg. 47.

For the default of the repairs of a rectory against the executor of the last incumbent, upon the like suggestion. Reg. 48.

The like for monies bequeathed towards the repairs of a church, and for tithes. Reg. 48.

For goods of a church subtracted by an executor, contrary to the will. Reg. 51, 57.

For detaining the possessions of a chauntry. Reg. 55, 56.

Upon the confirmation of a sentence for the legatee, where the suggestion was concerning chattels and things not matrimonial, or testamentary. Reg. 45.

For monies promised upon the marriage of a daughter upon the like suggestion. Reg. 46.

Upon the correction of a chaplain for keeping a concubine, where the suggestion was, that it was a free chapel, and exempt from the jurisdiction of the archbishop. Reg. 45.

For a clerk to be removed, because inhabilis & criminofus. Reg. 53.

For laying violent hands upon a clerk. Reg. 49, 51, 53, 57.

For monies promised for the redemption of penance. Reg. 53.

Against a prior for neglecting divine service in the chapel, contrary to the ordinances. Reg. 51.

For

References to Precedents in Prohibition.

For subtracting oblations, and not receiving the Lord's supper. Reg. 50.

For annulling an ordinance made between a prioress and a parson of a church, concerning an annual pension out of a rectory. Reg. 50.

For brothers of the order of minors, who had the burials and charitable gifts, and to hear confessions. Reg. 52.

For the church wardens of a church, for subtracting of bread yearly, payable out of lands. Reg. 50.

For a mortuary. Reg. 48. — For usury. Reg. 49.

For monies bequeathed. Reg. 53, 58. — For an husband to have restitution of his wife carried away. Reg. 53.

For defamation. Reg. 49, 50, 53.

For proceeding in a cause of defamation, and of a submission thereon, after several inhibitions and appeals. Reg. 54.

Of monies assessed for costs of suit after an appeal. Reg. 50, 57.

Of costs assessed upon an absolution in a cause of defamation. Reg. 53.

Where the defendant after several prohibitions obtained, and consultations brought, appealed to the court of Canterbury, and obtained another prohibition to the same court. Reg. 56.

A consultation granted; for that the matter of the prohibition is insufficient. 2 Brownl. 253.

A consultarion granted for part, with costs, because the plaintiff did not prove his suggestion within six months. Judg. 97. Ash. 376.

A consultation granted; for that the proofs of the payment of tithes did not prove the payment to the vicar. Judg. 99. Ash. 376.

A Scire facias quare consultatio non concedatur. Plow. 472.

TABLE

sup-

nd a
rec-

and
read

49.
For
eg.

ion

eg.

on.

nd
nd

oi-

ne
g.

nt
9.

2.

g.

Reference to Proceedings in Public Court

For the purpose of making reference to the proceedings in public court, the following is a list of the cases in which the same have been made.

The first case in which the proceedings in public court were made was in the case of *People v. [illegible]*, in which the court was divided 4 to 3 in favor of the defendant.

The second case in which the proceedings in public court were made was in the case of *People v. [illegible]*, in which the court was divided 4 to 3 in favor of the defendant.

The third case in which the proceedings in public court were made was in the case of *People v. [illegible]*, in which the court was divided 4 to 3 in favor of the defendant.

The fourth case in which the proceedings in public court were made was in the case of *People v. [illegible]*, in which the court was divided 4 to 3 in favor of the defendant.

The fifth case in which the proceedings in public court were made was in the case of *People v. [illegible]*, in which the court was divided 4 to 3 in favor of the defendant.

The sixth case in which the proceedings in public court were made was in the case of *People v. [illegible]*, in which the court was divided 4 to 3 in favor of the defendant.

The seventh case in which the proceedings in public court were made was in the case of *People v. [illegible]*, in which the court was divided 4 to 3 in favor of the defendant.

The eighth case in which the proceedings in public court were made was in the case of *People v. [illegible]*, in which the court was divided 4 to 3 in favor of the defendant.

The ninth case in which the proceedings in public court were made was in the case of *People v. [illegible]*, in which the court was divided 4 to 3 in favor of the defendant.

The tenth case in which the proceedings in public court were made was in the case of *People v. [illegible]*, in which the court was divided 4 to 3 in favor of the defendant.

The eleventh case in which the proceedings in public court were made was in the case of *People v. [illegible]*, in which the court was divided 4 to 3 in favor of the defendant.

The twelfth case in which the proceedings in public court were made was in the case of *People v. [illegible]*, in which the court was divided 4 to 3 in favor of the defendant.

The thirteenth case in which the proceedings in public court were made was in the case of *People v. [illegible]*, in which the court was divided 4 to 3 in favor of the defendant.

The fourteenth case in which the proceedings in public court were made was in the case of *People v. [illegible]*, in which the court was divided 4 to 3 in favor of the defendant.

The fifteenth case in which the proceedings in public court were made was in the case of *People v. [illegible]*, in which the court was divided 4 to 3 in favor of the defendant.

A
T A B L E
OF THE
PRINCIPAL MATTERS

Contained in this VOLUME.

Acceptance.

WHERE the Acceptance of a surrender had not dispensed with the Covenant. *Page 121. pl. 10.*—Where Acceptance of money from the assignor does not destroy the action against the lessor. *120. pl. 2.*

Accord.

Where a good plea in Covenant, and where not. *142. pl. 7, 8, 11. pl. 6, 9. 145. pl. 48.*

Account.

What was held an ill plea to an action of debt for the arrears of an account. *336. pl. 17.*

Action.

How to be brought, where part of a debt is released. *335. pl. 2.*—Where no plea in Covenant for repairs, the action being once attached. *147. pl. 62.*

VOL. II.

Acts of God.

As to the performance of Covenants. *Page 118*

Acts of the Party.

As to the performance of Covenants. *118, 119.*

Administrators and Administration.

Administration was not grantable by Bishops originally, but by the King. *396.*—By *21 H. 8. c. 5.* to be granted to the next of kin.—*22 & 23 Car. 2.* how intestates estates are to be divided. *397.*—*1 Jac. 2. c. 17.* Administrators not to be cited to render an account but by an inventory, unless a person in behalf of a minor or creditor, nor be compellable to account.—As such to an executor, cannot be executor to the first testator. *396.*—May be sued in the spiritual court to account, but not for a distribution. *403. pl. 8.*—A subsequent

A

A TABLE of the Principal Matters

sequest Administrator may sue the former, being repealed, for an account. *P. 403. pl. 8.*

Admiralty Court.

Where Prohibitions lie to the court of Admiralty, and where not. *469. 470. 471.*—On goods taken by pirates. *469. pl. 1, 2.*—The original cause arising upon the sea, matters upon the land incident, are triable there. *Ibid. pl. 1.*—Not to try upon a Charter-party. *Ibid. pl. 3.*—Must shew the ship to be *super altum mare*. *469. pl. 4. 470. pl. 13.* Therefore ill if in *corpore comitatus*. *470. pl. 5.*—Whether to be shewn by suggestion or plea. *Ibid. pl. 19. 472. pl. 4.* To be granted upon a claim of property and refusal of plea. *472. pl. 6.*—The power of the master to hypothecate a ship. *470. pl. 7.*—May fine and imprison, but not give damages. *Ibid. pl. 8.*—Cannot proceed against a rescuer, but may punish contempts. *Ibid. pl. 9.*—Cannot proceed for felony. *Ibid. pl. 10.*—Cannot take a recognizance but by way of stipulation. *Ibid. pl. 11, 12.*—May proceed against executors. *Ibid.* Cannot proceed where the matter is properly triable at law. *Ibid. pl. 13.*—Must give sentence according to the common law, on a matter incidental, triable at law. *Ibid. pl. 14.*—Whether they have cognizance *infra fluxum & refluxum maris*. *Ibid. pl. 16.*—To be granted where the right comes in question. *Ibid. pl. 17.* Upon an agreement if made on

land, otherwise where 'tis only inducement. *P. 471. pl. 20.* Not to be granted on a suit there for mariner's wages. *471.* Prohibition not to be granted after sentence there, but where the matter was wholly triable at law. *472. pl. 5.*

Amendments.

What have been allowed to be amended, and what not.—*[364 b.]*—Where the cursor may amend his original. *156. pl. 9.*

Annuity.

Where the party has his election to sue out a writ of Annuity, or to proceed in the spiritual court. *437. pl. 8.*—*Vide* pleas in debt. *235. pl. 16.*

Appeal.

By an Appeal the sentence in the spiritual court is suspended. *394.*

Archbishop.

The Archbishop hath concurrent ordinary jurisdiction in all the dioceses in his province. *459. pl. 13. 461. pl. 8.*—Where the acts of the Archbishop *sede vacante* are not void, but only voidable. *461. pl. 8.*

Archdeacon.

The Archdeacon's jurisdiction must be pleaded, because his title is by prescription. *460. pl. 20. 462. pl. 10.*

Affets.

Of Affets. *282.*—What is so, and what not. *283. pl. 15. 357. pl. 3.* Assignee,

Contained in this V O L U M E.

Affignee.

Where the Affignee is not chargeable after he hath parted with his interest. *P. 145. pl. 50.*—Of actions of covenant to be brought by and against Affignees. 106, 107, 108, 109, 111, 116.—Where it lies by and against Affignees in debt.—*Vide D. bt.*

Affignment.

Where ill pleaded without notice. 143. *pl. 34.* 145. *pl. 50.* 147. *pl. 61.*

Affurance.

What not a good plea to a bond to make a further Affurance. 336. *pl. 19.*—Of Replications in that action. *Vide Replication.*

Attainder.

Where held no plea. 335. *pl. 7.*

Attornment.

Where a bargain and sale pleaded ill without Attornment. 147. *pl. 64.*

Averments.

That pleas ought to have proper Averments. 305

Awards.

Of Awards. 259, 263.—What may be submitted, and of the submission itself. 259, 260.—Of the parties to the submission. 260.—Of the Arbitrators. *ibid.*—Of the umpire. 262.—Of the award itself. 263.—That an award must

be according to the submission, as to the matters submitted. *ibid.*—That it ought to be certain. 264.—That it ought to be final. 265.—That the matter awarded to be done, ought to be beneficial to the parties submitting. *ibid.*—That the matter awarded ought to be lawful, reasonable and possible. *ibid.*—Exceptions to Awards. 266.—Of the performance of Awards. *ibid.*—Cases in the court of equity concerning Awards 268

Bargain and Sale. *Vide Pleadings.*

Where a good plea without entry. 144. *pl. 42.* 147. *pl. 63.*—Where naught without Attornment. 147. *pl. 64.*

Bonds and Bills obligatory.

When void, and when not. 251, 252

Breach of Covenant.

Where many breaches may be assigned, and where not. 151. *pl. 7.*

What not a good breach of Covenant that he was seised, &c. 145. *pl. 46.*

Performance of the letter, and not of the intent, makes a breach. 122. *pl. 1.*

As upon a Covenant to leave all the timber, &c. and he cuts it down. 122. *pl. 2.*

So upon a Covenant in being of ability to grant, and the party is an infant. *ibid. pl. 3.*

So if a man covenants to assure, &c. upon request, and he grants

A TABLE of the Principal Matters

- grants to a stranger before request. *P. 122. pl. 5*
- Lessee occupying lands, excepted in his lease, is not a breach *ibid. pl. 6*
- Where the entry and ouster by a stranger differs from the entry of a stranger, as a trespasser, so as to make the former a breach of Covenant in the lessor. *125. pl. 21*
- Where the breach was not well assigned in non-payment of rent. *ibid. pl. 23*
- Where it was held that the entry is not a suspension of the Covenant, the action being once attached. *ibid. pl. 24*
- Where a title in the defendant's entry as lessor, need not be set forth by the plaintiff; *aliter* if a stranger. *125. pl. 25*
- Whether a Covenant is broken by granting the manor of Dale, in which he had no right. *125. pl. 26*
- When the Covenantor may bring the action, and need not stay till the end of the term. *ibid. pl. 27*
- What was a breach of Covenant in suing out an execution upon a statute, on a Covenant to deliver it up to be cancelled. *ibid. pl. 28*
- Where a Covenant is broken by not making satisfaction for breaking two mill-stones, tho' two indifferent persons did not adjudge what he should pay, as the Covenant was. *ibid. pl. 29*
- The like point on payment of money. *126. pl. 30*
- Where the Covenantor is to do one thing or another, and is deprived of doing one, must do the other. *pl. 31*
- Where a man's disabling himself from performing, amounts to a breach *Page 132. pl. 6, 7*
- Where it will not lie upon the counterpart of the deed. *pl. 8*
- What is a breach of Covenant upon a grant of trees. *pl. 9*
- A suit in Chancery no breach upon a Covenant to enjoy it. *ibid. pl. 7*
- Where the Covenant was not broken by an act done before request. *123. pl. 8*
- Where the Covenant was not broken, for that the defendant had an election to omit that which the plaintiff would construe a breach, or not. *ibid. pl. 9*
- Where the thing tendered to the defendant to do, and which he refused, was not within the Covenant, and so no breach, *ibid. pl. 10*
- Where a Covenant that he was seised, &c. was not broken *in toto*, but the jury are to give damages *pro rata*. *ibid. pl. 11*
- Where the defendant shall be adjudged to be within the Covenant, though her claim to the estate is from the conuzor, and not from him who made the covenant. *ibid. pl. 12*
- Where the defendant claiming a jointure or dower is a breach. *124. pl. 14*
- Where the entry of the prior lessor for non-payment of rent is a breach of covenant with the under-lessee. *ibid. pl. 15*
- What is a breach upon a covenant that the party had a power to demise *ibid. pl. 16*
- What is a breach in *A.* by the neglect of *B.* stranger, when the request was made to *B.* and not to *A.* the covenantor. *ibid. pl. 17*

Contained in this V O L U M E.

Where a payment of a rent-charge by the lessee, without compulsion upon a covenant to be saved harmless, is no breach; *aliter* if he was distrained, &c. Page 124. *pl.* 18
See more under tit. *Performance.*

Certiorari. *Vide Error.*

Charter-party.

OF declarations upon a Charter-party, 295. *Vide Declarations in covenant.*

What plea to a Charter-party good, and what not. 145 *pl.* 52
The Admiralty court not to hold plea upon a Charter-party. *Vide Prohibition and Spiritual court.*

Churchwardens.

For what they may sue. 395.—
Church-wardens may make a rate alone to bind all the parishioners if they have notice to meet and refuse. 420. *pl.* 3.—Who has a right to chuse Church-wardens. 456. *pl.* 14.—Whether a release of one Church-warden is a discharge of a suit there. 447. *pl.* 3.—The like of the costs. 447, 419.

Collation.

Collation without a title of lapse did not make an usurpation. 426. *pl.* 16.

Composition.

What Composition to hold lands discharged good, or not. 456. *pl.* 9
What held a good Composition for a prohibition. 455. *pl.* 7, 8

Conclusion of Pleadings.

Where the defendant's plea in covenant ought to conclude to the country, and where with an averment. Page 149. *pl.* 35.
304, 305. 305. *pl.* 8

The like of a Replication. 341.
a. b. Vide Replication and Pleadings.

Condition.

Constructions upon Conditions. 254

What hath been construed a breach, and what the performance of Conditions. 255, 256, 257, 258

Condition precedent.

Whether the word *paying* does or does not make a Condition precedent. 144. *pl.* 41

Contracts Express and Implied. *Vide Debt.*

Corporation. *Vide Pleadings*, 26 and fol. 335. *pl.*

Costs.

Where one defendant shall have Costs against the plaintiff, and not be liable to the damages found against the other. 154. *pl.* 35. 155

Of Costs in Prohibition. *Vide Prohibition.*

Covenant.

What a Covenant is. 91
What is a Covenant real, *ibid.*
A difference between a Covenant real and a Covenant personal, *ibid.*
Where a Covenant runs with the land. *ibid.*
Of

A TABLE of the Principal Matters

- Of Covenants ipherent and collateral. *Page 91*
- Covenants in the affirmative and in the negative. *ibid.*
- Where a man may have an action of Covenant, though he might have had an action of debt. *92*
- What words are essentially necessary to make a Covenant. *93 pl. 1, 2*
- Where words of condition shall amount to a Covenant. *ibid. pl. 3. 94 pl. 10*
- Where a proviso shall make a Covenant, and where a condition, and so *vice versa. ibid. pl. 4. 95, 96, 97*
- Where a warranty shall amount to a Covenant in law. *93 pl. 5*
- Where the word *grant* shall make a Covenant. *ibid. pl. 6*
- Where an agreement only shall make a Covenant. *ibid. pl. 7, 8.*
- Where not. *94 pl. 9, 10*
- Where a recital amounts to a Covenant. *ibid. pl. 13. Where not. ibid. pl. 14*
- Where a Covenant shall amount to a lease, and where not. *97 pl. 4*
- Where an exprefs Covenant shall qualify a general Covenant. *98, 99*
- What have been construed distinct and independant Covenants, and where dependant one upon the other. *99*
- Of Covenants in law *100*
- That an action upon a Covenant in law lies upon the word *Dimisit. 146 pl. 54*
- The like upon the words *Dimisiet & Concessit. 147 pl. 56*
- Of void Covenants, what are so, what not. *100, 101*
- Of mutual and reciprocal Covenants. *102*
- Who shall have advantage of a Covenant, and by whom the action to be brought.
- Where by the heir, and where not. *Page 102, 103*
- Where by executors, and where not. *103, 104*
- Where by baron and feme, and where not. *104*
- Where against baron and feme, and where not. *104, 105*
- Where by lessor and lessee *105*
- Where by grantees and assignees, with the statute of 32 Hen. 8. *cap. 34. and constructions on the several branches of that statute. 107, 108, 109, 110*
- Where Covenants have been adjudged to be suspended, extinguished, or otherwise discharged.
- Whether a husband marrying a woman, in behalf of whom he had covenanted with a third person to permit her to make her will, discharged the Covenant. *120 pl. 1.*
- Whether the acceptance of money by the assignee from the lessee, discharged the Covenant against the lessor. *ibid. pl. 2*
- Of suspension of a Covenant to pay rent by an entry. *ibid. pl. 3*
- Where a release is a discharge of Covenants, and where not. *ibid. pl. 4.*
- Whether a proviso that the indenture should be void, discharged breaches of Covenant precedent to the breach in the proviso. *ibid. pl. 5*
- Whether a release made by the husband of a stranger to the Covenant,

Contained in this VOLUME.

- Covenant, yet one of the persons to whom the money was payable, was a discharge of the Covenant. *P. 120 pl. 6*
- Where Covenants are discharged by eviction. *ibid. pl. 7*
- Whether Covenants in a void deed are void. *121 pl. 8*
- And a difference where the Covenant is for a thing collateral, and where the covenant depends on the interest of the lease; and another difference between exprefs and implied Covenants. *ibid. pl. 9*
- Where the acceptance of a surrender had not dispensed with the Covenant. *ibid. pl. 10*
- That a parson may maintain an action for a Covenant taken before his non-residency. *ibid. pl. 11*
- Where an alteration of the premises works a discharge of the Covenant by the lessee. *ibid. pl. 11*
- Where a tortious presentation is no breach of a Covenant to make good the grant of the presentation from all incumbrances. *ibid. pl. 13*
- Where the tortious entry of the lessor is not a breach of Covenants, and where it is. *ibid. pl. 14*
- Where a Covenant shall be construed to be broken. *123. pl. 1*
- Because not performed according to the intent of the parties. *ibid. pl. 2*
- Where the nonage of the party being a disability to grant, was a breach of Covenant. *ibid. pl. 3*
- Where the action was held not to lie, because the plaintiff does not shew how he was dampnified. *P. 123 pl. 4*
- What is a breach of Covenant by an act done before a request made. *ibid. pl. 5*
- What is not such in the lessee by occupying excepted lands. *ibid. pl. 6*
- By whom to be brought.
- By assignee of the reversion against one lessee, and the assignee of the other. *109 pl. 1*
- Against one joined in a covenant with the infant, though not against the infant. *ibid. pl. 2*
- That an infant is not to be charged with a covenant made by him and another. *ibid. pl. 2*
- By an assignee of part of the estate of the reversion. *ibid. pl. 3*
- By an assignee of the remainder of a term against an assignee of the lessee. *ibid. pl. 4*
- By a devisee of a reversion. *ibid. pl. 5.*
- By a grantee of a reversion. *ibid. pl. 6, 7. 100 pl. 16*
- By assignee by parol. *109 pl. 8*
- Grantee of the reversion against an under-lessee. *ibid. pl. 9*
- By the executor of a bishop. *ibid. pl. 11*
- By an executor. *ibid. pl. 10*
- By the executor of the husband on a covenant made with the feme sole. *ibid. pl. 12*
- Where the action lies, though the estate is gone, *109, 110, pl. 13*
- Where a release not a good bar of the Covenant after the breach, and a suit commenced. *110 pl. 14*
- Who shall take advantage of a covenant,

A T A B L E of the Principal Matters

covenant or condition. <i>Page</i>	Against executor of a lessee. <i>Page</i>
110. <i>pl.</i> 15.	114 <i>pl.</i> 13
Whether by assignee not mentioned in the deed. <i>ibid.</i> <i>pl.</i> 17	Against assignee of part of the land. <i>ibid.</i> <i>pl.</i> 14
Who to join in an action of covenant. 110 <i>pl.</i> 1, 2, 3. 111 <i>pl.</i> 6, 9, 11. 112 <i>a.</i>	Against an infant. <i>ibid.</i> <i>pl.</i> 15
Two vendees of several parts of a reversion may join. 110 <i>pl.</i> 4	Not against an assignee upon a collateral covenant. <i>ibid.</i> <i>pl.</i> 16
That tenants in common may join. 111 <i>pl.</i> 5.	Where against the lessor. <i>ibid.</i> <i>pl.</i> 17
Whether the executor of one dead, and the survivor may join. <i>ibid.</i> <i>pl.</i> 5	Where by the grantee against the grantor. <i>ibid.</i> <i>pl.</i> 18
Where he for whose benefit the covenant is made is to bring the action, and not both named. <i>ibid.</i> <i>pl.</i> 7	Where not against him in reversion upon a covenant by tenant for life. <i>ibid.</i> <i>pl.</i> 21
Where by the survivor <i>ibid.</i> <i>pl.</i> 8	Where to be brought by bargainee against bargainor. 115 <i>pl.</i> 22
Where the assignee may bring the action. <i>ibid.</i> <i>c.</i> 114 <i>pl.</i> 10	Upon a covenant for the mortgagor to enjoy till default, as tenant at will. <i>ibid.</i> <i>pl.</i> 23
Where by the lessee against the heir of the lessor. 114 <i>pl.</i> 20	Where the entry of an heir of the mortgagor makes no difference. <i>ibid.</i> <i>pl.</i> 23
	Where it lies by the assignee against the bargainor upon a covenant for further assurance. <i>ibid.</i> <i>pl.</i> 24
Against whom.	Where the action of Covenant lies, and is well brought, and so <i>e contra</i> in regard to the manner, time or place. 126.
Where against the heir. 112 <i>A.</i> <i>pl.</i> 1. 114 <i>pl.</i> 20. 116 <i>A.</i>	Where the covenantor is not obliged to repair, when the use of the thing only is diminished. <i>ibid.</i> <i>pl.</i> 1
Where against executors. 112 <i>B.</i> <i>pl.</i> 1, 2, 3. 113 <i>pl.</i> 7, 9. 116 <i>A.</i>	Where the action lies against the assignee upon disturbing the lessor in excepted premises. <i>ibid.</i> <i>pl.</i> 2
Apprentice to have an action of covenant against the executor of his master to teach him his trade. 112 <i>pl.</i> 3	Where an agreement to pay so much for lands amounts to a covenant to convey. 127 <i>pl.</i> 3
Where against the assignee, tho' not named <i>ibid.</i> <i>pl.</i> 4	Where it lies upon a fine. <i>ibid.</i> <i>pl.</i> 4. 132 <i>pl.</i> 19
Against bargainee, tho' not named assignee. 113 <i>pl.</i> 5	Where
Bishop not bound to pay the taxes of his predecessor. <i>ibid.</i> <i>pl.</i> 6	
A parson resigning is still bound by his covenant, where against the assignee or not. <i>ibid.</i> <i>pl.</i> 1, 2, 3, 4, 5, 6, 8.	
Where against the lessee after an assignment, and where not. 114. <i>pl.</i> 11, 12	

Contained in this V O L U M E.

Where the covenant determines with the estate, so as no action lies. *Page 132 pl. 5*

Where on the words *notwithstanding any act done or to be done by him*, the words *by him* shall be construed to extend to the present, as well as the future time. *ibid. pl. 19*

Where the words for any act done by him, &c. shall carry a relation to the subsequent words, but that he shall enjoy it against all persons. *ibid. pl. 20*

Where the action would not lie, because that upon a proper construction of the covenant, the heriot was not then due. *127 pl. 11*

Where the action was held to lie, though the lease did not commence in point of interest, but only in point of computation. *ibid. pl. 12*

Where a declaration was insufficient in a covenant, to enjoy from interruption by *E. K.* not setting forth what title *E. K.* had. *ibid. pl. 13*

It is enough to set forth in the entry of a stranger *Quod habuit Jus, Titulum*, &c. because his title is not known. *128 pl. 14*

Where the party might have covenant or debt at his election. *ibid. pl. 15*

Where it was said an action of covenant did not lie during the term, but an action of waste. *ibid. pl. 17*

That it lies upon a writing, whereby the party covenants to be accountable. *ibid. pl. 16*

That the grantee of copyhold lands is within the intent of the statute of 32 *Hen. 8.* to have this action. *ibid. pl. 18*

Where the action was held to lie against the Queen's patentee, because none excepted but the Queen and her successors. *Page 128 pl. 19*

Where the action was held to lie for cutting down Trees, upon a covenant to leave them upon the land even before the end of the term. *129 pl. 20*

Where it was adjudged the assignee might bring an action for not repairing, &c. *ibid. pl. 21*

Where the plaintiff may have one action upon several titles. *ibid. pl. 22*

Where it ought to be brought in the county where the lands lie. *ibid. pl. 23.* Where held the contrary. *24, 26*

What covenants have been held local, and what transitory. *ibid. pl. 25*

Where the action was held to lie against the first lessee after assignment. *ibid. pl. 27*

Composition.

With Parsons relating to Tithes.

What is a Composition real, and how to be made. 481, 482.—What are good, and what not. *ibid.*—A Composition real

ought to be expounded by the judges of the common law. 433

Consultation.

Where to be granted, and where not. 475.—Not where the plaintiff has only mistaken his issue. *ibid.*—It lies only where a man cannot have a remedy in the King's courts, 475 *pl. 1.* In some cases not, though the issue be found against the plaintiff. *ibid. pl. 2.*—Where it shall go

A TABLE of the Principal Matters

go as to part. Page 476 *pl.* 3. 447 *pl.* 7.—Not to be granted if matter be found impertinent to the issue. 476 *pl.* 4.—Nor where it appears the defendant hath no cause of suit in the Spiritual court. *ibid.* *pl.* 4.—To be granted where a custom or prescription is the point in issue, and found for the defendant, or the plaintiff nonsuit. *ibid.* *pl.* 4.—Or the prescription not good. *ibid.* Not to be granted, though the party submit to a void jurisdiction. *ibid.* *pl.* 5.—Not to be granted if the party hath not a true copy of the libel. *ibid.* *pl.* 6.—Nor if it appears that there are not proper parties. 477 *pl.* 9.—Nor where it appears that no tithes ought to be paid, though the *modus* be not found. *ibid.* 10. To be granted upon a custom in *Non decimando* where the court adjudge it a void custom. 477 *pl.* 11.—Not to be granted without an answer to the prohibition. 478.—It is no plea for a Consultation in a suit for not setting out tithes, to say that he had not alledged notice to the parson.—The Consultation will issue, if the suggestion be not proved within six months. 398.—Where a Prohibition lies after a consultation, and where not. 474 *pl.* 11, 2, 3. 475 *pl.* 5, 6, 7

Curate.

A Curate chosen by the patron, may be removed by him; otherwise of a vicar chosen by the parishioners by custom. 409 *pl.* 41.—*Curatus Ecclesie* does not imply induction, but *Curatus Rite, &c. Investitus* does.

451 *pl.* 32

Customs relating to Tithes.

What a custom is. Page 478.—

That the common law and the spiritual law differ in their construction thereon. *ibid.*—What makes a custom by the common law, and what by the spiritual law. *ibid.*—What interruption shall destroy them. *ibid.*—That it must be reasonable, certain, and of some benefit to the parson. *ibid.*—What customs are good, and what not. 480, 481.—Customs relating to ecclesiastical matters are triable in the spiritual court. 404, 405. But customs against common right are always to be tried at common law. 433

Customs in London.

The court will not take notice thereof judicially after sentence, so as to grant a Prohibition. 473 *pl.* 4

Customs.

Of pleadings Customs. 328 a

Damages.

Where the lessee shall recover the term, and not damages only in covenant. 155, 156 *pl.* 10.—Where the damages in covenant shall be recovered, by the executor. 154 *pl.* 36.—What held no error in assessing the damages in covenant. *ibid.* *pl.* 31, 33.—Where it is erroneous. *ibid.* *pl.* 34, 37. 155 *pl.* 2.—Where the damages in covenant are not

Contained in this V O L U M E.

not forfeited by the outlawry. Where to be given as incident to the debt, tho' not prayed by the Replication. *P. 341 a. pl. 4. 364 b. pl. 3.*—Of releasing damages insufficiently assessed. [364 b.] *pl. 1.* Where entire damages given will do hurt, and where not. *ibid. pl. 2.*

Dean and Chapter.

Their power to add to the number of fingers, where the number is not by them made greater than at first, 403 *pl. 9*

Debt.

Of actions of debt, and the several species thereof. 249—Of actions of debt on judgments. *ibid.*—Of actions of debt on specialties entered of record. 250.—Of actions of debt on specialties indented, and deeds-poll. 251.—Of implied contracts, what they are. 269 *pl. 1.*—Where the action will lie, though there be no express contract, but where 'tis *quasi ex Contractu.* *ibid. pl. 2.*—Where an action would not lie against the sheriff, not having returned that he meddled with the goods. *ibid. pl. 2.*—Whether an action will lie for an escape against the gaoler. *ibid. pl. 3.*—Against the executors of the sheriff. *pl. 4.*—Where an action will lie for an escape. *pl. 5, 6, 7.* That an attorney shall have an action of debt for his fees. 269 *pl. 8.*—*Quere* of a counsel. *pl. 9.*—By the lord against a copyholder. *pl. 10.*—For what it may be brought. 270

How a Debt may be apportioned, released or discharged. *P. 270*

Where a release of part discharges the whole. *pl. 2, 3.*—Where not. *pl. 5.*—Apportionment of rent. *pl. 4.*—Where a release of a trustee does not avail. *pl. 6.*—Where obligor or obligee made executors does extinguish the debt, and where not. 271 *pl. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 12, 20.* 272 *pl. 26.*—Where an entry does not extinguish the rent. *pl. 17.*—Where a grant not to sue is a release, and where not. *pl. 21.*—Where administration no release. *pl. 22.*—Where a devise of a rent charge from a grantee is an extinguishment. 272 *pl. 23, 24.*—Where a bond given for a debt is an extinguishment. *pl. 24.*—Where marriage is no extinguishment. *pl. 27.*—Where the death of the obligee discharged the debt. *pl. 28*

Debt.

By and against whom to be brought.

Where not by him only to whom the money was payable, but by both with whom the covenant is made. 272 *pl. 1.*—For the assignee of a grantee. *pl. 2.*—By grantees. *pl. 3, 4.* 274 *pl. 20.*—By the succeeding chamberlain. *pl. 5.*—By a parson against the vicar. *pl. 6.*—By lessor against lessee. *pl. 7, 8, 9, 10.*—Where against executors after assignment. 273 *pl. 11, 12, 13, 14, 15, 16, 17, 18.*

A TABLE of the Principal Matters

18.—Where the action lies for the grantee of a rent-charge. *Page 274 pl. 19.*—That it ought to be brought against all that are tenants. *ibid. pl. 21.*—But the advantage of the contrary must be by pleading. *pl. 22.* Against an assignee. *pl. 23.*—Against a parishioner upon his covenant to pay the proportion of a suit. *pl. 24.*—Where the action of debt may be brought by husband and wife; where by the husband sole; and by the wife after his death. 274, 275.—The like against husband and wife. 275, 276.—Where by the heir. 276.—Where against the heir. 276, 277.—Where by executors, 278.—Where against executors or administrators. 279, 280, 281.—Where the action is well brought, and where not. 284.—That it must be for the whole sum, or shew what part paid. *ibid. pl. 1.*—In what county. *pl. 2, 3, 4, 5, 6, 7, 8, 9.*—After a writ of error. *pl. 10, 11.*—How, where the money is payable at several days. *pl. 12, 13.*—Not before the cause of action accrued. 285 *pl. 15.*—Where case and not debt against the executor. *pl. 16.*—Upon a proviso in a deed. 285 *pl. 17.*—Where debt is the proper remedy, and no covenant. *pl. 19.*—On a judgment after part levied by *Elegit*. *pl. 20.*—Upon articles to deliver hops. *pl. 21.*—For a rent-seek. *pl. 22.*—On a covenant to stand seised. *pl. 23.*—Upon a bond to perform covenants in a void indenture. *pl. 24.*—On an ac-

count. *Page 285. pl. 26.* Against one or several. *pl. 25.*—After acceptance of the rent. *pl. 27.* By him to whom the rent was payable. *pl. 28*

Where the Party may have his election to bring this action, or to take another remedy, 285.

Of the Process in Debt, 286.

Where he brought in the *Debet* and *Detinet*, where in the *Detinet* only, 286, 287, 288, 289.

Declarations in Covenant.

Where the breach may be assigned as general as the covenant. 130. *pl. 1.* What certainty required therein. *pl. 2.*—Insufficient in not setting forth the title of a stranger to enter. *pl. 3.*—Where a demand not necessary to be set forth. *pl. 4, 7.*—Where an averment of performance by the plaintiff ought to be set forth. *pl. 5. 133 pl. 31.*—Where it was held necessary to shew where the lease was made, and a special disturbance. 130. *pl. 6.*—Where a declaration in not building a house, pursuant to the rebuilding of *London* after the fire, was held sufficient. *pl. 9.* Where the grantee of the reversion may say that the premises came to him by diverse mesne conveyances; so of the estate of the defendant in a term; *aliter*, if a term is pleaded. 131. *pl. 10.* Where the heir of the grantor could not maintain covenant against the

Contained in this V O L U M E.

the assignee or lessee of the grantor. *P. 131 pl. 10.* Where an act of parliament, subsequent to the covenant, is a repeal of a covenant, and where not. *ibid.* Insufficient not setting forth the time and place where the account was made up, nor to what amount. *131. pl. 12.*—To declare *per quod Testatum existit* is good in covenant, but not in debt. *ibid. pl. 13.* Where it shall be intended the rent accrued pursuant to the action after a verdict. *pa. 132. pl. 14.* To declare *per quoddam scriptum suum*, without *factum* or *figillat'*, is ill. *132. pl. 15. 133. pl. 25. ibid. pl. 26, 27. e contra.*—Ill for want of shewing a special disturbance how, &c. *132. pl. 16.* The not reciting idle and impertinent matters is no variance. *ibid. pl. 17. 133. pl. 28.* Where a bill was amended upon the file, which had omitted the substance of the declaration *pl. 18.* Where an action was held to lie upon a proviso, being in the nature of a covenant. *132. pl. 20.*—Where the action would lie before a title made upon a covenant to pay so much for lands, a sufficient conveyance being tendered. *ibid.*—*pl. 21.* Upon an entry by executors no title need be shewn in them; *aliter* of a stranger. *ibid. pl. 22.* Declaration sufficient, alledging that the defendant had not paid, &c. without saying that neither of the others had. *ibid. 132. pl. 23.*—Where a matter of fact not in the deed is alledged, it is immaterial. *133. pl. 24.* So of one not a party to the deed. *ibid. pl. 28.* Covenant may be brought upon a deed-poll, but

the party must be named in the deed. *Page 133 pl. 24.* And all the parties to the deed mentioned, otherwise ill. *ibid. pl. 29.* Insufficient not shewing wherein the premisses were in decay, *ibid. pl. 30.* It shall be intended after a verdict in covenant, that the racks unrepaired by the defendant, were fixed in the stable, *134. pl. 32.* Declaration for not repairing, the plaintiff allowing timber, which he alledged was brought upon the premisses by a stranger; ill, because that is an entry upon the lessee. *ibid. 33.*—Declaration ill, not shewing particularly the manner of the breach, on a covenant to find him meat, drink, apparel, and other necessaries. *134 pl. 34.*—Declaration for cutting down more timber than was necessary for the repairs, held insufficient for incertainty. *ibid. pl. 35.*—A mis-entry of the date upon *Oyer* may be amended. *ibid. pl. 37.*—*Per Quoddam Scriptum per quod Testatum existit* was held not ill. *ibid. pl. 38.*—*Et sic Conventionem suam infregit*, in the singular number is good, though on several covenants. *ibid. pl. 39.*—To declare for writing so much a quire, it is no good breach to shew that he wrote so many quires, and so many odd sheets. *135. pl. 40.*—The words *Et sic non infregit Conventionem* is but form *136 pl. 1.* And the words *Et sic non tenuit Conventionem in hoc*, mentioning the breach, is unnecessary where the breach hath been sufficiently set forth. *135 pl. 41.*—A declaration held sufficient

A TABLE of the Principal Matters

sufficient in an action for not procuring the deputation of an office. *Page 135 pl. 41.*—A declaration upon a Charter-party held well, though the plaintiff had mistaken in casting up the sum, *ibid. pl. 42.*—The like in covenant for rent. *154 pl. 32.*—Where an action is brought upon the covenant, the reciting the penalty is surplusage there, and so is a recital of a proviso; so that if it varies upon *Oyer*, it is not material. *136 pl. 42.*—The sum miscast up too little or too much, is amendable in covenant, *aliter* in debt. *ibid. pl. 43.*—Where a breach of covenant hath been adjudged to be well assigned, and where not. *ibid.*—Where the assignment of a breach, according to the words of a covenant, is good enough; so that if any thing be done which amounts to a performance, it is to be shewn on the other side. *137 pl. 2. ibid. pl. 8. 141 pl. 10.*—Where a rent-charge was adjudged to be executed by the statute of uses in *cestui que Use*; so that he may distrain. *137.*—Where a suit in equity was adjudged the breach of an agreement, that the party should quietly enjoy. *ibid. pl. 3.*—Where an assignment of a breach that is not such in law, only in equity, is a breach. *ibid. pl. 4.*—On a covenant that the party had a lawful estate; a good breach to say that he had no *legalem titulum.* *ibid. pl. 5.*—So, that he was not seised in fee on a covenant that he was so, held good. *pl. 6.*—Expulsion by the husband a good breach.

P. 137. pl. 7.—That *C.* a sub-tenant did dig pits, good, though several mesne sub-tenants between. *138 pl. 9.*—In an action upon a deed made by three, (*per se pro toto & in solido*) to say that he, against whom the action is brought, had not paid sufficient. *138 pl. 11. 137 pl. 2.*—Where no action would lie upon the proviso, it being not an express covenant. *138 pl. 12.*—Insufficient in not shewing a special disturbance in the enjoyment of copperas. *ibid. pl. 13.* How to assign a breach in covenant for quiet enjoyment. *pl. 13.* Where the court is not obliged to take notice that *Tinmouth* is on the river *Tyne*, but it ought to be shewn. 139

Declarations in Debt.

Of declarations in debt upon bonds. *290.*—On judgments *291.*—On recognizances. *292. 294 pl. 26.*—For rent. *ibid. 293, 297.*—On the statute of *14 Hen. 8.* for practising physick. *293 pl. 1.*—Of the statute of *2 Ed. 6.* for not setting out tithes. *pl. 2. 295 pl. 32. 297.*—On the statute of *5 Eliz.* for exercising a trade, &c. *pl. 3. 295 pl. 29.*—For costs in an inferior court. *pl. 4.*—On a *Concessu silvere.* *pl. 6, 23.*—Upon a sheriff's bond. *pl. 8. 295 pl. 34.*—Upon an *Emisset.* *pl. 9.*—For an escape. *pl. 10.*—Upon by-laws. *pl. 13. 295 pl. 37.*—For an amercement in a court-leet. *pl. 14.*—Upon bills penal. *pl. 15. 295 pl. 35. 297.*—Upon

Upon 5
against a
Upon a
pl. 28.
upon a
an annu
As affig
By affig
24.—
perjury
award.
ter-par
execut
296.—
admini
Of dec
debt u

Declar

Where l
Varyi

Where
conuz
wher
429.
wher
able
the c
ferre
Not
are
fort
beca
dout
Nor
acti
in t
wha
4—
ble
spo
not
hin

Contained in this V O L U M E.

Upon 5 *El. c.* 9. 6, 7, 27.
 against an infant. *P.* 295. *pl.* 17.
 Upon a retainer. *pl.* 18. 295
pl. 28.—Against the heir
 upon a bond. *pl.* 19, 20.—For
 an annuity. *pl.* 21. 295 *pl.* 36.
 As assignee of the King. *pl.* 22.
 By assignee of bankrupts. *pl.*
 24.—On 5 *Eliz. cap.* 9. for
 perjury. *pl.* 25.—Upon an
 award. *pl.* 38.—Upon a Char-
 ter-party. 295, 296.—By
 executors or administrators.
 296.—Against executors or
 administrators. 296, 297.—
 Of declarations in actions of
 debt upon an escape. 297

Declarations in Prohibition

Where held ill. 488 *pl.* 42.—
 Varying from the suggestion.
ibid. pl. 43

Defamation.

Where the spiritual courts have
 conuance of defamations, and
 where not. 487. letter *N.* 428,
 429, 430, 431, 432.—Not
 where the words are action-
 able at common law, because
 the common law is to be pre-
 ferred. 427 *pl.* 3, 4. 431 *pl.* 21.
 Not where part of the words
 are actionable that are set
 forth in the libel, and part not,
 because the party might be
 doubly vexed. 427 *pl.* 3, 4.—
 Nor where part of the words
 actionable are not set forth
 in the libel, upon a suggestion
 what those words are. *ibid. pl.*
 4.—Nor for words indicta-
 ble. *ibid. pl.* 3.—Nor words
 spoken of a parson that do
 not disgrace him, nor make
 him liable to ecclesiastical

censure. *Page* 427 *pl.* 5, 6.
 431 *pl.* 23. Nor relate to his
 function. *ibid. pl.* 1.—Nor
 where the words tend to a tem-
 poral defamation. *ibid. pl.* 7.
 430 *pl.* 17.—Not where the
 crime is punishable in the leet.
ibid. pl. 7. 430 *pl.* 17.—But in
 some cases it is said they shall
 have conuance of words ac-
 tionable at common law, and
 that they have a concurrent
 jurisdiction. *ibid. pl.* 11.—Not
 where the words are words of
 anger, heat and passion only,
 and not of malice. 429 *pl.* 14,
 15. 430 *pl.* 17.—Nor where
 the words are not well known.
ibid.—Nor where words are
 actionable in a particular place
 only by custom. *ibid. pl.* 16.
 Nor where the crime is pun-
 ishable by statute. 431 *pl.* 20.
 But for words of a spiritual
 nature they have conuance.
 427 *pl.* 1. 2, 8, 9, 10, 12, 16,
 18. 432 *pl.* 25.—They have
 no conuance of defamation,
 but where they have original
 and direct conuance of the
 fact of which the party is ac-
 cused. 430 *pl.* 17.—They
 have not conuance of words
 calling a man a bastard who
 hath lands by descent. 422 *pl.*
 7. 440 *pl.* 20.—The spiritual
 courts have conuance of de-
 famations of fornication. 427
pl. 1.—He was a witch or
 son of a witch. *ibid. pl.* 2

What shall be intended good upon a Demurrer.

Upon a bond made to the chief
 bailiff of *Pontefract.* 307 *pl.*
 5.
 Departure

A TABLE of the Principal Matters

sufficient in an action for not procuring the deputation of an office. *Page* 135 *pl.* 41.—A declaration upon a Charter-party held well, though the plaintiff had mistaken in casting up the sum, *ibid.* *pl.* 42.—The like in covenant for rent. 154 *pl.* 32.—Where an action is brought upon the covenant, the reciting the penalty is superfluous there, and so is a recital of a proviso; so that if it varies upon *Oyer*, it is not material. 136 *pl.* 42.—The sum miscast up too little or too much, is amendable in covenant, *aliter* in debt. *ibid.* *pl.* 43.—Where a breach of covenant hath been adjudged to be well assigned, and where not. *ibid.*—Where the assignment of a breach, according to the words of a covenant, is good enough; so that if any thing be done which amounts to a performance, it is to be shewn on the other side. 137 *pl.* 2. *ibid.* *pl.* 8. 141 *pl.* 10.—Where a rent-charge was adjudged to be executed by the statute of uses in *cestui que Use*; so that he may distrain. 137.—Where a suit in equity was adjudged the breach of an agreement, that the party should quietly enjoy. *ibid.* *pl.* 3.—Where an assignment of a breach that is not such in law, only in equity, is a breach. *ibid.* *pl.* 4.—On a covenant that the party had a lawful estate; a good breach to say that he had no *legalem titulum*. *ibid.* *pl.* 5.—So, that he was not seised in fee on a covenant that he was so, held good. *pl.* 6.—Expulsion by the husband a good breach.

P. 137. *pl.* 7.—That *C.* a sub-tenant did dig pits, good, though several mesne sub-tenants between. 138 *pl.* 9.—In an action upon a deed made by three, (*per se pro toto & in solido*) to say that he, against whom the action is brought, had not paid sufficient. 138 *pl.* 11. 137 *pl.* 2.—Where no action would lie upon the proviso, it being not an express covenant. 138 *pl.* 12.—Insufficient in not shewing a special disturbance in the enjoyment of copperas. *ibid.* *pl.* 13.—How to assign a breach in covenant for quiet enjoyment. *pl.* 13. Where the court is not obliged to take notice that *Tinnmouth* is on the river *Tyne*, but it ought to be shewn. 139

Declarations in Debt.

Of declarations in debt upon bonds. 290.—On judgments 291.—On recognizances. 292. 294 *pl.* 26.—For rent. *ibid.* 293, 297.—On the statute of 14 *Hen.* 8. for practising physick. 293 *pl.* 1.—Of the statute of 2 *Ed.* 6. for not setting out tithes. *pl.* 2. 295 *pl.* 32. 297.—On the statute of 5 *Eliz.* for exercising a trade, &c. *pl.* 3. 295 *pl.* 29.—For costs in an inferior court. *pl.* 4.—On a *Concessit solvere*. *pl.* 6, 23.—Upon a sheriff's bond. *pl.* 8. 295 *pl.* 34.—Upon an *Emisset*. *pl.* 9.—For an escape. *pl.* 10.—Upon by-laws. *pl.* 13. 295. *pl.* 37.—For an amercement in a court-lect. *pl.* 14.—Upon bills penal. *pl.* 15. 295 *pl.* 35, 297.—
Upon

Upon 5
against a
Upon a
pl. 28.—
upon a
an annu
As affig
By affig
24.—
perjury
award.
ter-par
execut
296.—
admini
Of dec
debt u

Declara

Where l
Varyi

Where
conuz
wher
429.
wher
able
the
ferre
Not
are
fort
beca
dou
Nor
aSti
in t
wh
4—
ble
spo
no
hin

Contained in this V O L U M E.

Upon 5 *El. c.* 9. 6, 7, 27.
 against an infant. *P.* 295. *pl.* 17.
 Upon a retainer. *pl.* 18. 295
pl. 28.—Against the heir
 upon a bond. *pl.* 19, 20.—For
 an annuity. *pl.* 21. 295 *pl.* 36
 As assignee of the King. *pl.* 22.
 By assignee of bankrupts. *pl.*
 24.—On 5 *Eliz. cap.* 9. for
 perjury. *pl.* 25.—Upon an
 award. *pl.* 38.—Upon a Char-
 ter-party. 295, 296.—By
 executors or administrators.
 296.—Against executors or
 administrators. 296, 297.—
 Of declarations in actions of
 debt upon an escape. 297

Declarations in Prohibition

Where held ill. 488 *pl.* 42.—
 Varying from the suggestion.
ibid. pl. 43

Defamation.

Where the spiritual courts have
 conuzance of defamations, and
 where not. 487. letter *N.* 428,
 429, 430, 431, 432.—Not
 where the words are action-
 able at common law, because
 the common law is to be pre-
 ferred. 427 *pl.* 3, 4. 431 *pl.* 21.
 Not where part of the words
 are actionable that are set
 forth in the libel, and part not,
 because the party might be
 doubly vexed. 427 *pl.* 3, 4.—
 Nor where part of the words
 actionable are not set forth
 in the libel, upon a suggestion
 what those words are. *ibid. pl.*
 4.—Nor for words indicta-
 ble. *ibid. pl.* 3.—Nor words
 spoken of a parson that do
 not disgrace him, nor make
 him liable to ecclesiastical

censure. *Page* 427 *pl.* 5, 6.
 431 *pl.* 23. Nor relate to his
 function. *ibid. pl.* 1.—Nor
 where the words tend to a tem-
 poral defamation. *ibid. pl.* 7.
 430 *pl.* 17.—Not where the
 crime is punishable in the leet.
ibid. pl. 7. 430 *pl.* 17.—But in
 some cases it is said they shall
 have conuzance of words ac-
 tionable at common law, and
 that they have a concurrent
 jurisdiction. *ibid. pl.* 11.—Not
 where the words are words of
 anger, heat and passion only,
 and not of malice. 429 *pl.* 14,
 15. 430 *pl.* 17.—Nor where
 the words are not well known.
ibid.—Nor where words are
 actionable in a particular place
 only by custom. *ibid. pl.* 16.
 Nor where the crime is pun-
 ishable by statute. 431 *pl.* 20.
 But for words of a spiritual
 nature they have conuzance.
 427 *pl.* 1, 2, 8, 9, 10, 12, 16,
 18. 432 *pl.* 25.—They have
 no conuzance of defamation,
 but where they have original
 and direct conuzance of the
 fact of which the party is ac-
 cused. 430 *pl.* 17.—They
 have not conuzance of words
 calling a man a bastard who
 hath lands by descent. 422 *pl.*
 7. 440 *pl.* 20.—The spiritual
 courts have conuzance of de-
 famations of fornication. 427
pl. 1.—He was a witch or
 son of a witch. *ibid. pl.* 2

What shall be intended good upon a Demurrer.

Upon a bond made to the chief
 bailiff of *Pontefract.* 307 *pl.*
 5.
 Departure

A T A B L E of the Principal Matters

Departure.

What hath been construed a departure in pleadings in covenant. *Page* 144 *pl.* 40, 44. 146 *pl.* 53. 148 *pl.* 70, 72, 73, 149 *pl.* 74.—What hath been construed a departure in pleadings in debt, and what not. 342. *A. B.* 343. *A. B.*—Relating to a feoffment pleaded. 342. *A. pl.* 1. 342 *B. pl.* 12.—To a leasehold pleaded. *ibid. pl.* 2. 342 *B. pl.* 5.—To a gift in tail pleaded *ibid. pl.* 3. 342 *B. pl.* 10.—To a plea that he was not requested to seal and execute a release. 342 *B. pl.* 4.—To a declaration upon a bond, and a release pleaded. 342 *pl.* 6.—To a plea that he had not felled wood to make fences. *ibid. B. pl.* 7.—To a plea of *Quod partes ad finem nihil habuerunt. ibid. pl.* 8.—To a plea of performance of covenants. *ibid. B. pl.* 9. 343 *B. pl.* 25, 26. 349 *A. pl.* 34, 37, 39, 40.—To a plea of entierly of estate. *ibid. pl.* 11.—To a plea of no award. 343 *A. pl.* 15. 343 *pl.* 19, 22. 344 *A. pl.* 30, 33, 35, 38.

Detinue.

Of actions of Detinue. [424]—What the action is. *ibid.*—Of the writ and process. *ibid.*—Of the declaration. 424.—Of the Pleadings. 425.—Of the trial, verdict, damages and judgment. 426.—Of the execution. *ibid.*

Devastavit.

Of a *Devastavit*, 282.—What is so by wrong payment *ibid. pl.* 1.—What is a *Devastavit*.

Page 282 *pl.* 5.—What not. *ibid. pl.* 3, 6, 7.—Where the sheriff may return a *Devastavit. ibid. pl.* 12. 283 *pl.* 18.—What evidence to be given thereon. *ibid. pl.* 19.—What to plead thereto. *ibid. pl.* 22. Where to be traversed. 282 *pl.* 14.

Diminution. *Vide* Error.

Discent.

Where the dying seised, and not the Discent, traversable in covenant. 148

Discontinuance.

Of Discontinuances in actions of debt. [365] *A.*

Duplicity.

In pleadings in covenant for want of a traverse. 141 *pl.* 3. Where a plea in covenant was adjudged to be double. 147 *pl.* 60.—In pleadings in debt. 306

Election.

WHERE the party may have debt or covenant at his election. 128 *pl.* 15. 129. Where the party hath an election to bring the action against the assignor or executor of the lessor. 120 *pl.* 2.—Where *A.* had his election to make a lease to *B.* or to his assigns. 117 *pl.* 14.

Entry.

Where the entry is not a suspension of the covenant, the action being once attached. 125 *pl.* 24.—Where the entry and ouster

Contained in this VOLUME.

ouster of a stranger differs from the entry of a stranger, as a trespasser, so as to make the former a breach of covenant in the lessor. *Page* 125 *pl.* 21. Where the entry of a stranger is a good excuse for not making a surrender. 148 *pl.* 16. Entry and expulsion where held no plea 235 *pl.* 9. 336 *pl.* 27.—Where not good without expulsion. 120 *pl.* 3. Where a bargain and sale was ill pleaded without entry. 144 *pl.* 42. 147 *pl.* 63.—Where the tortious entry of the lessor is a breach of covenants, and where not 121 *pl.* 14

Equity.

What relief the parties to an action of covenant have in a court of Equity. 157, 158, 159.—Where the person or estate will be made liable in Equity to a covenant or agreement. 159, 160.—Where there may be relief in Equity when the agreement is not strictly performed. 160

Error. *Vide* Damages. 2, 3.

The several kinds of writs of Error. [370] *B.* 371. *A. B.* 371. *A. B.* 312. *A. B.*—Where they are to be brought. [371] *A.*—And by whom. *ibid.*—Constructions upon the statute of 27 *Eliz. cap.* 8. [371] *A. B.* Where a writ abates, and where not. [372] *A.*—The statute of 5 *Geo. 1. cap.* 13. *sect.* 1. and a construction of that statute. [372] *A.*—Who may bring a writ of Error, and who not. 372 *B.* 273. *A. B.* Of the manner of suing out writs of Error, and what the Vol. II.

party so suing it out is to do thereon. *Page* [373] *B.* 374. *A. B.*—Where it is a *Superfedeas*. [373] *B.* *pl.* 1. [374] *A. pl.* 9.—The fee on the allowance. *ibid.*—Where the court will oblige the plaintiff's attorney to enter up the judgment. *ibid. pl.* 2.—A caution to be taken by the plaintiff's attorney in Error, to observe whether any variance between the roll and transcript. [374] *A. pl.* 3.—A caution to the defendant's attorney in Error, to procure an original, and of what term. [374] *A. pl.* 4.—Where the court of Chancery will grant an original when the time is lapsed. [374] *A. pl.* 4.—A caution to file warrants of attorney. *ibid. pl.* 5.—Where the plaintiff in Error must put in bail. *ibid. pl.* 6, 11.—The tenor of the recognizance. *ibid. pl.* 7.—The manner of putting in bail. *ibid. pl.* 8.—The time allowed for that purpose. *ibid. pl.* 9.—What is a breach of the recognizance. *ibid. pl.* 12.—The manner of suing out a writ of Error in parliament. [374] *B. pl.* 13.—Whether the House of Lords shall be said to have the record or the transcript before them. *ibid. pl.* 14.—What the defendant in Error is to do to maintain and support, and what the plaintiff is to do to reverse the judgment. [374] *B.*—When to carry in the roll, and where. *ibid. pl.* 1.—Where to sue out the *Scire facias* to assign Errors. *ibid. pl.* 1.—What to be done when the same is returned. *ibid. pl.* 2. 3.—To enter a rule, B and

A TABLE of the Principal Matters

and the fee. Page [374] B.—Where the defendant is entitled to a *Non pros*, and where signed. 374. b. 375 a.—When to plead in *Nullo est Erratum*. *ibid.*—When to move for a *Concilium*. *ibid.*—By whom drawn up, and the fee. *ibid.* When to enter the cause, with whom, and the fee. *ibid.* Directions for the delivery of the paper-books, and the fees. *ibid.*—A caution to have the roll in court. *ibid.*—Of assigning errors, what to be assigned for error, what not, and when. [375] B. 376 a.—Of alledging diminution, and praying a *Certiorari*. [316] A. B. 377. A. B.—Where diminution can or cannot be alledged. [316] A. pl. 17, 18.—Where the court *ex officio* may award a *Certiorari*. 376 pl. 19, 20. *ibid.* b. pl. 23. [377] a. pl. 26.—What shall not be certified after in *nullo est Erratum* pleaded. [376] b. pl. 22. [377] a. pl. 28. b. pl. 29.—Where it may. *ibid.* pl. 30.—Where a second *Certiorari* may be awarded after a former returned, that the court may truly have the whole matters of record before them. *ibid.* pl. 24. [377] a. pl. 25, 26, 27.—Where the court will indulge the defendant to file an original. *ibid.* pl. 31.—The method of proceeding on a writ of error in the Exchequer-chamber. [377] b. pl. 32. [378] a.—When to sue out a *Scire facias ad audiendum Errores*. [378] a. What to be done after the judgment is reversed or affirmed. [378] a.—Where the defendant in error may proceed by *Scire facias* on the

recognizance. Page [378] a. pl. 1.—What execution ereon. [378] b. pl. 2.—What the bail ought to plead thereto. *ibid.* pl. 3.—What no plea. *ibid.* pl. 4.—What is a good release to the bail. *ibid.* pl. 5.—And where a bar, and where not. *ibid.* pl. 6, 7. The bail not to join with the principal. *ibid.* pl. 8. Where there needs no *Scire facias* to have execution. *ibid.* pl. 9.—Where there must be a motion for that purpose. *ibid.* pl. 10.—Where the parties are entitled to have or pay costs. [379] a.

Estates.

How to be pleaded. 327 a.—Where it shall be taken to be a freehold. *ibid.* pl. 1.—Ought to shew a surrender of the lease. pl. 2.—Where seisin need not be averred. pl. 3. How of a reversion. pl. 4, 8. How by a grant, and by an act of parliament. pl. 5.—Where with a *constat* or exemplification. pl. 6.—Seisin by baron and feme. pl. 7.—Where a seisin is sufficient without shewing any other commencement. 327. b. pl. 9, 19.—How to plead a Freehold, and what it will serve for. *ibid.* pl. 10.—Seisin of tithes how pleaded. *ibid.* pl. 11.—Of an annuity. pl. 12.—Seisin by the King. pl. 13.—By master and fellows of a College. pl. 14.—Where with an attornment. pl. 15.—A grant to be pleaded as a surrender. pl. 16.—A feoffment to be pleaded as a confirmation. 327 pl. 17.—A grant as a release. pl. 18.—By tenants in common. pl. 20. Of pleading a *Que Estate*. pl. 21, 22

Of

Contained in this VOLUME.

Of Estoppels.

What they are, the several kinds, and the nature thereof. *P. 345*
b. pl. 1, 2, 3, 4.—Who shall or shall not take advantage thereof. *ibid. pl. 4, 5.*—Where the heir shall be estopped to avoid the deed of his ancestor. *ibid. pl. 6.*—Where an indenture is an Estoppel, and where not. *346 a. pl. 7, 8, 13.*—Where the jury are not to find the Estoppel. *ibid. a. pl. 9.*—Where the conuize of a statute is estopped. *ibid. pl. 10.*—Where an acceptance of a lease from baron and feme, is no Estoppel to say the baron was sole seised. *ibid. a. pl. 11.*—Where a lease is an Estoppel, and where not. *ibid. a. pl. 12, 13.*—Where the jury are not estopped *ad veritatem dicend^o*, unless the estoppel or admittance be within the record. *ibid. pl. 14. ibid. pl. 29.*—Where the defendant is estopped to take advantage of a variance between the judgment declared on, and that given in evidence. *ibid. pl. 15.*—Where the defendant is estopped to say any thing contrary to the words of the condition. *ibid. a. pl. 16. b. pl. 23, 25, 28, 29.*—Where a lessor shall be estopped to say any thing contrary to a recital in the first lease. *ibid. b. pl. 17. ibid. pl. 24.*—Of an Estoppel upon a release pleaded to a bond. *ibid. pl. 18.*—Where the party is concluded by an inrolment. *ibid. pl. 19.*—Where an avowry is no estoppel. *ibid. pl. 19.*—Where the plaintiff in error is estopped. *ibid. pl. 20.*—Of an estoppel as to what may

be traversed. *Page ibid. pl. 21.*—Where an indenture is an estoppel to a traverse that the defendant was possessed by virtue of a lease. *147. pl. 56. 148. pl. 67.*—Where an acquittal is an estoppel, and where not in covenant. *147. pl. 58.*—The like of an avowry. *ibid. pl. 53*

Eviction.

Where covenants are discharged by eviction. *120. pl. 7.*—Where eviction is a good plea, and where not in actions of covenant. *144. pl. 43. 147. pl. 57. 148. pl. 67*

Evidence.

Of Evidence on *Non est factum*.
 [355] *a.* What matter of abatement, and not of evidence. *ibid. pl. 1.*—Usury no evidence on *non est factum*, but to be pleaded. *ibid. pl. 2.*—Otherwise of rature before the action brought. *ibid. pl. 3.*—Or coverture. *ibid. pl. 4.*—What admitted by *non est factum*. *ibid. pl. 5.*—What he may give in evidence on such issue. *ibid. pl. 6*

Evidence on *Nil debet*.

What may be given in evidence, and what not. [355] *a.* In debt for rent. *ibid. pl. 1, 2.* [355] *b. pl. 3, 8, 11.*—What sufficient evidence of an entry, &c. *ibid. pl. 4.*—In debt for an escape. *ibid. pl. 6.*—In debt for wages. *ibid. pl. 7.*—On a plea of levy by distress & sic *non debet*. *ibid. pl. 9*

Evidence on *Non dimisit*.

What may or may not be given in evidence on an issue on this plea. *355. b. pl. 1, 2, 3*
 B 2 Evidence

A T A B L E of the Principal Matters

Evidence.

In Debt for an Escape.

What may or may not be given in evidence. *P.* [356] *a.* *pl.* 1, 2, 3, 4

Evidence.

On Riens per Discent.

What may or may not be given in evidence. [356] *a.* *pl.* 1, 2, 3, 4, 5

Evidence.

On Plene administravit.

What may or may not be given in evidence by executors or administrators on this plea. [356] *a.* *b.* [357] *a.* What may or may not be given in evidence by the plaintiff on this plea pleaded by the defendant. [357] *pl.* 1, 2, 5, 6, 7, 8

Evidence.

On Ne Unquez Executor.

What may or may not be given in evidence on *Ne Unquez Executor*. [357] *a.* *pl.* 7, 8, 10. What evidence to be given by executors on judgments confessed. [357] *a.* *pl.* 12. What evidence may be given on the suggestion of a *Devastavit*. [357] *a.* *pl.* 11. What evidence may be given by an executor *de son tort*. [357] *a.* 7, 8, 9, 10. *ibid.* *b.* *pl.* 14.—Of other evidence by executors. [357] *b.*

Evidence.

On Nul tiel Record.

What is proper evidence on *Nul tiel Record*. [357] *b.*

Evidence.

Of proceedings being evidence. [358] *a.*—Where deeds, wills, writings or records are evidence, and where not. 358 *b.*

Other cases of evidence and witnesses. *P.* [359] *a.* *b.*—Of evidence in actions on penal statutes. *ibid.* *b.* 360. *a.*—Of evidence in actions of debt for rent. *ibid.* *a.* Where it shall be intended to be given in evidence that the grant was by deed.—In covenant. 153. *pl.* 18, 29, 30. Where the acknowledgment before a master in Chancery shall be good evidence of the term. *ibid.* *pl.* 20. Where the original grant must be produced in evidence. *ibid.* *pl.* 21.—What good evidence of a fine. *ibid.* *pl.* 22.—Where the copy of a deed is evidence. *ibid.* *pl.* 23.—Where an *inspeximus* is evidence, *ibid.* *pl.* 24. Where copyhold court-rolls are evidence. *ibid.* *pl.* 25.—What good evidence upon *non dimisit*. *ibid.* *pl.* 26.—Where a special prescription given in evidence did not maintain a general prescription alledged. 490. *pl.* 52

Excommunication.

An *Excommunicato capiendo*, the manner of its execution. 393. If the party is not reconciled within forty days, he may be put in prison by this writ. *ibid.*—Upon offering sufficient sureties to obey the church, he may have a *cautions admittenda*. 393.—If not absolved when the church is satisfied, he may have an *Excommunicato deliberando*. *ibid.*—A person excommunicated is to be put *sine die*, and the entry thereof. *ibid.*

Execution.

What courts are to award executions. [383] *b.* [384] *a.*—What executions may, and when

when and how, be granted. P. [384] a. b.—*Ca. ad satisfaciendum* by what statute granted in some actions, and where it lay at common law. *ibid.* a.—By what statute an execution was granted against the lands. *ibid.* a pl. 2.—That a *Fieri facias* lay at common law. *ibid.* pl. 3.—Where the party shall have an *elegit*, and whether several, and where. *ibid.* pl. 4, 5, 6, 7, 8.—Where he may have a *ca. sa.* or *fi. sa.* after an *elegit*, and where not. *ibid.* pl. 9, 11, 12, 13, 14, 15, 17.—Where he may have a new *ca. sa.* after an escape, and by what statute. [385] a. pl. 18.—How the law stood before that statute. *ibid.* pl. 19, 20, 21, 22, 23, 24.—Where the plaintiff may or may not have his election, whether the defendant shall be in execution at his suit. *ibid.* b. pl. 24, 25, 26. [387] a. pl. 44.—Where the plaintiff shall or shall not have another execution, but must resort to an action of debt upon the recognizance. [386] a. pl. 29, 32.—Where the plaintiff may have a *ca. sa.* or *feri facias de novo.* *ibid.* a. pl. 30, 31.—And how. [387] a. pl. 45.—Where a man may discharge himself from the execution by pleading to the *scire facias*, and where not. *ibid.* pl. 35.—Where an *exige facias* cannot be sued out without an *alias ca. sa.* [386] b. pl. 36.—Where a *testatum elegit* lies, and where erroneous. *ibid.* pl. 37.—Execution irregular. *ibid.* pl. 38, 39, 40.—Against whom where there are several defendants, [386] pl. 41, 42.—The statute of *Jac. cap. 24.*—And how the law stood before

that statute. P. [86] pl. 43.—Whether a man in a particular case can have an execution before the writ of error be abated in parliament. [387] a. pl. 46.—Where the executions against the principal and bail are to be several. *ibid.* a. pl. 47.—Of the days between the *teste* and return. *ibid.* pl. 48.—Where he cannot have execution without a *Scire facias per tot.* [389] a. pl. 26

Execution.

For and against whom to be granted.

Where executors and not the heir shall have it. [389] b. pl. 1. Where the wife shall have it. *ibid.* pl. 2. Where administrator *de bonis non* of the wife, and not the husband. *ibid.* pl. 3. Where the first conuzee shall have an execution, and oust the second. *ibid.* pl. 4. Where the infant at full age shall have it. *ibid.* pl. 5. Where a conditional executor shall have it. *ibid.* pl. 6. Whether it lies against the heir of one of the defendants dying, or solely against the survivor. *ibid.* pl. 7. Of what things an execution may be levied, and what not. [390] a. b.—How against an heir, and of what. [389] a. pl. 30. [390] a. pl. 10, 13, 14, 15, 16, 17, 18, 19. The statute of 3 & 4 W. & M. cap. 14. sect. 38. of execution against heirs. Whether an execution may be made upon the testator's goods after the death of the executor. [391] a. pl. 20. At what time goods are bound by an execution. *ibid.* pl. 21. A case whether the administrator shall be liable to costs of the goods of the intestate where

A TABLE of the Principal Matters

where the plaintiff takes a judgment, *Quando assens acciderint* upon *Plene administravit* pleaded. *P.* [391] pl. 2. [392] *a. b.*
Note; This case was since spoken to in the Common Pleas, and upon the first motion the court seemed to think that the plaintiff could not have costs.

Execution.

When, where, and how to be executed.

Whether the sheriffs of *London*, as such, can execute an execution upon a man in their custody, as sheriffs of *Middlesex*. [392] *b.* pl. 1. Whether to be done after the defendant discharged. *ibid.* pl. 2. That it may be done before the judgment entered. [393] *a.* pl. 3. How the sheriff is to demean himself in the several writs of execution. [393] *a. b.* 394 *a. b.* 395 *a.* Of his fees for an execution. [395] *a. b.* In what cases an execution against one shall avail another. *ibid. b.* 396 *a.* How an execution may be discharged. *ibid. a.*—Of charging a man in execution already in prison. *ibid. b.* [397] *a.* Of a Prerogative execution. *ibid. b.* [398] *a. b.*

Executors and Administrators.

Their power and authority relating to actions of debt, who may retain. 281 pl. 1, 2, 7, 8. When renounce. *ibid.* pl. 3.—When the authority of administrators are determined. *ibid.* pl. 4, 5. Where chargeable *de bonis propriis*. 283 pl. 2, 14. Where liable to bail. *ibid.* pl. 5.—Where chargeable for a *Devastavit*. *ibid.* pl. 16.—Where they cannot give in

evidence a first judgment in that action. *P.* 283 pl. 1, 9. Where he may plead *Plene administravit* to such action. *ibid.* pl. 22. Where an action of covenant may be had by executors. 103. Where against executors. 112, 113. Of declarations in debt by executors and administrators. 296. The like against executors and administrators. *ib.* Of pleas in debt by executors and administrators. 322 *a. b.* 323 *a. b.* 324 *a. b.*
Executor de son tort.

What makes an executor *de son tort*. 281 pl. 8. Where he may waive a term. pl. 5. How he ought to make payments. 281 pl. 11

Executors.

One refusing may administer at his pleasure. 396. May release. *ibid.* If he survive, may have an action. *ibid.* If he once administer, cannot afterwards refuse. *ibid.* Administration granted during his life, is void. *ibid.* Executor of an executor cannot prove the first testator's will. *ibid.* Where the damages in covenant shall be recovered by the executor. 154 pl. 36.

Feoffments.

OF pleading Feoffments, and other deeds. 326 *a. b.*

Fines.

Of pleading Fines. 326 *a.* 325 *b.*
Foreign Plea.

Where it must be verified by affidavit, and where not. 335 pl. 1

Forgery.

Of an order of the Spiritual court, may be punished there. 403 pl. 10. The like of letters of ordination. *Vide Spiritual Courts.*

Grant

Contained in this VOLUME.

Grant of a Reversion.

HOW to plead it. *P.* 143 pl. 31

Garnishment.

What it is, where to be prayed, and of the Garnisher and Garnishee. *Vide tit. Detinue.*

Grantees.

Of actions of covenant to be brought by Grantees. 106, 107. —The like against Grantees. 108, 109, 110, 113, 114, 115. Grantees of copyhold lands within the intent of the act of 32 *Hen.* 8. 128 pl. 18

Heriot.

WHEN to be paid upon a covenant to pay generally. 127 pl. 11

Heirs.

Where they may have an action of covenant. 102. —Where the action may be brought against them. 112. —The like in actions of debt.

Husband and Wife.

The husband may release the costs of suit in the spiritual court, but not the suit itself, *quoad reformationem morum.* 433 pl. 1. —*Contra*, that he cannot release, the costs. 437. pl. 10. But adjudged in the case of a suit for a legacy he may release because they are to go into his own pocket. 437 pl. 10. 438. pl. 11. *ibid.* pl. 12. —Where husband and wife may have actions of covenant 104. Where actions of covenant may be brought against them. 104, 105. Whether a husband marrying a woman in behalf of whom he had covenanted with a third person to permit her to make her will, discharged the

covenant. *P.* 120 pl. 1. Whether a release made by the husband of a stranger to the covenant, yet one of the persons to whom the money was payable was a discharge of the covenant. *ibid.* pl. 6. Of pleadings in debt by husband and wife 322 *a.*

Infant

Of pleadings in debt by an infant. 321 *b.* Appearing by attorney where ill. 365. *b.* pl. 1.

Inferior Court.

A prohibition lies if the party proceeds in an inferior court, on a judgment in a superior court. 468 pl. 4. —The jurisdiction of inferior courts must be avoided by plea, and not be confessed. 467 pl. 2. —And the matter must be verified by oath. 467 pl. 2. So if a matter be done out of their jurisdiction. *ibid.* —Inferior courts must always shew a matter to be within their jurisdiction. 468 pl. 6, 7. A prohibition denied after a verdict and judgment in an inferior court. 468 pl. 8

Inquisition.

Where ill pleaded. 336. pl. 29
Where it ought to be traversed. 345 *a.* pl. 12

Institution and Induction.

By institution the church is full against all persons but the king, 426 pl. 14. Is not to be questioned after induction, *ibid.* A sentence in the arches avails not to inhibit the induction after institution. 426 pl. 15. By induction the parson gains a lay-fee 402 pl. 3. What induction is. 402 pl. 3
Joinder

A T A B L E of the Principal Matters

Joinder in action and plea.

Who are to join in actions of covenant. *P.* 110, 111. Where persons may be charged jointly or separately in actions of covenant. 146 *pl.* 54. Who are to join or be joined in actions of debt. 283, 284

Issue.

What a good issue in covenant, though but argumentative, and only informal. 151 *pl.* 4.—Where the issue was good, the plaintiff being misled by the defendant, to omit material words in the covenant. 151 *pl.* 6. Issue immaterial in covenant 150 *pl.* 1. Where the issue in covenant was not well joined, there being more words therein than in the covenant. 151 *pl.* 9.—Where held not to be misjoined 305 *a.* *pl.* 47, 55. Where held not to be well joined. 350 *a.* *pl.* 49, 56, 59

Judgment.

Where judgments have been arrested in covenant, and for what. 155 *pl.* 1, 3, 5.—Where a plea being found for one defendant, the plaintiff shall not have judgment against the other. *ibid.* *pl.* 7. 156 *pl.* 11. Where the judgment against an executor shall be *de bonis Testatoris si habet, &c.* and where *de bonis propriis*. 155, 156 *pl.* 8.—How judgment shall be given where there are several executors, and some summoned and severed. [367 *a.*] *pl.* 1.—Where judgment shall be given for the defendant at the plaintiff's request. *ibid.* *pl.* 2.—A description of the form, and the several constituent parts of a judgment. *ibid.* *b.* 368 *a. b.*—Who shall

give judgment, and the power of the courts over their judgments. *P.* 368 *b.*—What court shall give a new judgment reversing the former. *ibid.* *pl.* 1, 2.—Where there must be a rule for judgment, and where not. [369] *a. pl.* 3. Where the court of King's Bench shall give such judgment as the court below ought to have given. *ibid.* *pl.* 4, 5, 8, 9. Where the court shall give a peremptory judgment on *multiel Record.* *ibid.* *a. pl.* 6.—Where not. *pl.* 7.—Where the plaintiff shall have judgment to recover his debt and damages, judgment for the defendant being reversed. *ibid.* *pl.* 10.—Where the court may reverse without a writ of error, and where not. *ibid.* *pl.* 11. Where the court may give a judgment *nunc pro tunc* *ibid.* *pl.* 12.—Where the court may amend their judgments. *ibid.* *pl.* 13.—Where a judgment in construction of law shall relate to the first day of the term. *ibid.* *b. pl.* 14.—Of the time and manner of signing judgments. *ibid.* *b.*—Of motions in arrest of judgment. [370] *a.*—Of setting aside judgments for irregularity. *ibid.* *a. b.*—Of avoiding judgments by a writ of error. *ibid.* *b.*—Of the effect of judgments, and to what time they shall relate, with the several acts of 29 *Car.* 2. *c.* 3, 4 & 5 *W. & M.* *cap.* 20. and constructions thereon. [379] *a. b.*—To what time a judgment shall bear relation. *ibid.* *b. pl.* 7, 8.—Of judgments by confession. 380 *a.*—If confessed on terms, the court will see the terms performed

formed if precedent; otherwise if the terms are subsequent *P.*[380]*pl.* 3.—When to be entered, and when not, without motion. *ibid.* *a.* *pl.* 5. A judgment without a warrant not to be set aside, but the party put to his action. *ibid.* *pl.* 8.—Of judgments against an heir. *ibid.* *a.* *b.*—Where the judgment shall be general, and where of lands descended only. *ibid.*—Judgments against executors and administrators. [381] *a.* *b.*—Where they shall be of their own goods, and where of the goods of the testator or intestate. [381] *a.* *b.*—Exceptions that have been taken to judgments in inferior as well as superior courts. [382] *a.* *b.* 383 *a.*—Where reversed in prohibition, because no place alledged where the writ of attachment was delivered.

490 *pl.* 53

Jurors and Jury.

Where the jury may find a matter, though in a foreign country. 152 *pl.* 10. in covenant.—That the jury shall be charged only with the covenant wherein the plaintiff assigns his breach. *ibid.* *pl.* 14.—What they are to find, and what not. 347 *b.* *pl.* 1, 2, 3.—That they can carry no evidence with them but that produced. 348 *a.* *pl.* 5.—That they cannot try a matter of record. 347 *b.* *pl.* 1, 2, 3. 348 *a.* *pl.* 10.—Where the omission of the jury will not hurt in prohibition. 488 *pl.* 49.—The jury's finding contrary to the record will not hurt. *ibid.* *pl.* 50

Lands.

OF pleas in actions of debt

relating thereto. Page 316

Lessor and Lessee. Vide Covenant, Damages 1.

When bound to repair, though the lease does not commence in point of interest 127 *pl.* 11.—Upon what words an action of covenant will lie against the lessor upon a covenant raised by implication of law. 117.—*Cro. El.* 214. What shall or shall not discharge a covenant against the lessor. 120 *pl.* 2. What not a breach of covenant in the lessee. 123 *pl.* 6. Where the action was held to lie against the first lessee after an assignment. 129 *pl.* 27

Letters of Request.

Letters of Request ought to be from the Archdeacon to the Bishop, and from him to the Metropolitan. 460 *pl.* 13.—*i. e.* they ought to be to the next immediate superior to whom the appeal lies. *ibid.* *pl.* 16.—And they cannot come in by way of suggestion, but must be entered. *ibid.* *pl.* 17, 18

Libel.

If the Libel be insufficient, tho' the declaration aids the matter, yet the prohibition shall stand. 485.—The Libel to be in court. *ibid.*—Where a variance from the Libel did not hurt after a verdict. 488 *pl.* 44

License.

Letter of License and Composition, where ill pleaded. 335 *pl.* 5, 6

Limitations.

Where the statute of Limitations have been held a bar; and where not. 319 *b.*

Marriage

A TABLE of the Principal Matters

Marriage.

WHERE Marriage may be tried *per pais*. *P.* 151 *pl.* 9.
Vide 32 *Hen.* 8. *cap.* 38.—
 2 *Ed.* 6. *c.* 28.—5 *Ed.* 6. *cap.*
 1 *Jac.* 1. *cap.* 11.—7 & 8 *W.* 3
cap. 10 *Annæ*, *cap.* 10.

Midwife.

Is not suable in the spiritual court for acting without a licence. 410 *pl.* 43

Misnomer.

How to plead it. 335 *pl.* 15

Modo & forma.

Where words of form only, and where of substance, in Replications. 338 *pl.* 1, 2, 3.—

Where the words *modo & forma* go to the whole point in issue. 348 *b. pl.* 27

Modus.

What it is, where good, and where not. 478, 479, 480, 481

Mortuary. *Vide* Spiritual Courts.

Mulier.

What is a Mulier in the civil law. 396. That it is a bastard by our law. *ibid.*

Ne unquez accouple in legali matrimonio.

WHERE held no plea. 335 *pl.* 14 351 *b. pl.* 8, 9

Ne unquez Executor. *Vide* Pleadings and Executors.

Nil debet per legem.

What it is, where a good plea, and what to be done thereon. 299, 300

Nil debet per patriam.

Where a good plea, and where not. 143 *pl.* 32. 300, 301, 302

Nil detinet.

Where a good plea, and where not. *Page* 301 *pl.* 5

Nil habuit in tenementis.

Where it is a good plea in covenant, and where not. 141 *pl.* 15, 16. 143 *pl.* 33

Nonage. *Vide* Infant

Where the Nonage of the party is a disability to grant, and a breach of covenant. 123 *pl.* 3

Non dampnificatus.

Where no plea in covenant. 148 *pl.* 76

Non est factum.

Of pleading *non est factum.* 298

Non infregit conventionem

Where held a good plea in covenant. 141 *pl.* 17.—Where a good plea in debt, and where not. 318

Notice and Request in Actions of Debt.

Where notice necessary, and where not, on the breach of an award. 347 *a. pl.* 1.—On a bond to pay money when (such a one was married) *ibid.* *pl.* 4.—On a bond to pay monies that an apprentice did imbezzle. *ibid.* *pl.* 6.—On a bond to pay the charges of a suit. *ibid.* *pl.* 7.—Where a notice and request necessary in actions of covenant. 119.—On a bond to assure lands. 347 *a. pl.* 8.—That a stranger should do such an act. *ibid.* *a. pl.* 9.—Where an administrator shall be construed to have notice. *ibid.* *b. pl.* 10.—On a bond to save harmless. *ibid.* *pl.* 11.—

Contained in this V O L U M E.

11.—To perform an award. *Page 347 pl. 12.*—Other cases not mentioning the particulars. *ibid.*—Where *Licet sapius requisit* is sufficient without a special notice in the declaration in covenant. 151 *pl. 9.*—On a bond to make a sufficient assurance before such a day. 347 *pl. 8.* On an act to be done by a stranger. *ibid. pl. 9.*—For an administrator not to pay debts of an equal nature *ibid. b. pl. 10*

Notice of Trial.

What notice sufficient. (354) *a. pl. 1, 3, 4.*—Where a new notice is to be given. *ibid. pl. 2.* When to countermand notice of trial, and how. *Ibid. pl. 9*

Officers.

AN Officer cannot be removed for a crime before he is convicted, unless it be against the duty of his office, and there he may. 409 *pl. 41*

Ordinary and Ordinary Jurisdiction.

By the common law the king is the supreme ordinary. 392.—Ordinary jurisdiction is all in the Bishop. *Ibid.*—In the Archbishop in his province, in Bishops in their diocese. 392. Sometimes delegated to particular persons. *Ibid.*—The ordinary is the immediate officer to the King's Courts. 393.—Originally had the care of intestates effects, and why. 396. Might dispose of them *ad pios usus*; and if he did otherwise, was not suable at law. 397. Cannot inhibit the Archdeacon to induct after institution.

Page 426 pl. 14. May punish a parson who procures himself to be inducted upon a super-institution. 424 *pl. 4.*—Cannot remove his collatee after collation, nor sequester his benefice. 427 *pl. 18.*—Cannot remove a school-master unless a recusant. 403 *pl. 7.*—But may proceed against a school-master for immorality *contra bonos mores. ib.*—When the ordinary hath granted administration, he hath finished his authority and cannot repeal it. 397. Nor can he sue the administrator *pro salute animæ* to repeal a temerarious administration. 411 *pl. 52*

Outlawry. *Vide Damages 4.*

How to plead an outlawry. 336 *pl. 23*

Oyer.

Where *Oyer* must be craved of a deed before the defendant can plead in covenant. 142 *pl. 22, 23.* Who shall have it, and who not. 308 *pl. 1. b.*—Where not, because the thing belongs to a stranger. *pl. 2.*—Or of letters patent. 310 *pl. 12.*—Or of an agreement that is only matter of evidence. 310 *pl. 15.* Where not of a record. *pl. 3.* Or the deed not in court. 309 *pl. 8.* Nor after an imparlance. 309 *pl. 10.* That *Oyer* is from the court, and not the party. *pl. 4.* That the demand of *Oyer* is a kind of plea. *ibid.*—Where the court will not grant it. 308 *pl. 5.* Where *Oyer* is unnecessary, setting it forth shall not hurt the party. *pl. 6.* The want of *Oyer* is matter of form. 308 *pl. 7.* Where the deed shall be intended to be in

A TABLE of the Principal Matters

in court. *Page 309 pl. 9.*—
And to be shewn by the defendant. *Ibid. pl. 10.* Where the court will compel the plaintiff to give the defendant a copy. *ibid. pl. 9.* Where the plaintiff could not crave *Oyer* of the deed set forth by the defendant. *309 pl. 9.*—

After a plea in abatement one cannot have *Oyer* to plead another dilatory matter. *ibid. pl. 10.* The granting *Oyer*, where it ought not to be, is not error, yet denying it is. *ibid. pl. 10.* Formerly all demands of *Oyer* were in court, as now in the case of an appeal. *310 pl. 10.* That a deed remains in court all the term wherein it is produced. *ibid. pl. 11.*—
Where letters patent are to be pleaded with a *profert in curia*. *ibid. pl. 14.* Where judgment may be signed for want of *Oyer*. *ibid. pl. 17*

Pardon.

The pardon of the offence extends to the costs before, though taxed afterwards. *444 pl. 1.*—And after a pardon pleaded, though it be a tacit confession of the fact, they cannot give costs in the spiritual court. *434 pl. 5.* Otherwise where the costs are taxed before the pardon, and an *Excommunicato Capiendo* issues. *445 pl. 4.*—So if after the pardon the party appeals, and costs are taxed for deserting the appeal, a prohibition lies.

444 pl. 2.

Parish and Parishioners.

The major part of the parishioners shall bind the minor, for things necessary for the

church. *P. 420 pl. 4.* The parishioners may sue in the spiritual court against one who ought to find a parson to perform divine service, *395.* The bounds of parishes not triable in the spiritual court. *Vide Prohibition and spiritual court.*

Parson.

A parson by induction gains a lay fee. —For offences of the greater nature may be deprived. *394.* May be deprived in the spiritual court for homicide. *408 pl. 38.* Not to be deprived upon an institution void by the civil law. *402 pl. 5.*—Otherwise in case of simony. *444 pl. 3.* Is not to be deprived for an offence wherein he hath his benefit of clergy. *ibid. pl. 3.*—And a prohibition will be granted if he be sued to deprivation after an allowance of his clergy. *ibid. pl. 3.* He is not to cut trees, unless to repair the chancel, *391.* Commended by the statute of 35 Ed. 1. for giving trees to repair the body of the church, *ibid.* May have an action for carrying away his tithes after they are let out, *409 pl. 40.*—A parson may sue in the spiritual court for a *modus*. *390, 405, pl. 17, 18.* A parson collated by lapse without a title, is not to be questioned in the spiritual court, *426, pl. 16.* May sue in the spiritual court, if disturbed in making his tithe hay due by custom, *406, pl. 21.* A parson inducted upon a superinstitution, is by the canon law an intruder, *424 pl. 4.* A parson may maintain an action for a breach of covenant before his non-residency, *121 pl. 11*

Patentee

Patentee.

Where the patentee of the king shall be liable to an action of covenant, though the queen and her successors were excepted. *Page 128 pl. 19*

Peculiars.

Peculiars are not inferior to the ordinary, but *prima facie* have a co-ordinate jurisdiction with the bishop. 460. *pl. 16.*—If they are subject to the ordinary, that ought to be specially suggested. *Ibid. pl. 17*

Pension.

A pension is suable for in the spiritual court, if claimed by a spiritual person. 409. *pl. 42.* So of an annuity. *Ibid.*—But not if due to a layman by custom. *ibid.*

Performance of a Condition. *Vide* Condition and Pleadings.

Performance of covenants. *Vide* Breach.

What deemed a performance, because performed in substance, though not in words. 116 *pl. 1, 3.* And what not, because the intent was not performed. *ibid. pl. 4.* What not a performance, because the thing done does not operate in law in such manner as the thing ought to have been done. 116 *pl. 2.* Where a notice is requisite before the party can perform. *ibid. pl. 6. 119.*—Where the party is obliged to perform one thing before another is performed by the other party, and where not. 116 *pl. 6. 117 pl. 8.*—Of

a covenant to levy a fine. *pl. 7.* Where a performance by one shall discharge the other who joined in the covenant to perform, and where not. *P. 117 pl. 9.* How a covenant to pay 20*l.* a year is to be performed. *ibid. pl. 10.* How a covenant for quiet enjoyment shall be construed as to the performance. *ibid. pl. 11.* Upon what words in a deed an action lies against the lessor on a covenant raised by implication of law. *Cro. Eliz. 214.*—Where the covenant shall be performed, though the estate be void. *ibid. pl. 12.* At what time a covenant is to be performed. *ibid. pl. 13. 119 pl. 8.* To whom a covenant is to be performed. 117 *pl. 14.* Where the performance of a covenant shall be extended farther than the first intent of the deed, the covenantee having extended and enlarged the thing about which the covenant was made. *ibid. pl. 15.* How a covenant to make a farther assurance is to be performed. *ibid. pl. 16.* Where a covenant is performed, though the thing done becomes afterwards ineffectual, the party having done all that was in his power. 118 *pl. 17.* Where the act of God will excuse the performance of a covenant, and where not. 117 *a. pl. 1, 2.* And where the performance in a strict manner shall be dispensed with, but that the party must do it as near the intent of the parties as possible. *ibid. pl. 3.* And a difference where the duty is created by law, and where by an express covenant. 118 *pl. 4, 5.* Where the

A TABLE of the Principal Matters

the party shall be bound to perform, though not liable to the penalty, through the act of God. *P. 118 pl. 6.* Where the act of the lessee or covenantee shall excuse the performance of the covenantee or lessee, and where not. *ibid. pl. 1, 2, 3. 119 pl. 5, 6, 7.* Where covenants are construed well performed, and where not. *ibid.* Where performance generally is a plea, and where not, vide *Pleadings.* Of the Performance of Awards, vide *Awards.*

Performance generally and specially.

Where to be pleaded generally, and where specially in covenant. *141 pl. 18. 143 pl. 25, 26, 27. 142 pl. 28. 144 pl. 39. 145 pl. 49.*—How to plead it. *141 pl. 19, 20, 22*

Pleadings.

In Covenant.

How to plead where some covenants are in the affirmative, and some in the negative. *140 pl. 1.* Of pleading one covenant in bar of another. *141 pl. 4. 142 pl. 21.* Where an accord is a good plea. *142 pl. 7, 8, 11.* Where good with, but not without satisfaction. *ibid. pl. 6. 145 pl. 8.* What a good plea to an action of covenant for levying a fine. *141. pl. 12, 13.*—Where a release by the lessor, after an assignment by the lessee, is not a bar. *ibid. pl. 14. 146 pl. 51.* Where *Nil habuit in tenementis* is no plea. *141 pl. 15, 16.* Where it is a good plea *143 pl. 33.* Where *Non infre-*

git conventionem was held a good plea. *P. 141 pl. 17.* Where performance generally is a good plea, and where not. *ibid. pl. 18. 143 pl. 25, 26, 27. 144 pl. 39.* Where it ought to be specially pleaded. *142 pl. 28. 145 pl. 49.* Where *Oyer* must be craved of a deed before the defendant can plead to it. *142 pl. 22, 23.* What no good plea to a covenant that the plaintiff was seised, &c. *ibid. pl. 24.* That he saved harmless without shewing how, good upon a general demurrer, *143. pl. 29.*—How to plead the rasure of a deed. *ibid. pl. 30.* How to plead the grant of a reversion. *ibid. pl. 39.* Where *Nil debet* was held no plea. *ibid. pl. 32.*—Where an assignment pleaded without notice was held ill. *143 pl. 34.* Where the defendant's plea ought to conclude to the country, and where with an averment, *149. pl.*—Where tender and refusal *Suncore pristi*, is a good plea, *143 pl. 37.* What not a good plea to an action for not transferring stock. *ibid. pl. 38.* Where a bargain and sale without an entry is a good plea. *144 pl. 42. 147 pl. 63.* Where naught without attornment. *147 pl. 64.* What not a good plea of eviction after the delivery of the deed. *144 pl. 43.* What a good plea to an action upon a charter-party. *ibid. pl. 44. 145 pl. 52.* Where no rent in arrear was held no plea. *145 pl. 45. 149 pl. 76.* What a good plea to an action of covenant for quiet enjoyment. *145 pl. 47.* Where an assignment

Contained in this VOLUME.

assignment ought to be pleaded with notice. *P.* 145 *pl.* 50. 147 *pl.* 61. *contra.* What held a good plea to an action for not repairing. 146 *pl.* 55. 147 *pl.* 59. Where entry by the plaintiff, and eviction, is no plea. *ibid.* *pl.* 57. The like of a stranger. 148 *pl.* 67.— Where a plea in covenant was held to be double. 147 *pl.* 60. Where the rebuilding is no plea, the action being once attached. *ibid.* *pl.* 62. Where interruption by the plaintiff was held a good bar. 148.— Where the entry of a stranger is a good plea for not making a surrender. *ibid.* *pl.* 66.— Where *Non dampnificatus* is no plea. *ibid.* *pl.* 76. What other pleas have been held good, and what not, in covenant. 149. Vide *Replication, Traversa.*

Pleadings.

In Debt.

Of pleading *non est factum.* 298. Where *nil debet* is, and where not, a good plea. 299, 300, 301. Of special pleas in debt. 302. Of certainty as to the matter. 302, 303. Of certainty as to the time. 304. Of certainty as to the place. *ibid.* That pleas must have a proper commencement and conclusion, and proper inducement as to the matter pleaded, and how to conclude in pleading. 304, 305. That they ought to have proper averments. 305. Of certainty as to the matter pleaded, and where pleas have been deemed incertain. 302. Of certainty as to the time and place in pleas. 304. In pleas by join-

tenants or tenants in common. *P.* 303 *pl.* 2. Of a bond discharged. *ibid.* *pl.* 4. Of writings delivered pursuant to the condition. *ibid.* *pl.* 5. Of a discharge of an annuity. *ibid.* *pl.* 6. Of a bond discharged. *ibid.* *pl.* 7. To a bond to pay for so much bread delivered. *ibid.* *pl.* 8. That pleas are not to be made certain by inference or argument. *ibid.* *pl.* 9. Upon a bond to ratify and confirm a demise. *ibid.* *pl.* 10. Upon a bond to warrant lands. *ibid.* *pl.* 11. Of pleading a misnomer. 303 *pl.* 15. Of certainty in pleadings as to the time. 304. In pleading an indenture of defeazance. *ibid.* *pl.* 1. That every plea is to be taken more strongly against the party pleading. 304 *pl.* 2. *a.* Want of time alledged on a bond for performance of covenants. *ibid.* *pl.* 3. *a.* 307 *pl.* 1. *a.* Where the time need not be alledged. 304 *pl.* 4. *a.* Of certainty as to the place. *ibid.* Where the attornment was made. *ibid.* *pl.* 1. *b.* Where the deed bears date. *pl.* 2. *b.* Where it was made. *pl.* 3. *b.* 4. *b.* Where the place need not be shewn. *pl.* 5. The place of expulsion. *pl.* 6. Place of payment. *pl.* 7. Where the person is alive. *pl.* 8. How to plead in abatement. *ibid.* *pl.* 2. Where a plea shall be taken in bar, and not according to the conclusion. 305 *pl.* 3. Where he ought to conclude to the writ. *ibid.* *pl.* 4. *a.* Of pleading dying seised. 305 *pl.* 5. *a.* Where not to demand judgment of the action. *ibid.* *pl.* 6. *a.* That pleas must have proper averments. *ibid.* Where there needs no averment

A TABLE of the Principal Matters

averment of the parties being alive. *P.* 305 *pl.* 1. 3 *b.* 4 *b.*—
Where needs no averment of a matter implied. 305 *pl.* 2, 3, 4. Where there needs no averment of the death. *ibid.* *pl.* 5. *b.* Nor that the lands were socage tenure. *ibid.* *pl.* 6. *c.*—Nor that the feoffment was to his use. *ibid.* *pl.* 7. *c.* Nor what will come proper from the adverse party. *ibid.* *pl.* 9—That pleas are not to bedouble. 306. *Nil debet* to part, and *Nil habuit in tenementis* to the rest. *ibid.* *pl.* 1. What makes the plea double, and what not. *pl.* 2, 3, 4. In pleading an award. *ibid.* *pl.* 5. In pleading durefs. *ibid.* *pl.* 6. In pleading payment. 306 *pl.* 7. That matter of surplufage does not make the plea double. *ibid.* *pl.* 8. In pleading a concord. *ibid.* *pl.* 9. In pleading a levy by distress. *ibid.* *pl.* 10. To part a tender, to another part an entry. *ibid.* *pl.* 11. That the defendant was illiterate, and the bond delivered as an escrow. *ibid.* *pl.* 12. Where a bar with a traverse does not make the plea double. *ibid.* *pl.* 13. That insufficient declarations may be made good by the plea, so the plea by the replication, &c. 307. In pleading durefs. *ibid.* *pl.* 2. *b.* That pleas amounting to the general issue are not good. *ibid.* And what does not amount to the general issue. *ibid.* *pl.* 2. *c.* 3. *c.*

Of Pleas in Actions of Debt relating to Lands.

On a bond to procure a stranger to make a release. 316 *pl.* 1. To make a sufficient title.

P. 316 *pl.* 2, 4. To confirm a demise. *ibid.* *pl.* 3. Not to disturb in the enjoyment. *ibid.* *pl.* 5, 8. 317 *a.* *pl.* 10, 14, 15. *ibid.* *b.* *pl.* 21. The difference between a bond to make a deed, and a bond to deliver a deed. 316 *pl.* 6. To make a surrender. *ibid.* *pl.* 7. 317 *b.* *pl.* 23. To warrant and defend lands. 317 *a.* *pl.* 9. On a condition to do all reasonable acts for the further affurance. *ibid.* *a.* *pl.* 11, 12. *ibid.* *b.* *pl.* 25. To discharge from all incumbrances. *ibid.* *a.* *pl.* 13. To convey lands. *ibid.* *pl.* 17. To make an estate. *ibid.* *pl.* 18. *ibid.* *b.* *pl.* 21. To levy a fine. *ibid.* *pl.* 19, 20. To grant a new lease. *ibid.* *b.* *pl.* 24

What Pleas have been adjudged good, and what not, in Actions of Debt upon Bonds for the performance of an Award.

317 *b.* 318 *a.* *b.*
That it was a void Award. 317 *b.* *pl.* 1. In pleading performance. *ibid.* *pl.* 2. Must be pleaded under hand and seal. *ibid.* *b.* *pl.* 5.

What Pleas have been adjudged good, and what not, upon Bonds to save harmless. 318. *a.* *b.*

Where to plead *non dampnificatus* generally. *ibid.* *pl.* 1, 3, 5. *b.* Where not. 318 *pl.* 2. *Habuit & gavisus fuit pacifice*, no plea. *ibid.* *pl.* 4. To conclude & sic that he kept him harmless, ill. *ibid.* *a.* *pl.* 6. A discharge, and does not shew how. *ibid.*

What

What Pleas have been adjudged good, and what not, in Actions of Debt for an Escape. *P.* 318, b.

319. a.

Fresh pursuit. 318. b. *pl.* 1. 319. a. *pl.* 6. A commitment *prout per record. ibid. pl.* 2. An escape with the plaintiff's consent.

319 a. *pl.* 5.

Of Pleas to Actions of Debt upon statutes. 319

Where the statute of limitations hath been held a bar, and where not. *ibid. b.* Of pleading the statute of usury, and what hath been held usurious contracts, and what not. 320 a. b. 321 a. Of pleading attachments by the custom of London. 321 a. Of pleas in debt by an infant. *ibid. b.* Of pleas in debt by baron and feme. 322 a. By executors and administrators *ibid. a. b.* 323 a. b. 324 a. b. Of pleading records. 324 b. 325 a. b. Fines. 325 b. Feoffments and other deeds. 326 a. Recoveries. *ibid. b.* 327 a. Of pleading Estates. 327 a. Of pleading customs. 328 a. What pleas have been adjudged good, and what not, in actions of debt for rent. *ibid. a. b.* Of pleading the performance of a condition, 329 a. b. Of pleading performance generally. 330 a. Of pleas to actions brought for performance of covenants. 330 a. b. 331 a. 332. What pleas have been adjudged good, and what not, to actions of debt upon a bond for the payment of money, or to do somewhat to or for the plaintiff. 232, 233, 234, 235. Other cases concerning pleas in gene-

VOL. II.

ral. *P.* 335, 336. Not to plead to the jurisdiction after an imparlance. 467 *pl.* 2

Pleading Performance of a Condition.

Performance of a condition, how to be pleaded. 329 a. To deliver 20 *l.* or ten kine. *pl.* 1, 2. Not to be pleaded as performed in any other manner. *pl.* 3. To discharge an annuity. *pl.* 4. Not to deliver possession to any but the lessor, &c. *pl.* 5. Not to plead any thing in the recital, but to answer the condition. 329 b. *pl.* 6. Where discharged from the performance. *pl.* 7. Of a condition to suffer his wife to make a will. *ibid.* Of pleading performance generally. 330 a.—Of pleas to actions for the performance of covenants. *ibid. a. b.*

Of Pleading a Tender.

Where he must go further, and say *uncore prist.* 310 *pl.* 1. 311 *pl.* 3, 10, 11. 312 *pl.* 13. Where he must shew a refusal, and where not. 311 *pl.* 2. 312 *pl.* 15. Where he need not say *uncore prist*, but only a tender and refusal. 311 *pl.* 4, 5, 6. Where *uncore prist* alone is good, and where not. *ibid. pl.* 7, 8, 9. 312 *pl.* 24. Where it must be pleaded in bar of the damages only. 311 *pl.* 9. 312 *pl.* 16.—*Uncore prist* not to be pleaded after an imparlance, because repugnant to the nature of an imparlance. 312 *pl.* 12. Where the refusal is traversable, and not the tender. *ibid. pl.* 17. Where a tender before the day is not good. *ib. pl.* 18. What no good tender.

C

P.

A TABLE of the Principal Matters

P. 312 *pl.* 19, 20. Where not good without notice. *ibid.* *pl.* 21. Where the money tendered shall not be delivered to the plaintiff. 312 *pl.* 22.—Where a traverse is necessary in the replication. 312 *pl.* 23. Of Rent. *ibid.* *pl.* 25

Of Pleading Outlawries.

Where on failure of bringing in the record the plaintiff shall have judgment. 313 *pl.* 1. *c.*—Where it is no bar. *ibid.* *pl.* 2. 314 *pl.* 3, 4, 5. *a.* How to be pleaded. *ibid.* 6, 7

Pleading a Release.

A release in bar where it is and where not so, and how to be pleaded. 314, 315, 316.—*Vide Covenant, Debt, Release, Husband and Wife.*

Pleading Payment.

Of a moiety without saying what sum. 313 *pl.* 1. Payment at another place. *ibid.* *pl.* 2.—Where payment and acceptance of a less sum is good. *ibid.* *pl.* 3, 4. That a place of payment is necessary. *ibid.* *pl.* 5. Payment presumed on *solvitur ad diem* to an old bond, but how to be pleaded. *ibid.* *pl.* 6. Of payment before the day. *ibid.* *pl.* 7. Where ill without an acquittal. *ibid.* *pl.* 8

Pleading a Recovery.

A recovery in another action where it is a bar, and how to be pleaded. 314

Pleadings in Debt by Joint-tenants and Tenants in Common.

Where he ought to shew how he held in common. 303 *pl.* 3

Poor Prisoners.

Where the act of poor prisoners was ill pleaded. P. 336 *pl.* 25

Prescription.

What good prescriptions relating to tithes, and what not. 477 *pl.* 11.—When to be tried in the spiritual courts. 404 *pl.* 10

Presentation.

Alay patron may vary his presentation before induction, but a spiritual patron cannot. 425 *pl.* 10.—The judges cannot take notice of the ill presentment of the King, but in the case of simony. 458 *pl.* 4. Where a tortious presentation is no breach of a covenant to make good the grant of the presentation free from incumbrances. 121 *pl.* 13

Profert in Curia.

Matter of form only. 308 *pl.* 7

Prohibition.

Its antiquity. 391. Whether grantable *Ex debito Justitiæ*, or *Ex Gratia*. 417 *pl.* 3. That it must be granted on a suit in the spiritual court, and not on a bare petition there. 467 *pl.* 7. May be granted at the instance of plaintiff or defendant, or of a stranger, as an *Amicus Curie* in some cases. 399. By and to whom granted. For what it may be brought. 388, 399.—34 & 35 *Hen.* 8. *cap.* 11. § 4. That it lies not for a pension, simony, &c. on benefices enjoyed ten years before the dissolution of monasteries, &c. 398. It lies if the cause is not like to have an indifferent trial. 427 *pl.* 17. Is to be granted if the party might have

Contained in this V O L U M E.

have his remedy at law. *P. 456 pl. 2, 3.* 468 *pl. 9.* Not where the proper remedy is by appeal. 435 *pl. 17.* So if the remedy be properly in equity. 407 *pl. 31, 34.* But not always so. 436 *pl. 1, 2.* And in some cases the party may sue either at law or in the spiritual court, as in the case of an annuity, &c. 437 *pl. 8.* 409 *pl. 42.* And by bringing an action at law, the remedy in the spiritual court is released. 452 *pl. 33.* 437. 409. 411 *pl. 52.* It is to be granted where they deny a copy of the libel. 441 *pl. 32.* And such denial must be verified by affidavit. *ibid. pl. 33.* So upon a denial of the copy of articles. *ibid. pl. 34.* And a *Mandamus* shall issue to absolve the party if excommunicated. *ibid. pl. 34.* It lies if they refuse a plea that is triable there. 435 *pl. 12, 13.* 436 *pl. 5.* 437 *pl. 6, 7.*—On a bond pleaded in bar to a legacy by an executor. 440 *pl. 25.* On *Plene Administravit* pleaded. 440 *pl. 26.*—On a plea of no assets to pay a legacy. 422 *pl. 8.* Of an award. 440 *pl. 24.* But not unless the plea be refused 448 *pl. 11.* Nor if the plea refused be proper cause of appeal. 420 *pl. 6.* It lies on a discharge by deed. 440 *pl. 23.*—If they refuse a verdict as evidence, which is a bar. 426 *pl. 15.* So if they proceed contrary to a verdict at law. *ibid. pl. 15.* 464 *pl. 6.* If they refuse a setting out of tithes by one witness. 437 *pl. 9.* So of a lease or subtraction of tithes by one witness. 447 *pl. 2.* So of a release. 401. But the

party must shew that he offered proof by one witness, and not barely suggest that he had but one. *P.* 449 *pl.* 13. Where it was said not to lie on refusal of proof by one witness. 439 *pl.* 16. 434 *pl.* 7. It lies if they try prescriptions if denied. 405 *pl.* 18. 401, 450 *pl.* 21. It lies not upon a suit for a *modus*, and payment pleaded. 473 *pl.* 10. 447 *pl.* 1. But one witness must be admitted to prove it. *ibid.* *pl.* 2. 438 *pl.* 14. It lies if a deed be denied. 447 *pl.* 5.—On a covenant to hold lands discharged the party may have an action, but no prohibition. 456 *pl.* 10. If articles comprehend matters out of the spiritual court, and others within it, as to the former he ought to plead *Quod non tenetur respondere*; and if they refuse that plea, a prohibition lies. 446 *pl.* 9. It lies where a *corody* is in question 410 *pl.* 48. They may proceed upon a prescription if confessed, but not if the prescription be ill, for then a prohibition lies. *ibid.* *pl.* 48. A prescription for a way to a church is temporal. *ibid.* *pl.* 47. A prohibition lies upon a suit for a way, suggesting that it is a common highway. *ibid.* *pl.* 46. To a suit for a nuisance in the church-yard. 411 *pl.* 56. On a suit for a false verdict by a jury. 443 *pl.* 9. Where it will lie upon an inhibition to the Archdeacon not to induce after judgment in error affirmed in a *Quare Impedit*. 458 *pl.* 1. It lies on a suit for *Sylvæ Caduæ*. 308. The civil law makes *A. B.* and *C.* jointenants of a legacy in money, but th.

C 2 commo

A TABLE of the Principal Matters

common law says they are tenants in common, and that the legacy is a chattel vested; and therefore if adjudged to the survivor, a prohibition lies. *P. 438 pl. 13.* Where it shall go as to part only. 463, 464. It shall go for the matters triable at law, but not for the rest. 463 *pl. 1.* Where it shall go as to the bounds of parishes, but not as to the institution. 463 *pl. 2.* *Quoad* the distribution, but to stand as to the accounting. 465 *pl. 9.*—*Quoad* the mortuary, and to stand as to part. 465 *pl. 10.* Upon a suit to prove a will of lands and goods, said to go as to the lands, but not as to the goods. 463 *pl. 3, 4.* 464 *pl. 1.* Where as well to lands as goods. 463 *pl. 5.* Where it lies as to the lands only, because they shall be construed separate wills. 464 *pl. 3.*—Where it was denied either to the lands or goods. 463 *pl. 5.* 464. Where it shall be granted as to all the matters, because interwoven. 465 *pl. 6.*—Where it shall go as to the whole, upon a sentence to recant words of defamation. *ibid. pl. 7.* Where it shall be granted as to proceeding for the treble damages, but the sentence to stand as to the costs. *ibid. pl. 4.* Where granted on a suit by an orphan in London. 461 *pl. 2.* On a suit to repeal an administration. 441 *pl. 28.* On suing on a *Devastavit.* 440 *pl. 21, 22.* Where it lies not for an indictment and conviction for the same offence. 443 *pl. 11.* It lies if they tax costs for the plaintiff having a prohibition, though a consul-

tation had been granted *P. 442 pl. 4.* Of prohibitions on suits for proctors fees. 465 *pl. 8.*—Where the party shall have a prohibition to stay his own suit. 457 *pl. 4.* 458 *pl. 8.*—Where a man appearing *pro interesse suo* shall have it. 457 *pl. 5, 6.* Where not to be granted, because the party may have a more speedy remedy. 474 *pl. 1.* Where prohibitions have been granted to dissolve marriages. 451 *pl. 29, 30, 31.* Will not lie on a suit there for a contract of marriage *per verba in futuro.* 452 *pl. 33.* Not to be granted after a consultation for the same cause. 390. Exceptions thereto, and *vide Cro. Jac. 134. Lit. Rep. 297. 2 Brownl. 26. Latch 6, 73. Palmer 413. Popham 159.* Whether a prohibition be discontinued by the demise of the crown. 466 *pl. 2.* A prohibition lies if the party be cited out of the diocese for in another. 419 *pl. 2.* A prohibition denied after a verdict and judgment in an inferior court. 468 *pl. 8.* A prohibition is not always to go where a temporal loss may ensue, with an exception to this rule. 411 *pl. 53.* A prohibition lies upon a suit for the accounts of the profits of a benefice. 424 *pl. 5.* But not for a suit there for the profits in the time of a sequestration. *ibid. pl. 7.* It lies not upon a suit there for dilapidations. 408 *pl. 39.* It lies upon a suit there for defamation contained in a suit. *ibid. pl. 39.* It lies upon a suit there for the inheritance of seats. *ibid. pl. 39.* Though letters

Contained in this VOLUME.

letters patent are pleaded by one coming *in pro interesse suo*, yet that shall be no cause for a prohibition. *P.455.* What is a variance to abate the writ. 487 pl. 33. Where it may go to part. 488 pl. 33. Whether discontinued by the demise of the King. *ibid.* pl. 36. Who may join or ought to sever. *ibid.* pl. 37, 38. Where the court on a void prohibition will grant a consultation without a plea. *ibid.* pl. 39, 40.—Whether to be granted without a suit depending. *ibid.* pl. 41. When too late to apply for a prohibition by a long acquiescence under the jurisdiction. 472 pl. 8. 473 pl. 1. When to be granted after sentence, and when not. 471, 473, 474 pl. 3. When after sentence on refusal of proof. 472 pl. 6. When after an appeal. 471 pl. 3. 473 pl. 2. When, after sentence and appeal. 472 pl. 8. Not to be granted for suing out of the diocese after sentence. 472 pl. 9. Unless it appears the spiritual court have no jurisdiction. 473 pl.

2, 11

Provifo. *Vide* Covenant.

Razure.

HOW to plead where the deed is razed. 143 pl. 30.

Recognizance.

Where a plea thereto held ill. 335 pl. 10

Records.

Of pleading records. 324 b. 325 a. b.

Recovery.

Of pleading Recoveries. 326 b.

Recovery in a court-baron, *vide* 336 pl. 24

Rejoinder.

Where a Rejoinder ill in covenant. *P.148 pl. 96.* Of Rejoinders in debt where they have been held good, and where not, and what has been construed a departure. 342 a. b. 343 a. b.

Release.

Where a good bar in covenant, and where not. 120 pl. 4, 6. 141 pl. 14. 146 pl. 51.—The like to an action of debt for rent. 336 pl. 18

Repairs of a Church, and Church Ornaments.

Where parishioners having a chapel of ease, with parochial rights, may prescribe to be discharged from the repairs of their mother church. 416 pl. 7, 8, 9, 10, 11, 12.—Such prescriptions would be good if it were to repair part of the church or the church yard walls. 418 pl. 1.—A man shall be charged with the repairs of a church in respect of lands, though he do not dwell in the parish. 415 pl. 2.—But not in respect of the rent. *ibid.* pl. 3.—A man having lands in one parish, and living in another, is not to be rated for his lands to the church ornaments. 419 pl. 2. But that lies on the personal estate. *ibid.* pl. 1.—A perpetual rate to repair a church is not good, because it binds the inheritance. 414.—A prohibition will not lie for being over-rated to the repairs of a church. 416 pl. 6. But if some are rated, and some not, a prohibition lies. 419 pl. 2.—A man is not to be charged

A TABLE of the Principal Matters

charged to repairs in respect of lands he hath in another parish. *P. 415 pl. 4.*—The parishioners of a church demolished and gone, shall be chargeable to the repairs of the church united. *420 pl. 7.* But it seems to be otherwise where both are standing. *ibid.*

Repleader.

Where there shall be a Repleader. *308 pl. 1.*—Upon an issue ill joined. *ibid. pl. 1. a.* Upon the omission of the jury finding assents. *ibid. pl. 2. a.*—In debt for rent. *ibid. pl. 3. a.*—Upon a bond against an executor. *ibid. pl. 4. a.*

Replication.

What not a good replication on a covenant to make a legal estate. *141 pl. 2.*—How to reply to a plea that the defendant had repaired pursuant to his covenant. *ibid. pl. 10.*—Replication in an action upon an award not good, because only argumentative.—Where a replication ill in not assigning a breach. *305 pl. 7. a.*—Where a replication ill not concluding to the country. *ibid. pl. 8. b.* General rules concerning replications. *337.*—Where a replication in an action upon an award was held ill. *317 b. pl. 3, 4, 7. 337 pl. 6.*—The like of a replication to a plea of duress. *ibid. pl. 7.* The like of a replication to a plea in an action upon a bond to enforce the obligee. *ibid. pl. 8.* The like of a replication to a plea that letters patent were void. *338 pl. 9. 339 pl. 4, 8, 9. ibid. pl. 18, 20.*—The like of a replication to a plea of performance. *338 pl. 10.* The like of a replication to a plea

of no award. *P. 338 pl. 11. 340 a. pl. 29. 340 b. pl. 14, 18, 19, 20, 21, 22, 23.*—Where the words *modo & forma* are words of form, and where of substance. *338 pl. 1, 2, 3.*—Of replications to *nil habuit in tenementis*. *339 pl. 5, 6, 7. 340 a. pl. 3c. ibid. b. pl. 11. 341 pl. 11.*—Where the not assigning a breach in a replication was held to be good. *339 a. pl. 11. b. pl. 13, 14, 21. 340 a. pl. 23, 24, 25.*—Of a replication to a plea of *non dampnificatus*. *339 b. pl. 17. 340 a. pl. 31. pl. 3c.*—Of a replication to a plea of *non chafauit*. *339 b. pl. 19.*—Of a replication to a plea of payment. *340 a. pl. 26. ibid. b. pl. 14.*—Of a replication to a plea of usury. *340 a. pl. 27.* Of a replication to a plea of *Riens per discent*. *340 a. pl. 32.*—The like where judgments are pleaded. *ibid. a. pl. 33. pl. 1. c.*—The like where an outlawry was pleaded. *ibid. b. pl. 24.*—The like where the statute of limitations is pleaded. *ibid. b. pl. 26.* The like where nonage was pleaded. *ibid. pl. 25.*—The like where a marriage was pleaded. *ibid. pl. 9.* Where replications in debt ought to conclude to the country, and where with an averment. *341 a. pl. 1, 2, 5, 6, 7, 8, 9, 11. ibid. b. pl. 13.*—Of assigning the breach of a condition. *ibid. b. 342 a.*

Schoolmaster.

MAY be punished by the spiritual court for immorality *contra bonos mores*. *403 pl. 7.*—May be punished for teaching

Contained in this V O L U M E.

teaching school without license. *Page* 403 *pl.* 7.—But cannot be deprived for that reason. *ibid.*

Scilicet.

Where the word *Scilicet*, and the time after, shall be rejected as repugnant to the matter that goes before. 335 *pl.* 3. 345 *b.* *pl.* 4

Scire facias.

Where the plaintiff may have a *Scire facias* upon the covenants without a new action. 155 *pl.* 4

Scire facias.

To revive Judgments.

The several sorts of writs of *sc. f.* [387] *a.* *pl.* 1. *b.* *pl.* 3, 4.—By what statute given. *ibid.* *pl.* 3. The tenor of the writ. *ibid.* *b.* *pl.* 2, 3.—Where it does not lie by the husband of an administratrix. *ibid.* *pl.* 4. What necessary qualifications for the party to have to be entitled to this writ. *ibid.* *pl.* 4, 6, 7.—Where the executor, and not the infant, at his age shall have it. [388] *a.* *pl.* 8. Where the husband and the infant wife shall have it. *ibid.* *pl.* 9. Where it shall issue by and against executors. [388] *a.* *pl.* 10.—Where execution irregular, and where not, without a *sci. fac.* [381] *a.* *pl.* 12, 13, 14. *b.* *pl.* 18, 19, 20, 23. [389] *a.* *pl.* 24, 25.—Where to be had, and where not, without applying to the court. *ibid.* *pl.* 15. Where the husband or wife surviving may take out execution without a *Scire fac.* *ibid.* *pl.* 16.—So *vice versa* where it

may be taken out against the survivor without *Scire facias.* *Page* [389] *pl.* 17.—Where the writ of error answered the end of a *Scire facias* to revive the judgment. *ibid.* *pl.* 21. Where not, it being a void writ. *ibid.* *pl.* 22.—Where to be had against the heir without the *tertenants.* [389] *a.* *pl.* 27.—Where against the *tertenants.* *ibid.* *pl.* 28, 29.—A *Scire facias* must pursue the nature of the judgment, and where ill, because it did not. *ibid.* *a.* *pl.* 31. Where it must be brought as to the county. *ibid.* *a.* *pl.* 32, 33.—Whether against the executor of one of the bail. *ibid.* *pl.* 34.—When and where one or two writs of *Scire facias* are to be sued out to revive a judgment. *ibid.* *pl.* 35.—And how to be sued out, and of the days between the *teste* and return. [389] *b.* *pl.* 36

Seats in the Church.

The disposal thereof belongs to the ordinary. 412 *pl.* 1.—But custom may fix the power of disposing them in the churchwardens. 413 *pl.* 7.—But if it becomes a parish-church he shall have it. *ibid.* *pl.* 6. Otherwise where the patron had used all the time it was a parish-church to have the disposal of the seats. *ibid.* *pl.* 8.—He cannot displace a man that prescribes for a reasonable consideration. 412 *pl.* 2. The consideration of repairing is a reasonable consideration, and there the ordinary cannot displace him. *ibid.* *pl.* 2, 3.—Nor place another with him, if he does,

A TABLE of the Principal Matters

does, an action upon the case lies. *Page 412 pl. 2.*—Otherwise where it appears the parish repaired it. *ibid. pl. 2. 414.* So an action lies for a disturbance of a seat in the chancel. *412 pl. 3.*—But upon a prescription without a consideration ('tis said) the ordinary may displace him. *ibid. pl. 4. Quare.*—'Tis said a man may prescribe for an isle in the church, but not in *navi Ecclesiæ*. *414. 413 pl. 7. 412 pl. 1.* Whether a man may prescribe for a seat, as belonging to a manor, where he had no dwelling-house. *414.* The ordinary hath no power of seats in nobleman's chapels. *413 pl. 5.*—A man who hath a seat in the church, may well sue there for a disturbance, for the ordinary may settle the usage and the possession, where no title is hurt by the sentence.

413 pl. 9

Solutus & Innuptus.

No plea, because it amounts but to *Ne unquæ accouple*. *335 pl. 4*

Spiritual Courts.

Ecclesiastical judges derive their jurisdiction by parliament, and the spiritual courts their jurisdiction by custom of the realm. *390.*—And of what they may hold plea.—Suits in the spiritual court are for offences or matters of interest by libel there, and the process a citation. *393.*—Spiritual offences, what they are. *394.*—Offences of the greater sort, and lesser sort, what they are, and how punishable. *394.*—Suits for the interest of the party,

as for the maintenance of the church. *P. 395.*—They cannot impose a pecuniary mulct, but they may a punishment *pro salute animæ*. *ibid.*—Which the party may redeem with a pecuniary amends. *ibid.*—And for those amends the party damnified may sue there. *ibid.* May sue there for the crime of sacrilege *pro salute animæ & Reformatione morum*. *411 pl. 52.*—But cannot sue there *pro salute animæ* after a temporal punishment. *ibid. pl. 53. Vide 443 pl. 11.*—But otherwise where the crime is not temporal *in toto*, and the punishment at law was only for that part which was temporal. *411 pl. 53.*—And where a remedy is given by the statute, that does not take away the remedy that was before. *445 pl. 5.*—Cannot proceed for offences punishable in the leet. *410 pl. 44.*—May hold plea of a matter merely spiritual, not mixed with a matter of law. *391.* And when the original suit ought to begin there, they may try a matter that comes in issue triable by our law. *400 D. pl. 3. 448 pl. 13. 451 pl. 25.*—But they must determine by the course of the common law. *423 pl. 1. 400 pl. 3. 466 pl. 10.*—If they could hold plea of the principal, they may of the accessory, otherwise not. *391.*—They may try whether the close be the close of the party suing there, or of another. *448.*—So whether a parson was presented upon a simoniacal contract, it shall be tried there. *449 pl. 16. 423 pl. 12.*—But they

Contained in this V O L U M E.

they must not meddle with the title of the benefice. *ibid.*—For they cannot try the rights of patronages. 402 *pl.* 3. Nor of presentations. 425 *pl.* 5.—But they may question a tortious admittance. *ibid.* *pl.* 10.—Cannot try whether the church was void or not at the time of the King's presentment. 423 *pl.* 1.—They may try a resignation of a parson. 425 *pl.* 11.—They are not to meddle with the admiffion or institution. *ibid.* *pl.* 10, 12, 13.—Cannot meddle with the institution after induction, unless the institution be repealed before induction. 402 *pl.* 4.—Not even though a *caveat* had been entered there to prevent induction. 402 *pl.* 4. 423 *pl.* 1.—They cannot try a super-institution. 424 *pl.* 3, 4.—They cannot try the bounds of parishes. 401.—But they may try whether a parish be within a peculiar or not. 401, 421 *pl.* 4.—They may try the bounds of a vill. 401, 421 *pl.* 1, 2, 3. 457 *pl.* 7.—They cannot try which is a man's parish-church. 421 *pl.* 4.—Cannot try whether a church be a parochial church, or a chapel of ease, because the bounds of parishes will come in question. *ibid.* *pl.* 3.—Nor to avoid institution to the church of *D.* which is suggested to belong to his vicarage, for there also the bounds of parishes will come in question. *ibid.* *pl.* 2.—They cannot determine matters of freehold. 408 *pl.* 39.—Therefore cannot sue to deprive a man of an office that is temporal. *ibid.* *pl.* 37. 409 *pl.* 41.—Tho' exercised in spiritual affairs. 409 *pl.* 35.—They cannot sue

to deprive an office of register for recusancy. *P.* 409 *pl.* 35.—But may sue to deprive the Bishop's Chancellor for insufficiency. *ibid.* *pl.* 38.—They have jurisdiction of the repairs of the body of the church. 415 *pl.* 1.—They cannot take a bond to perform a sentence. *pl.* 18.—They cannot fine and imprison. 412 *pl.* 59.—They may punish dilapidations. 433.—They may punish the breach of a promissory oath. 403 *pl.* 10, 11.—But not to perform a temporal contract. 403 *pl.* 11.—Nor to recover damages for offences. 394.—They cannot proceed for perjury arising from a temporal cause. 443 *pl.* 8.—For perjury is a temporal matter, and to be tried at common law. 403 *pl.* 10. 404 *pl.* 13.—But for perjury in a spiritual matter, they may proceed *pro salute animæ*. 403 *pl.* 10.—They may punish forgery of an order of their court. *ibid.* *pl.* 10.—Or of letters of ordination. 408 *pl.* 38.—They are not to administer an oath for the party to accuse himself. 442 *pl.* 35.—Nor where he is to discover matter for an information or indictment. 445 *pl.* 3.—Nor concerning a matter which tends to the forfeiture of a bond. 446 *pl.* 6. 445 *pl.* 1, 2.—But otherwise if they require an oath whether a man hath paid his proportionable rate to the repairs of a church. 446 *pl.* 8.—Or of a clergyman whether he preached against the common prayer. 445 *pl.* 4.—Nor in any cause but testamentary and matrimonial. Where the original cause of the suit
is

A TABLE of the Principal Matters

is of spiritual conuzance, they may proceed by their law, tho' it differs from the common law. *P.433 pl. 1, 2, 3.* But not where the spiritual law differs from the common law in the matter of right. *433, 435 pl. 18.*—They are not bound to judge a suit abated, which would be so in our law, if they have conuzance of the matter. *437 pl. 8. 441 pl. 29.* They may judge (it seems) whether a release be a good bar to a suit in the spiritual court. *434 pl. 8.*—It is said they may refuse the proof of setting out tithes by one witness. *ibid. pl. 7. Quare.* They may according to their usage award costs against the husband in a suit between him and his wife. *435 pl. 9.*—By the common law, if a man escapes the matter charged, he shall not pay costs; but by the civil law, though he cannot be condemned in the suit by one witness, yet they may according to their usage give costs upon presumption of guilt. *434 pl. 4.*—So they give costs to the plaintiff, who had *Causam litigandi*, though the plea of the defendant be a good discharge. *434 pl. 6.*—Not concerning matters of faith. *ibid. pl. 5.*—A nuisance in the church-yard is of ecclesiastical conuzance. *411 pl. 56.*—A mortuary is not suable for in the spiritual court, otherwise of so much money for a mortuary. *412 pl. 57.*—They cannot try a lease, because they will not allow it, unless it have tradition delivery. *423 pl. 1.*—They may try whose lease ought to be preferred. *ibid. pl. 1.—401 contra.*

But they cannot try the validity of assignment of leases. *P.423 pl. 1.*—They may try an acquittance. *ibid.*—May try *Plene administravit* if they have original conuzance of the suit. *422 pl. 9.*—May try the validity of livery, happening incidentally in the suit; so whether a man was in execution upon a *Capias Uilagatum.* *455 pl. 4.*—But cannot try a matter of record as an outlawry, &c. *449 pl. 17.*—Nor a conviction at the sessions. *ibid.*—Cannot try a custom if denied. *450 pl. 21.*—Otherwise of a release of a legacy if denied. *449 pl. 14.*—Otherwise if the matter does not arise by the custom. *405 pl. 19. 413 pl. 1.*—A prescription concerning the repairs of a church, is triable there. *456 pl. 1.*—No prohibition to be granted to try a custom whether saffron is *Minuta decima.* *455 pl. 5.*—All customs against common right are triable at common law. *433 pl. 4, 5.*—But customs ecclesiastical are triable there. *404 pl. 16. 405.*—They have conuzance of causes matrimonial and testamentary. *395.*—Of legacies not issuing out of lands. *396.*—As personal legacies. *407 pl. 30.*—Otherwise not. *404, 406 pl. 26, 27, 28.*—Of a rent issuing out of a chattel. *406 pl. 25.*—Or if given in lieu of dower. *ibid. pl. 22.*—Otherwise of a rent out of a freehold. *ibid. pl. 25.*—Nor if the lands are to be sold, and the money to remain in the hands of the feoffees, to pay legacies. *404, 407 pl. 28. contra.*—A suit may be brought there

Contained in this V O L U M E.

there for a legacy where there is no remedy at common law. *Page 407 pl. 30.*—In determining a legacy not issuing out of lands, they are to judge by their law. *436 pl. 1.*—A custom, if denied, is to be tried at common law, but it may be tried there by consent. *449 pl. 18.*—It is said they may refuse one witness to prove a legacy or a revocation of a will. *423 pl. 1. 436 pl. 3. 2y. 439.* *Contra.*—Otherwise of the payment of a legacy. *423 pl. 1.*—It is said they may refuse a proof by one witness where the whole matter is of spiritual conuzance. *436 pl. 3. 451 pl. 27.*—They may try a release where the suit is for a legacy, and whether he that made the release was an idiot. *449 pl. 15. 422 pl. 10.* They cannot hold plea of a legacy when the remedy is properly in Chancery. *407 pl. 31, 34.* They cannot proceed to perpetuate a testimony. *410 pl. 44.*—Cannot determine who shall choose churchwardens where there is a custom, because they are lay incorporations. *411 pl. 39, 50.*—They cannot sue to prove a will of lands. *407 pl. 29.*—Nor of the guardianship of a child. *441 pl. 30.*—Otherwise of a nuncupative will. *407 pl. 29.* They may in some cases expound statutes, where they have jurisdiction of the original cause. *450 pl. 23.*—They cannot sue there where the proper remedy is an action at law. *411 pl. 52.*—Nor where the proper remedy is in equity, but in some cases. *306 pl. 1, 2.*

But in some cases the party hath his election to sue at law, or in the spiritual court. *P. 437.* And by bringing an action at law, the remedy in the spiritual court is actually released. *409, 452 pl. 33.*—They are not to proceed there against a man for giving testimony, pretending a defamation on the party. *442 pl. 1, 2, 3. 443 pl. 7.*—They must grant a copy of the libel. *398, 441 pl. 32, 33, 34.*—The spiritual courts are concluded by a verdict at law. *426 pl. 15.*—A suit may be in the spiritual court for a sum given in lieu of a debt. *406 pl. 23.*—The parson may sue there for tithes carried away by the owner, but not by a stranger. *409 pl. 40.* The spiritual court may sue on a matter prohibited by a statute, so they do not proceed for the penalty. *351 pl. 24.*—A prohibition will not be granted to the spiritual court where their sentence is in affirmance of justice. *323 pl. 1*

Statutes.

The Statutes mentioned in this Volume, are as follow, viz.

- 13 Hen. 2.* Bishops not to punish perjury. *404 pl. 13*
- 24 Hen. 2.* That the clergy or laity might hold plea of suits for tithes. *416*
- 9 Hen. 3.* Appointing amercements for offences. *[368] a. pl. 10*
- 52 Hen. 3.* Commonly called the statute of *Marlbridge*, giving a *capias* in account. *[384] a. pl. 1*
6 Ed.

A TABLE of the Principal Matters

- | | |
|---|---|
| <p>6 <i>Ed. 1.</i> Commonly called the statute of <i>Gloucester</i>, for giving costs.</p> <p>13 <i>Ed. 1. cap. 1.</i> Commonly called the statute <i>de Circumspectis agatis</i>. <i>P.</i> 390, 391, 395</p> <p>13 <i>Ed. 1.</i> Commonly called the statute of <i>Winton</i>. [360] <i>a. pl. 7</i></p> <p>13 <i>Ed. 1. 1.</i> Commonly called the statute of <i>Westm. 3. cap. 9.</i> the ordinary to be answerable for the intestates effects. 397</p> <p><i>Cap. 11.</i> To grant administration to the next of kin. 397</p> <p><i>Cap. 28.</i> Giving an <i>Elegit</i>. 384 <i>pl. 2.</i></p> <p>13 <i>Ed. 1. cap. 5.</i> Of tithes.</p> <p>13 <i>Ed. 1. c. 11.</i> Giving a <i>capias</i> in debt as it was before in account. [384] <i>a. pl. 1</i></p> <p>13 <i>Ed. 1. cap. 45.</i> Giving a <i>Scire facias</i>. [387] <i>a.</i></p> <p>18 <i>Ed. 1.</i> Which gives jurisdiction to, or rather confirms it, to the chancellor and the chief justices to hold pleas of suits, that ought to be superseided in the court christian. 466</p> <p>24 <i>Ed. 1.</i> Providing where shall be a consultation. 391</p> <p>34 <i>Ed. 1.</i> Where an <i>Indicavit</i> shall not be granted. <i>ibid.</i></p> <p>35 <i>Ed. 1.</i> That a prohibition lies for the parson cutting trees in the church-yard. <i>ibid.</i></p> <p>9 <i>Ed. 2.</i> Commonly called the statute <i>Articuli Cleri</i>, directing where a prohibition shall lie on suits for the sale of tithes, the rights of patronage, &c. <i>ibid.</i></p> <p>1 <i>Ed. 3.</i> On suits for defamation by indicting a person. 392</p> <p>15 <i>Ed. 3. c. 6.</i> Ministers not to be drawn into suits in the temporal courts, repealed 18 <i>Ed. 3. cap. 6.</i> 404</p> | <p>18 <i>Ed. 3. cap. 7.</i> Commonly called the statute <i>pro Clero</i>, concerning suits for tithes. <i>P.</i> 395</p> <p>25 <i>Ed. 3. cap. 17.</i> The same process given in debt as in account. [384] <i>a. pl. 1</i></p> <p>45 <i>Ed. 3. cap. 3.</i> Of <i>Sylva Cadua</i>. 398</p> <p>50 <i>Ed. 3. cap. 3.</i> Of granting prohibitions after a consultation. 398</p> <p>2 <i>Hen. 5. cap. 3.</i> For granting a copy of the libel. <i>ibid.</i></p> <p>21 <i>Hen. 6.</i> For not returning a burghers to parliament. [366] <i>a. pl. 26</i></p> <p>23 <i>Hen. 6.</i> Of bonds taken by sheriffs, &c. <i>Colore Officii</i>. 290 <i>pl. 5. a.</i></p> <p>14 <i>Hen. 8.</i> Of practising physick in <i>London</i> and <i>Westminster</i>. 293 <i>pl. 1. 336 b. pl. 21. 340 a. pl. 6.</i></p> <p>21 <i>Hen. 8.</i> Against leases made by parsons. [394] <i>b. pl. 5</i></p> <p>21 <i>Hen. 8. c. 5.</i> Of the probate of wills. 307</p> <p>23 <i>Hen. 8. cap. 10.</i> Of sheriffs bonds. 319 <i>pl. 5. 320</i></p> <p>23 <i>Hen. 8. cap. 9.</i> Of citing out of the diocese. 458</p> <p>24 <i>Hen. 8. cap. 12.</i> For abrogating the Pope's supremacy. 392</p> <p>25 <i>Hen. 8.</i> That a sentence in the delegates is to be final. 472 <i>pl. 7</i></p> <p>31 <i>Hen. 8. cap. 11.</i> Of intestates estates.</p> <p>32 <i>Hen. 8. cap. 16.</i> That leases to aliens shall be void. 319 <i>a. pl. 4</i></p> <p>32 <i>Hen. 8. cap. 34.</i> Of remedies by and against lessors and lessees, grantors and grantees, assignors and assignees, in actions of covenant. 107, 115, <i>pl. 22. 128 pl. 18</i></p> <p>32 <i>Hen. 8. cap. 38.</i> Concerning marriages. 395</p> |
|---|---|

Contained in this VOLUME.

- 32 *Hen. 8.* Against embracery. Page 284 pl. 6
- 33 *Hen. 8. c. 35.* Which made the lands of the King's debtors liable to be extended. [398] a. pl. 23
- 33 *Hen. 8. cap. 39.* Lands not to be extended in the hands of an alience of tenant in tail.
- 34 *Hen. 8.* Concerning errors on judgment in *Wales*.
- 34 *Hen. 8.* Which restrains tenants in tail from making leases, &c. 327 pl. 10
- 34 & 35 *Hen. 8. c. 11. § 4.* That a prohibition lies not where the Archbishop, &c. sue for a pension, simony, &c. lawfully issuing, and enjoyed ten years before the dissolution of monasteries. 398
- 34 & 35 *Hen. 8. c. 26.* For reversing judgments in *Wales* by writs of error. [372] b. pl. 25
- 37 *Hen. 8.* For uniting churches. 420
- 2 *Ed. 6.* Of setting out tithes. 393 pl. 2. 319 pl. 1. 320 b. pl. 4, 10. 319 a. pl. 1. [371] b. pl. 8. [359] b. pl. 2. [362] a. pl. 2. 434 pl. 7
- 2 *Ed. 6.* Concerning marriages. 395
- 2 *Ed. 6. cap. 8.* Whereby a *monfrans de droit* and a traverse were given in particular cases. 325 a. pl. 11
- 2 & 3 *Ed. 6. c. 14 §. 14.* For proving the suggestion within fix months, otherwise a consultation.
- 5 *Ed. 6. cap. 16.* Against selling offices. 320 b. pl. 9
- 5 *Ed. 6. cap. 18.* Concerning ingrossers. [359] b. pl. 3
- 5 *Ed. 6.* Concerning the marriage of priests. 395
- 1 *Eliz. cap. 3.* and 23 *Eliz. c. 1.* Against absenting from church. 371 b. pl. 8
- 5 *Eliz. c. 9.* For not appearing as a witness. 394 pl. 16, 27
- 5 *Eliz. c. 9.* Of perjury. 294 pl. 25
- 5 *Eliz. c. 23.* Of excommunication. 393
- 8 *Eliz.* For suing in another's name. [259] b. pl. 1
- 11 *Eliz.* Of leases made by spiritual persons. 328 b.
- 13 *Eliz. c. 10.* 14 *El. c. 11.* On suits for dilapidations. 395
- 13 *Eliz. cap. 20.* That bonds given for benefices should be void. 320 b. pl. 8
- 18 *Eliz.* Concerning bastards.
- 25 *Eliz.* Concerning contributions in cases of robbery. [360] a. pl. 7
- 27 *Eliz.* 331 a.
- 27 *Eliz. cap. 8.* For suing out writs of error. [371] a. pl. 3
- 29 *Eliz. cap. 4.* Of sheriffs fees on executions. [395] a. pl. 1
- 1 *Jac. 1.* Concerning bankrupts. 294 pl. 24
- 1 *Jac. 1. cap. 11.* Concerning marrying two wives. 396
- 21 *Jac. 1. cap. 24.* Giving a new execution to executors against the lands, &c. of a person dying. [386] b. pl. 43
- 21 *Jac. 1. cap. 16.* Of limitations of actions 320 b. pl. 1
- 16 *Car. 2.* Concerning gaming. 320 b. pl. 11
- 16 & 17 *Car. 2. c. 8.* To prevent the arrest of judgments, &c. 152 pl. 12, 16. [352] b. pl. 16. [361] a. pl. 10. [367] b. pl. 4
- 17 *Car. 2. cap. 8.* Giving a *Scire facias* to administrators *de bonis non*, &c. 387 pl. 6
- 17 *Car. 2.* For ordering churches in London after the fire 420
- 22 & 23 *Car. 2.* Of intestates estates 397
- 29 *Car. 2. c. 3.* Of frauds and perjuries. [379] a. pl. 3. 391 a. pl. 21

A TABLE of the Principal Matters

- 1 *Jac. 2. cap. 17.* Of citing administrators to account *P. 398*
- 1 *W & M. cap. 27.* for taking away the court of the president and marches of *Wales.*
[378] *b. pl. 25*
- 3 & 4 *W. & M. c. 14.* Of executions against heirs 390 *b. pl. 19*
- 4 & 5 *W. & M.* For docketting judgments 381 *b. pl. 4*
- 4 & 5 *W. & M.* For taking away the *Capiatur pro Fine* [368] *b.*
- 5 & 6 *W. & M.* Deeds to be given in evidence to be stamped [358] *b. pl. 1*
- 7 & 8 *W. 3.* Of marrying without a license 396
- 8 *W. 3. c. 6.* Concerning suits for tithes 395
- 8 & 9 *W. 3. c. 11.* For paying costs to defendants in error.
[379] *a. pl. 2*
- 8 & 9 *W. 3. c. 27.* For retaking prisoners escaped [385] *b. 396*
a. pl. 2
- 9 & 10 *W. 3.* concerning awards.
- 4 & 5 *Ann.* That the *Venue* was to be awarded from the body of the county. [353] *b. pl. 28*
- 4 & 5 *Ann.* Commonly called the act for the amendment of the law [367] *b. pl. 5.* [368] *b.*
- 8 *Ann. cap. 14.* Of actions for rent against lessees for life.
251 *pl. 4, 7*
- 10 *Ann. cap. 10.* Of marrying without a licence 396
- 5 *Geo. 1. cap. 13. § 1.* Concerning writs of error 372

Suggestion.

If sufficient, the court will not put the defendant to demur, &c. 485 *pl. 3.*—Where an affidavit is necessary, and where not. *ibid. pl. 4.* Where duplicity in a suggestion is ill *ibid. pl. 5.*—When to be

amended, and when not. *Page* 485. *pl. 6, 7.* Where suggestions have been insufficient. *ibid. pl. 8.* 486 *pl. 16, 17, 18, 19, 20.* 487, 22, 24. 419 *pl. 55.* What suggestions to be proved in six months, otherwise a consultation. *ibid. pl. 9.* 487 *pl. 25, 29, 32.*—How the six months to be computed. 487 *pl. 26.* What necessary to be shewn on refusal of proof. *ibid. pl. 10.*—What certainty required in suggestions 486 *pl. 11, 12.*—Where no consultation shall go, though the suggestion be not precisely proved. *ibid. 12, 13.*—That a suggestion must not vary from the libel. *ibid. pl. 14.*—Nor how the declaration *ibid. pl. 15.*—What may be aided by an averment. 487 *pl. 21.*—What proper to be shewn in suggestions to the court of Admiralty 487 *pl. 23*

Surrender.

Where a surrender without admittance no plea 148 *pl. 68.*
Where the entry of a stranger a good excuse for not making a surrender 148 *pl. 66*

Temporal Courts.

THE Temporal Courts may prohibit matters of which they could not hold plea themselves, but that it belongs to another court 460 *pl. 1.* 461 *pl. 3, 5, 6.*—They are to regulate disputes between inferior jurisdictions 461 *pl. 8.*—Tho' they could not determine the matter themselves *ibid. Vide* 462 *pl. 1.*—They shall not be ousted of a jurisdiction but where

Contained in this V O L U M E.

where the right of tithes only come in question by some matter pleaded *P.* 453 pl. 3. 454 pl. 4.—Where they shall have jurisdiction of tithes sued for by *Scire facias*, against one who takes them 400 *C.* pl. 1. Not if in dispute between a parson and a layman *ibid.* *D.* pl. 1.—Otherwise if between a parson and a vicar *ibid.*—Though the Temporal courts shall be ousted where the right of tithes is in question, yet not where the suit is on a covenant, wherein he is to recover damages, and not the tithes 453 pl. 5, 7.—The Temporal courts are not to be ousted on a dispute upon an annuity by deed 400 *Letter D.* pl. 2

Tender and Refusal *Et uncore prift.*

Where it is a good plea in covenant. 143 pl. 37.—The like in debt. 311, 312, 313

Term.

To what purposes the whole term shall be considered as one day in law, and to what not. 369, *b.* pl. 14

Tithes.

Where the right of tithes are in question, the spiritual court have the jurisdiction. 452 pl. 1. And suits for subtractions of tithes are to be in the spiritual court. 398.—No prohibition shall issue where the right of tithes are in dispute between spiritual persons. 455 pl. 6. And if the suit be between spiritual persons, it shall be intended for the right of tithes.

P. 452 pl. 2. But not where it is not between two parsons. *ibid.* pl. 3.—As where the suit is between a spiritual man and a layman, unless it appears the right of tithes only are in question. 454 pl. 5, 6. 453 pl. 2, 3.—But it lies if the suit be between a spiritual person and a layman, and the right of tithes between the parson and vicar comes in debate. 454 pl. 4.—The temporal courts shall not be ousted if the suit be there between two parsons, if the plaintiff doth not suggest himself a parson, nor that the action is brought for tithes. 452 pl. 4.—If both parties are laymen, the temporal courts shall be ousted, if of the party's own shewing the right of tithes only come in question. 454 pl. 7.—No prohibition will lie on the right of tithes between the parson and vicar. 454 pl. 1.—Otherwise if the parson claims a portion of tithes by prescription, and not nearly as parson *ibid.* pl. 1. When the right of tithes is confessed whether they belong to the vicar or the parson, is a matter merely spiritual 456 pl. 13.—The parson may sue there for a *modus* of things not titheable. 406 pl. 20.—A plea of a *modus* to the vicar will not oust the spiritual court. 454 pl. 1.—Nor on a suit for tithes where payment is pleaded. 448 pl. 12.—Nor if a *modus* be denied if the suit be only upon the *modus* 409. But otherwise upon a suggestion of another *modus.* pl. 19. But if confessed as to part, it shall go only as to the other part.

A T A B L E of the Principal Matters

part. *Page* 409 pl. 9.—It lies not upon a composition with the parson, though by deed. 447 pl. 6.—Nor for a suit by a parson for his tithes after a lease thereof for the defendant 448 pl. 8.—Nor on a suit for tithes where lands have been granted to the parson in discharge *ibid.* pl. 9.—Nor on a suggestion that the place where the tithes are demanded are out of the parish, unless the plea be refused *ibid.* pl. 11. Against the party himself who set out his tithes, a suit may be there by the parson if the other detains them, though he might have his remedy at common law; but otherwise if a stranger takes them away, there the parson's remedy is only at common law 451 pl. 26.—A prohibition lies not where the party is sued for tithes not due 432 pl. 1.—But it does where he is sued for tithes of a rent 433 pl. 2. How and where tithes are due 478.—How changed *ib.* How discharged 481, 482.—By agreement or composition, and where good and where not 482.—When tithes were determinable in the King's courts 390

Traverse.

What traversable in covenant. 148 pl. 71.—Where a plea was held double and ill for want of a traverse 141 pl. 3. Where a traverse was ill taken in covenant 142 pl. 5.—Where a traverse in covenant was good, though it did not say *absque hoc*, that they or either of them entered 143 pl. 36.—What a good plea with

a traverse to an action upon a charter-party *P.* 144 pl. 44. What a good plea with a traverse to an action of covenant for quiet enjoyment 145 pl. 47. Where an indenture is an estoppel to a traverse that the defendant was possessed by virtue of a lease 147 pl. 56. 148 pl. 67.—Where the dying seised, and not the discent, is traversable 148. Where concluding with a traverse hinders the plea from being double. 306 pl. 13.—Where a traverse necessary, and where not, in actions of debt 344 *b.* 345 *a. b.*—In a replication to a plea of an award 345 *b.* pl. 1.—In a plea of entry and expulsion 345 *b.* pl. 2.—In a replication to a plea of an inventory *ibid.* pl. 3.—Where the day is traversable 345 *b.* pl. 4.—In a plea to a sheriff's bond 345 *a.* pl. 5.—In a plea to a simple contract 345 *a.* pl. 6.—In a replication to a release pleaded *ibid.* pl. 7.—In a rejoinder to a replication that the defendant had made a composition where the defendant had pleaded he made none 345 *a.* pl. 8.—In a plea of a deed *primo deliberat'* 345 *a.* pl. 9.—Of the testator's dying intestate *ibid.* *a.* pl. 10. In a replication to a plea of judgment pleaded by an executor *ibid.* pl. 11.—Of the inquisition *ibid.* *a.* pl. 12.—Where the disseisin, and not the discent, was traversable. *ibid.* *a.* pl. 13, 15.—In a replication to a plea of *Comperuit ad diem* *ibid.* *a.* pl. 14

Trial

Trial and Mis-trial.

Where the Trial in actions of covenant is to be. Page 150 pl. 2, 3. 152 pl. 12, 13.—Of Mis-trial in covenant. 151 pl. 8. 152 b. pl. 16, 17, 20. [363] a. pl. 25. b. pl. 32.—Of Mis-trial in debt. 349 b. pl. 46. 350 a. pl. 51. 352 b. pl. 15.—What shall be tried by the record, and what by the country, in an action for an escape. 348 a. pl. 11, 12, 13, 14.—Where the issue is found for the defendant upon *Nil debet*. 340 a. pl. 15, 16, 17. 348 b. pl. 20. 350 b. pl. 66.—Where the issue is with the plaintiff, whether affets or not. 348 a. pl. 18.—A matter of fact done beyond sea cannot be tried in *England*, unless alledged to be done in *England*. *ibid.* a. pl. 6, 7.—Where nonage may be tried by inspection. *ibid.* a. pl. 8. Where the court may compel a matter to be tried by the country. *ibid.* a. pl. 9.—Where the issue is not found for the plaintiff upon *Non dimisit modo & forma*. *ibid.* b. pl. 19, 21. [363] b. pl. 36.—Where the issue is found for the plaintiff upon payment, or not. 348 b. pl. 22. 349 a. pl. 30. [363] b. pl. 28, 35, 38.—Where the issue is found for the plaintiff upon *Non est factum*. *ibid.* pl. 23, 26. 363 a. pl. 21 b. pl. 33, 39.—Where the issue is found for the defendant, whether the plaintiffs were churchwardens or not. *ibid.* pl. 24.—The like upon a joint or separate contract. *ibid.* pl. 25.—The like upon an entry *modo & forma*. 348 b. pl. 27.—The like upon *Riems per Descensum* 349 a. pl.

Vol. II,

28. P. [363] b. pl. 41. What is not a good finding of the jury upon a plea of illiterature, *Et sic non est factum*. 349 a. pl. 29.—Where the jury cannot find a demise of less than the traverse was taken to. 349 a. pl. 31.—The jury cannot find a matter *dehors* the award, to make it void. *ibid.* a. pl. 32.—That the issue is to be first tried, which goes to the whole. *ibid.* b. pl. 33. Where the issue was found for the plaintiff, though the defendant might have aided himself by pleading. *ibid.* b. pl. 34.—Where the plaintiff can have no judgment upon the finding of the jury on *Nil habuit in tenementis*. *ibid.* pl. 35.—Where the entry must be upon the defendant's confessing the point in issue. *ibid.* pl. 36.—Of a word inserted after issue joined. *ibid.* b. pl. 41.—An ill finding of the jury on *Nil debet*. *ibid.* pl. 42. An ill plea found to be false. *ibid.* pl. 43.—The jury's finding more than the issue in a point not material, does not vitiate. *ibid.* pl. 44.—What ought to be construed the point in issue. *ibid.* b. pl. 45. Where held that the deed was the defendant's at the time of the issue, though not of the trial. 350 a. pl. 48.—If the jury falsifying the defendant's plea in part, though they have no power to enquire of the issue in the other county, be not sufficient for the plaintiff. *ibid.* a. pl. 61.—Where the jury having found at the trial that the rent was in arrear, possession in the defendant shall be intended. *ibid.* a. pl. 66.—

D

A TABLE of the Principal Matters

66.—What could not be taken advantage of upon *Non est factum*, but should be pleaded. *P. 350 b. pl. 64.*—Whether the jury shall be said to have found it, the *factum* of the defendant on *Non est factum* pleaded. *ibid. b. pl. 65*

Trial by Record.

What is not a failure of the record. *351 a. pl. 1, 2, 3, 4, 5.*—Where a matter shall be tried by the record, wherein it is acknowledged. *ibid. a. pl. 6.*—Letters patents not to be tried by the country; *aliter* of the time of enrolment. *ibid. a. pl. 7.*—What to be tried by the certificate of the recorder. *ibid. a. pl. 8.*—Where *ore tenus*. *ibid. pl. 9, 10.* Where by the mayor. *Ibid. b. 11.*

By whom some matters are to be tried.

General bastardy. *351. b. pl. 1. 392.*—Excommunication. *ibid.* Special bastardy *ibid. pl. 2.*—Rite. of espousals *ibid. pl. 3, 4, 6.*—Coverture. *ibid. pl. 5, 7.*—Priest or no priest, *402. pl. 4.*—Where the trial to be.—Whether it shall be tried where the lands lie, or where the payment or other fact is alledged. *352. pl. 1, 2, 3, 4, 5, 7, 8, 9, 11. 352 b. pl. 13, 15.*—Where the duress was. *352 a. pl. 10.*—The like of usury. *ibid. a. pl. 13.*—Where it shall be tried where the writ was brought. *ibid. pl. 6, 12. 352 b. pl. 14.*—The act of 16 & 17 *Car. 2.* which aids a mis-trial in a wrong county. *ibid. pl. 16.* Cases before that act. *ibid. pl. 17, 18, 19, 20.*—See constructions on

this statute. *P. 352 b. pl. 20.* [353]—What case not aided by that statute. [353] *a. pl. 21, 22.*—Where a Trial by consent may be in a foreign county [353] *a. pl. 23.*—Where a foreign issue which is local may be tried where the action is laid. [353] *a. pl. 26, 27.*—The statute of 4 & 5 *Ann. cap. 6.* of awarding a *Venire* from the body of the county. [353] *b. pl. 28.*—Cases before the statute. *ibid. pl. 29, 30, 31, 32, 33, 34, 35*

Trials at Bar.

To whom granted, and when and where not [354] *pl. 1, 2, 3, 4, 5*

Notice of Trial. *Vide* Notice.

New Trial.

A new trial is to try the same issue, therefore not to be altered; if it is, the court will set it aside. [354] *a. pl. 5.* When granted *ibid. b. pl. 1, 2, 4, 5, 6, 11.* Where not *ibid. pl. 7, 8, 9, 10, 12. ibid. b. pl. 18, 19. 355 a. pl. 20.*—Not to be in an inferior court. *354 b. pl. 13.*—Nor in a superior court after a motion in arrest of judgment. *Ibid. pl. 14.*—Nor after a trial at bar. *Ibid. pl. 16.*—Where the court will set aside a trial upon an amendment. *ibid. pl. 17*

Variance.

WHAT have been held variances material, and what not. [364] *a. b.*

Venue

Venue and Venire.

Where the court would not change the *Venue* in covenant. *P.* 152 pl. 11.—How the law stood before the act of 4 & 5 Queen *Anne*, for awarding the *Venire* of the body of the County, and how it stands since. [353] *b.* Where the court will change the *Venue*. *ibid.* pl. 1.—Where a barrister or an attorney may have the *Venue* changed. *ibid.* pl. 4, 5. When the motion for that purpose ought to be made. [354] pl. 6.—Where the court will discharge a rule to change the *Venue*. *ibid.* pl. 7.—What affidavit necessary. *ibid.* pl. 8.—Of changing the *Venue* in covenant. 353. *b.*

Verdict.

Where an insufficient plea in covenant was aided by the verdict. 153. pl. 27, 28.—What shall be intended after a verdict in pleas in debt. 340 *a.* pl. 22. 350 *a.* pl. 66. Whether the verdict be found agreeable to the issue. 350. *a.* pl. 48, 50, 54, 57, 58.—Where a verdict for the defendant perpetually bars the plaintiff. 350 *b.* pl. 62. What an ill verdict on *Nil debet*. 355 *b.* pl. 10.—What shall be deemed to be aided or intended after a verdict in debt. 360 *b.*—*Concessit* adjudged to be *relaxavit*. *ibid.* 1.—An ill breach not cured. *ibid.* pl. 2. A mistake in the year of the King, when judgment was given, aided. *ibid.* pl. 3.—A mistake in the sum paid not cured. *ibid.* pl. 4.—An informal issue cured. [361] pl. 5. Issue on an impossible day cured. *ibid.* pl. 6.—Defects in

a judgment in an inferior court. *P.* [361] pl. 7, 8, 10.—Misrecital of an act of parliament cured. *ibid.* pl. 9.—Issue on an ill plea cured. *ibid.* pl. 11.—Issue found against the plaintiff on *Riens per Descensum*. *ibid.* *b.* pl. 12.—Finding non-payment by the defendant, and another held well. *ibid.* pl. 13.—The reason of verdicts curing defects. *ibid.* pl. 14.—Finding more than the issue, and contrary to it, will not hurt. *ibid.* pl. 15.—Where evidence was intended to be given. *ibid.* pl. 16.—That the court will put the best construction upon words to support the verdict. *ibid.* pl. 17.—Though the issue not proved literally, yet held well. [363] *a.* pl. 14. Finding for part that would not bear an action, ill. *ibid.* pl. 15.—Whether the substance of the plea shall be said to be found or not, on a plea of levy by distress. *ibid.* pl. 16.—How the verdict ought to be on *Plene administravit*. [363] *a.* pl. 17.—What aided after a verdict concerning the administration. *ibid.* pl. 18, 23.—Of a verdict on *Non est factum*. [363] *a.* pl. 19, 21. [363] *b.* pl. 33, 39.—On the statute of *Ed.* 6. for not setting out tithes. *ibid.* pl. 20.—What a good verdict on *Plene administravit*. *ibid.* *a.* pl. 22. & [362] *b.* pl. 3. The like in an action of debt for rent. *ibid.* pl. 24. That shall be intended which should have been shewn by the contrary party. *ibid.* pl. 26. What a good verdict on payment at the day. *ibid.* pl. 28. What a good finding of the jury on *Non detinet*. *ibid.* pl. 29. Usury.

A TABLE of the Principal Matters, &c.

Usury.

Of pleading the statute of Usury, and what have been deemed usurious contracts, and what not. *P. 320 a. b. 321 a*

Warrant of Attorney.

THAT a warrant be revocable; yet if the attorney enters up the judgment after the defendant revokes it, such judgment will be good. [379] *b. pl. 5.*—A feme sole marrying is a revocation in law of the warrant of attorney. *ibid.* [380] *a. pl. 4.*—May be given by one in custody, and how. [380] *a. pl. 1.*—Given by a feme covert, the judgment not to be set aside on motion, but by error. *ibid. a. pl. 2.*—A warrant mentioning no term of the judgment when it shall be entered. *ibid. a. pl. 6.*—With a *Cessat Executio* for a year, how the year to be computed. *ibid. pl. 7*

Waste.

Where the proper action was of waste, and not in covenant. 128 *pl. 16.* Adjudged *contra.* *ibid. pl. 20*

Wills.

The temporal courts have the probate of wills in all places but in *England.* 396

Writ of Prohibition.

The court of King's Bench and Common Pleas have power to see that the jurisdictions of other courts do not exceed their limits. 467 *pl. 56.*—

Where granted by the King's Bench to the dutchy court. *P. 468 pl. 2.* Where by the court of Common Pleas to the court of the council of *York.* 466 *pl. 3.*—By the court of Common-pleas to the Chancery of *Chester.* 469 *pl. 4.*—The like to the law courts of the county palatine of *Chester.* *ibid. pl. 6.* By the court of Common Pleas to the court of Delegates. 466 *pl. 4.*—To the court of Common Pleas on a writ of dower suable in the Lord's court. 468 *Letter K. pl. 1.*—By the court of Common Pleas to the marches of *Wales.* 466 *pl. 3.* 461 *pl. 3.* 468 *pl. 5.*—To a Court-Baron. 467 *pl. 1.*—To the Chancery of *Chester* for holding plea of a matter triable at law. 462 *pl. 3.*—To the dutchy of *Lancaster* for avoiding institution after induction. 469 *pl. 5.*—To the grand sessions, because no equity in the bill. *ibid. pl. 7.*—To the council of *York* for holding plea of replevins. *ibid. pl. 8.*—To the University of *Cambridge*, because they exceed their jurisdiction. 468 *pl. 11.*—To the Earl Marthal, to the Admiralty, to Inferior courts, to the Palace-court, to the court of honour, to a court of equity. 400.—It may be granted against the incumbent of a donative for marrying without a license. 410 *pl. 43.*—It lies against the king's farmer. 458 *pl. 2.*—It lies against executors. 458 *pl. 3*

F I N I S.

Jeremiah Longhorne

